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A TIME TO KILL, THE O.J. SIMPSON TRIALS, AND STORYTELLING TO JURIES

Leonard M. Baynes*

*It's different with me. I could probably get off. . . . I'm white, and this is a white country. With a little luck I could get an all-white jury, which will naturally be sympathetic. This is not New York or California.*¹

I. INTRODUCTION

In presenting a case to a jury, a lawyer needs to think about linking all the evidence together to present a credible story that the jury will believe. In representing African American² male defendants, storytelling becomes even more crucial; juries are more likely to convict (and more severely punish) African American men for killing White people than for killing other Blacks.³ African Americans are more likely than Whites to be shot at by police, eighteen times more likely to be wounded, and five times more likely to be killed.⁴ Prosecutors are more likely to pursue full

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1. Colloquy between Carl Lee Hailey (an African American character charged with murder) and Jake Brigance (Hailey's White defense counsel). JOHN GRISHAM, *A TIME TO KILL* 48 (1989).

2. I use the terms "African American" and "Black" interchangeably throughout this essay.

3. Statistics show that one-third of African American men age 20–29 are incarcerated or on probation or parole on any given day; as a result, 14% of African American men now cannot vote. See Fox Butterfield, *Many Black Males Barred from Voting, Study Shows*, N.Y. TIMES, Jan. 29, 1997, at A8. Studies also show that African American men are more likely to receive capital punishment than White men. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 286–87 & n.5 (1987) (upholding the Georgia death penalty despite the introduction of the Baldus study, which showed a disparity in the imposition of the death sentence in the state of Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant).

4. See, e.g., James J. Fyfe, *Blind Justice: Police Shootings in Memphis*, 73 J. CRIM. L. & CRIMINOLOGY 707, 718–20 (1982); see also Edward Littlejohn, *Deadly Force and Its Effects on Police-Community Relations*, 27 HOW. L.J. 1131, 1166–67 & n.100 (1984) (analyzing fatal

prosecution, file more severe charges, and seek more stringent penalties in cases involving African American defendants—especially if the victim is White.⁵ African Americans are also sentenced to prison more often and receive longer terms than Whites convicted of similar crimes and with similar records.⁶

I believe that this difference in treatment⁷ of African American defendants by the criminal justice system, and specifically by juries, has to do with the prevailing stereotype of the African American male as the savage brute.⁸ Unfortunately, this stereotype is deeply ingrained in our popular culture and society.

Historically, Whites were often fearful of slave revolts.⁹ In many slave-holding territories and states, Blacks were a large percentage of the population.¹⁰ The fear of slave violence may also be attributable to White guilt over the subjugation of Black slaves and the fear of Black retaliation for this treatment. After the Civil War, the stereotype of the violent Black male was used to scare Whites and to justify the oppressive Jim Crow laws.¹¹

Today, the image of young violent Black men is very prevalent in the media. So much that even the Rev. Jesse Jackson has said that when he hears footsteps behind him on a street, he is relieved when he turns and

shootings by Detroit police officers from 1970–80 and citing a similar survey of Chicago police; surveys indicated that the number of Blacks shot by police in each city was “substantially greater than their representation in the population”).

5. *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1525–32 (1988); see Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC’Y REV. 587, 615–19 (1985).

6. See JOAN PETERSILIA, RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM ix (1983); ZIMMERMAN & FREDERICK, DISCRIMINATION IN THE DECISION TO INCARCERATE, in CRIMINAL JUSTICE SYSTEM AND BLACKS 315, 326 (D. Georges-Abeyale ed., 1984); Norval Morris, *Race and Crime: What Evidence Is There That Race Influences Results in the Criminal Justice System?*, 72 JUDICATURE 111, 112 (Aug.–Sept. 1988). African Americans comprise 51% of the 1.1 million inmates in state and federal prisons, even though African Americans comprise 14% of the nation’s population. Butterfield, *supra* note 3, at A8.

7. People who commit crimes should be punished, deterred, and/or rehabilitated in accordance with the crime committed. Some of the crimes for which many African Americans are sentenced these days are victimless crimes, like the possession of crack cocaine. These persons need treatment and rehabilitation more than punishment.

This essay addresses these stereotypes and issues of representing an African American male defendant so he can get a fair trial.

8. See ETHNIC NOTIONS (California Newsreel 1987); Gregory Lewis, *Simpson Case Aggravates Stereotypical Image of Black Men*, S.F. EXAMINER, July 7, 1994, at 14A.

9. See DERRICK BELL, RACE, RACISM, AND AMERICAN LAW § 1.10, at 31 (3d ed. 1992).

10. *Id.* (citing REPORT OF NATIONAL COMMISSION ON CIVIL DISORDERS, REJECTION AND PROTEST: AN HISTORICAL SKETCH 95 (1968)).

11. ETHNIC NOTIONS, *supra* note 8.

sees it is a White person.¹² This stereotype is used to justify the policies that allow for the incarceration of many young Black men, instead of dealing with the underlying problems they face (i.e., unemployment¹³ and the lack of jobs particularly in inner cities).¹⁴

As Eleanor Holmes Norton has commented, "The black man is increasingly seen as a criminal by virtue of his sex and color."¹⁵ Several prominent Black men in the Boston area discussed some of the problems they encountered with Whites who thought that they were criminals.¹⁶ This stereotype is often more ingrained in our depiction of young Black men.¹⁷ The stereotype is so strong that a Newark theater company received death threats and ticket cancellations when it cast a young Black actor to play Jesus in a play.¹⁸

In criminal cases, the prosecution attempts to introduce any evidence of prior violent conduct or acts that will show a propensity on the part of the defendant to engage in violence. Psychologically, this evidence plays into fears and the stereotype that the Black man is a savage brute. Such evidence may indeed be relevant. However, the stereotype of violent

12. Lynne Duke, *Confronting Violence; African American Conferees Look Inward*, WASH. POST, Jan. 8, 1994, at A1; Susan Feeney, *Jackson Crusades to End Violence Among Blacks Topic a Sensitive One Among Civil Rights Leaders*, DALLAS MORNING NEWS, Jan. 8, 1994, at A1.

13. One in three Black Americans lives in poverty—almost ten million Black people. BELL, *supra* note 9, at 31 (citing SWINTON, *THE ECONOMIC STATUS OF AFRICAN AMERICANS: "PERMANENT" POVERTY AND INEQUALITY IN THE STATE OF BLACK AMERICA 1991*, at 25 (Dewart ed. 1991)). The median income for Black families in 1989 was \$20,209, less than that for White families which was \$35,975. BELL, *supra* note 9, at 807.

In 1990, 12.4% of Blacks were unemployed, twice the rate for Whites. *Id.* At least one-third of all Black teenagers were jobless in 1990. *Id.* The incomes of the lowest two-thirds of Black families have deteriorated substantially, so much so that this backslide has more than offset the proportional gains at the highest levels of income, causing median Black family income to decline in the last two decades. *Id.* at 808.

14. See generally WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1995).

15. Jill Smolowe, *Race and the OJ Case*, TIME, Aug. 1, 1994, at 24–25.

16. Carol Stocker & Barbara Carton, *Guilty . . . of Being Black*, BOSTON GLOBE, May 7, 1992, at 85. The men were a virtual "Who's Who" among Boston's African American Brahmin—Wayne Budd, then Associate Attorney General of the United States and currently executive vice president of NYNEX Corp.; Henry Hampton, executive producer of the *Eyes on the Prize* series; Karl Nurse, executive director for community programming at Channel 5; and Harvard law professor Charles Ogletree. *Id.* at 85, 89.

17. See Derrick Z. Jackson, *A Woburn Lesson: There's a Double Standard About Kids and Justice*, BOSTON GLOBE, Mar. 7, 1997, at A21 (highlighting that, in several recent criminal incidents in the Greater Boston area involving White teenagers, the media portrays the White kids as misguided, whereas Black teenagers are treated as if they were fundamentally bad).

18. The actor, Desi Arnaz Giles, played the devil in another show. Mr. Giles said, "We'll see how many people object to a black man playing [the devil]." *Id.*

behavior may be so powerful that there is a real danger it will create such prejudice that a largely White jury may ignore the evidence and convict. I have heard some White people say that even if a Black defendant did not commit the crime for which he was accused, he probably is guilty of something.

The role of the defense counsel in representing an African American defendant is to acknowledge the stereotype and to try to combat it in some way. This is what the defense counsel successfully did in the fictional book and film *A Time to Kill*.¹⁹ This is also what defense counsel did in the real life representation of former world heavyweight boxing champion Mike Tyson in his trial for the rape of Desiree Washington.

In a very controversial strategy, Tyson's defense counsel, Vincent Fuller,²⁰ embraced the stereotype instead of trying to counter it, portraying Tyson as a savage brute.²¹ Given Tyson's persona as a pugilist in both his public and private life, Fuller may have believed that countering the stereotype would be difficult and that the best strategy was to acknowledge and openly discuss what many jurors were thinking. By acknowledging the stereotype, Fuller could then either portray Washington as mendacious or characterize her behavior in going up to Tyson's hotel room late at night as either consensual or an assumption of risk.²² However, this technique failed: a jury of ten Whites and two African Americans convicted Mike Tyson for the rape of Desiree Washington.²³

In this essay, I will explore two recent accounts of storytelling dealing with African American males charged with the murder of White people. The first, as mentioned earlier, is the fictionalized account of Carl

19. GRISHAM, *supra* note 1; *A TIME TO KILL* (Warner Bros. 1996).

20. Fuller is a prominent White attorney in the Washington, D.C. office of Williams & Connelly.

21. See Editorial, *Tyson Apologists Champion a Loser*, ATLANTA J.-CONST., Feb. 20, 1992, at A12; Dianne Klein, *Rewrite Script for Rape Trials*, L.A. TIMES, Feb. 13, 1992, at E1; Larry Tye, *Analysts Say Defense Strategy Missed the Point*, BOSTON GLOBE, Feb. 12, 1992, at 10.

22. To add insult to injury, the press initially reported the rape trial in the sports pages of many major newspapers. Many women were horrified that this was done because it seemed to trivialize the seriousness of rape. Gordon McKibben, *Tyson Trial: Page 1 or the Sports Section?*, BOSTON GLOBE, Feb. 17, 1992, at 13. African Americans also have a right to be outraged. The initial treatment of a serious news event as a sports event treated a serious issue between two African Americans as a sport—something to be watched, like Monday Night Football.

23. At the time of trial, the prosecution portrayed Ms. Washington as a naive young woman. She was an honor student at a college in Rhode Island, a former Sunday school teacher, and a contestant in the Black Miss America Pageant. Ken Parrish Perkins, *The Ballad of Iron Mike*, DALLAS MORNING NEWS, Feb. 11, 1993, at 1C. Even though Ms. Washington is an African American, the predominately White jury probably identified more with her than Mike Tyson, who grew up on the streets of Brooklyn and did a stint in reform school. *Id.*

Lee Hailey, who was charged with the murder of two White men in the John Grisham novel, *A Time to Kill*.²⁴ The second is the real-life trials of Orenthal James Simpson for the murder and wrongful deaths of two White people, his ex-wife, Nicole Brown Simpson, and Ronald Goldman. My thesis is that defense counsel will only be able to exonerate an African American man charged with the murder of White people before an all-White (or almost all-White) jury if he or she can cast the African American defendant in the stereotypical light of a White man, such as avenging an ultimate wrong—fighting for truth, justice, and the American way. In contrast, before an all-Black (or almost all-Black) jury, the savage Black brute stereotype is neutralized and has less force because the jury is able to evaluate dispassionately allegations of prior violent acts, such as spousal abuse. An all-Black jury is also more likely to give credence to allegations of police racism and corruption and less value to the media's portrayal of Black men as violent criminals.

II. *A TIME TO KILL*

A. *The Story*

In *A Time to Kill*, John Grisham does an excellent job of storytelling and of depicting the problems that African American male defendants have in getting a fair trial before all-White juries.²⁵ In the book, Tonya Hailey (a ten-year-old Black girl) was brutally gang raped by two White men, Billy Ray Cobb and Pete Willard.²⁶ Tonya was on an errand for her mother, getting groceries from the store, when she encountered the two men who, after kidnapping and raping her, attempted to lynch her by stringing her up to a tree, and eventually left her for dead in a small ravine lined with kudzu.²⁷

24. GRISHAM, *supra* note 1. I have also viewed the 1996 film adaptation of this book. Grisham has also written several other best selling books: *The Firm*, *The Pelican Brief*, *The Client*, *The Chamber*, *The Rainmaker*, *The Runaway Jury*, and *The Partner* many of which have been adapted to film. Many to whom I have spoken who have read all of his books enjoyed *A Time to Kill* the most.

25. The book even discusses the fact that Carl Lee Hailey may have had a more sympathetic jury if it had been composed of more African American jurors. *Id.* at 105.

26. *Id.* at 1–2.

27. *Id.* at 1–7. Fortunately, Tonya survives the brutal incident. However, she loses the ability to have children and her family worries about the impact of the incident on her long term psychological and emotional development. *Id.* at 221–23.

In a local bar, Cobb and Willard bragged to a police informant about finding a "nigger who was a virgin"²⁸ and that she was "eight or nine" years old.²⁹ They were apprehended and charged with the rape of Tonya Hailey. Willard eventually signed a confession. Upon learning of the arrest of these men for his daughter's rape, Carl Lee Hailey sought revenge. He went to Memphis to obtain an M-16 rifle from a friend whose life he saved in Vietnam.³⁰ With the M-16, he then killed both Cobb and Willard as they left the court after a bail hearing.³¹ He unintentionally also shot Sheriff's Deputy Looney, who was escorting Cobb and Willard back to jail.³² As a result of the shooting, Deputy Looney had one of his legs amputated below the knee.³³

The book juxtaposes the prevailing media images of African Americans with those of Whites. Grisham describes the two White rapists, Cobb and Willard, as "rednecks."³⁴ Cobb was twenty-three years old but had already spent three years in the state penitentiary for dealing in drugs.³⁵ After leaving prison, he resumed his position as a small-time narcotics dealer.³⁶ Willard was twenty-seven years old and, although having never been in serious trouble, had difficulty holding a job, was not too bright, and dealt drugs with Cobb.³⁷

In contrast, Grisham describes the African American family as hard working, honest, and law-abiding.³⁸ Carl Lee Hailey was a courageous Vietnam veteran and a devoted family man. He worked in a local paper

28. *Id.* at 15. Grisham again is very willing to engage the reader and highlights some of society's prevailing stereotypes. In this case, the stereotype is that of the black woman who is oversexed and overly promiscuous.

29. *Id.* at 15.

30. GRISHAM, *supra* note 1, at 57. The friend, Cat Bruster, is involved in a number of underworld activities, *id.* at 55, and helps Carl Lee obtain the weapon. *Id.* at 57-60.

31. *Id.* at 72.

32. *Id.*

33. *Id.* at 100. At trial, Deputy Looney testified that he did not blame Carl Lee Hailey for shooting him. He believed that it was an accident, and states that he would have shot the rapists themselves if they had done the same thing to his little girl. *Id.* at 422. Interestingly in the film, unlike the book, Carl Lee Hailey has to encourage his attorney, Jake Brigance, to ask Deputy Looney at trial whether he thought that Hailey should be punished for shooting Looney. A TIME TO KILL, *supra* note 19, at t: 01:41:35-:42:16. The difference in the two versions may be because the film makers wanted to give Carl Lee Hailey a larger role in his defense.

34. GRISHAM, *supra* note 1, at 1.

35. *Id.*

36. *Id.*

37. *Id.* at 1.

38. *Id.* at 89. In the book, Grisham features Lester Hailey, an uncle of Tonya and the brother of Carl Lee, who was exonerated in a trial for the murder of an African American. See generally *id.*

But fact is, you just like all the rest of them. When you look at me, you don't see a man. You see a Black man. . . . We ain't no friends, Jake. We on different sides of the line. I ain't never seen you in my part of town. I bet you don't even know where I live. Our daughters, Jake, they ain't never going to play together. . . . America is a war, and you on the other side. How a Black man ever gonna get a fair trial with the enemy on the bench and the jury box—my life in White hands? You, Jake, that's how. You my secret weapon cuz you one of the bad guys. You don't mean to be, but ya are. It's how you's raised. Nigger. Negro. Black. African American. No matter how you see me, you see me as different. You see me like that jury sees me. You are them. Now throw out your points of law, Jake. If you was on that jury, what would it take to convince you to set me free? That's how you save my ass. That's how you save us both.⁴⁶

In his brilliant closing arguments the next day, Brigance asked the jury to imagine that the little girl who was raped was White.⁴⁷ Of course, as a result of the closing argument,⁴⁸ Carl Lee Hailey was found not guilty by reason of insanity.⁴⁹

B. Critical Race Analysis

Through storytelling, John Grisham provides us with a glimpse of the type of story that he believes an all-White jury would accept to exonerate an obviously guilty African American male defendant for the murder of a

46. *Id.* at t: 02:09:04–11:13. In the book, the above-mentioned conversation did not take place.

47. *Id.* at t: 02:13:01–20:20. In the book, it was one of the jurors during deliberation who made the other jurors imagine that the little girl who was raped was White, not Black, and that the rapists were Black, not White. GRISHAM, *supra* note 1, at 513.

48. My sister, Ethel Richards, also read *A Time to Kill*. Of course, neither she nor I purport to speak for all African American people, but she told me that she “did not like the ending of *A Time to Kill*” because she felt “it was totally unrealistic.” She did not think that “Whites could put themselves in Black men’s shoes to truly empathize in order to acquit Carl Lee Hailey. She also thought that “African Americans could not put themselves in the shoes of White people to understand their concerns.” Telephone interview with Ethel Richards (Mar. 15, 1997).

49. *A TIME TO KILL*, *supra* note 19, at t: 02:20:50. Interestingly in the book, there were many other possible influences on the jury decision; there were allegations of possible juror tampering, one juror was threatened by the KKK, and another juror may have been bribed by an associate of Brigance. In addition, there was a massive demonstration of African Americans from all over the South in support of Carl Lee Hailey. The noise from the demonstrators was so loud that the jurors could hear it and were fearful of the demonstrators. GRISHAM, *supra* note 1, at 494–97.

mill and owned several acres of land surrounding his house.³⁹ His wife, Gwen Hailey, was a good and concerned mother who worried about the whereabouts of her children.⁴⁰

The most interesting point about *A Time to Kill* from a legal standpoint is how Hailey's lawyer, Jake Brigance,⁴¹ goes about defending his obviously guilty African American defendant to an all-White jury. Brigance had Hailey plead not guilty by reason of insanity.⁴² In the film, Brigance felt very discouraged and believed he was going to lose the case because, on cross examination, his expert witness as to Hailey's insanity admitted that he, the expert, was convicted of statutory rape many years earlier.⁴³ The evening before closing arguments, Brigance went to see Hailey in jail and advised Hailey to plea bargain for life imprisonment.⁴⁴ Hailey admonished him, "Jake, I can't do no life in prison."⁴⁵ He then continued,

You White and I'm Black. Ya see, Jake, you think just like them. That's why I picked you. You one of them, don't you see? Oh you think you ain't cuz you eatin' claws and you out there tryin' to get me off on TV talkin' 'bout Black and White.

39. *Id.* at 89.

40. GRISHAM, *supra* note 1, at 5.

41. Although the book effectively exposes a great deal of the inequities in the criminal justice system in the United States, like many books of its genre, it stars Jake Brigance as the courageous White male protagonist, who overcomes great odds to help his client. During the course of the book, Brigance receives obscene phone calls at his home and office, he has a cross burned in the yard of his home, his house is eventually destroyed by Ku Klux Klan ("KKK") arsonists, his dog is killed by the fire, his secretary's husband is killed by the KKK, and his wife separates from him. See generally *id.* This article is not meant to diminish the contributions and sacrifices that many Whites have made in pursuit of the Civil Rights Movement. However, it seems so often in fiction that an African American male hardly ever gets the chance to save the day. Moreover, Carl Lee Hailey's character is not fleshed out as much in the book as it is in the film.

Jake Brigance is also portrayed as an inexperienced lawyer who is a bit hypocritical. On the one hand, before the murders he tells Hailey that he would kill any one who raped his young daughter. On the other hand, when discussing the case, Brigance tries to show his moral superiority by telling Hailey, "You just don't shoot a person or persons, in cold blood, and then tell the jury they needed killing, and expect to walk out of the courtroom." *Id.* at 79. Then when Hailey observes that Brigance does not appear confident, Brigance thinks to himself that Carl Lee is a "big stupid idiot." *Id.*

42. *Id.* at 148, 159.

43. A TIME TO KILL, *supra* note 19, at t: 01:56:37--57:51. The prosecution witness on Hailey's sanity also faltered under cross examination when he admitted that he never found any criminal defendant insane even though he managed a psychiatric hospital in which at least one criminal defendant about whom he testified was under his care. *Id.* at t: 01:46:47--48:05.

44. *Id.* at t: 02:08:09--08:39.

45. *Id.* at t: 02:08:41.

White person. He suggests that an all-White jury will exonerate a guilty African American male when the defendant is a respectable member of the community, when the Whites who are killed are disresponsible, and when the African American man is avenging⁵⁰ some horrific crime that the deceased Whites have perpetuated on the African American man's family. Carl Lee Hailey's anger is understandable to most people. Many parents would feel like killing anyone who molested their child. His rage was something to which many Americans—Black or White—could relate.⁵¹

50. Vigilantism against certain societally identifiable wrongdoers is something that the larger society admires. For example, Bernard Goetz comes to mind: he was glorified and became an instant hero after shooting four young Black male attackers.

On December 22, 1984, Goetz, a White man, was riding a New York City subway and was approached by four young Black men. The young men allegedly asked him for five dollars. Goetz believed that they were toying with him. *People v. Goetz*, 497 N.E.2d 41, 44 (N.Y. 1986). Goetz pulled out a gun and shot each of them—two of them in the back. "The tragedy of the Goetz case is that a public barely aware of the facts was rooting for him to get away with it." Stephen L. Carter, *When Victims Happen To Be Black*, 97 YALE L.J. 420, 424 (1988).

51. Rage by African American male defendants will probably not work in other circumstances. Defense counsel for Colin Ferguson in the murder of several White passengers on the Long Island Railroad initially wanted to plead insanity by reason of "Black rage." Larry McShane, *Lawyer Follows in Kunstler's Footsteps*, TIMES UNION (Albany, N.Y.), Oct. 9, 1995, at B2. The theory was that institutional racism made Ferguson insane. *Id.* This proposed defense infuriated White people. See generally Michael Alexander, *Racial Stress Spawns a Black Rage*, BUFFALO NEWS, May 18, 1994, at B9; Peter Noel, *Rage of An Invisible Man: The Trial of Colin Ferguson*, VILLAGE VOICE, Feb. 21, 1995, at 21; Warren Strugatch, *Kunstler: Rebuilding from the Inside*, NEWSDAY, Sept. 7, 1995, A37. This defense strategy did not take place since Ferguson fired his lawyers and chose to represent himself. Ferguson's defense was that he did not commit the crimes. See *Madness in a Long Island Court*, N.Y. TIMES, Feb. 2, 1995, at A22; Janny Scott, *A Murder Trial Through the Looking Glass*, N.Y. TIMES, Feb. 4, 1995, at A1.

In *The Alchemy of Race and Rights*, Professor Patricia Williams highlights a hypothetical in which she demonstrates that an African American man in a case very similar to the one involving Bernard Goetz would probably not get the same reception. Professor Williams hypothesizes that an African American man who murders several White people because they attempt to panhandle money from him would not be viewed sympathetically by a White jury. She writes:

A lone black man was riding in an elevator in a busy downtown department store. The elevator stopped on the third floor, and a crowd of noisy white high school students got on. The black man took out a gun, shot as many of them as he could, before the doors opened on the first floor and the rest fled for their lives. The black man later explained to the police that he could tell from the "body language" of the students, from their "shiny eyes and big smiles," that they wanted to "play with him, like a cat plays with a mouse." Furthermore, the black man explained, one of the youths had tried to panhandle money from him and another asked "how are you?"

"That's a meaningless thing," he said in his confession, but "in certain circumstances, that can be a real threat." He added that a similar greeting had preceded the vicious beating of his father, a black civil rights lawyer in Mississippi, some time before. His intention, he confessed, was to murder the high school students.

Yet Jake Brigrance, Carl Lee Hailey's attorney, still had to ask the jury to envision that it was a little White girl who was brutally raped to get his Black male defendant acquitted. As a consequence, the jury also had to envision the defendant as being White. So the main message in *A Time to Kill* is perhaps that only White men have legitimate reasons for taking the life of another White man. An African American man still has no legitimate right to kill a White man, and the only way that an all-White jury can justify the African American man's actions is by imagining that he is White. Of course, the chance of all of these circumstances unfolding together is probably very rare, and certain attributes of the African American defendant, attributes of the deceased Whites, and the crime of the Whites would be hotly litigated by the prosecution. By this I mean the prosecution would work very hard to dredge up any prior bad acts of the African American male defendant—especially that involve violence—in order to show that the killing was not justified.

III. THE CRIMINAL AND CIVIL TRIALS OF O.J. SIMPSON

On June 12, 1994, Nicole Brown Simpson, the ex-wife of O.J. Simpson, and Ronald Goldman, a waiter, were killed outside the home of Ms. Simpson. On June 17, 1994, O.J. Simpson was arrested and charged with their murder. The criminal trial was televised and quickly became a media spectacle. At least eighty-two percent of the population watched some part of the criminal trial on television.

O.J. Simpson is a modern success story. Simpson's legs were bowed by rickets, but he overcame his early affliction and ascended from poverty in San Francisco to a legendary football career and a fortune in show business. He played football for the Buffalo Bills and San Francisco Forty-Niners, was a spokesman for Hertz Rent-a-Car, and acted in several movies.⁵² He bragged that "Hertz told me in all their surveys that I was colorless."⁵³ He also took voice lessons to remove all traces of stereotypical "black speech patterns."

PATRICIA J. WILLIAMS, *ALCHEMY OF RACE AND RIGHTS* 76 (1st ed. 8th prtg. 1995). The author shows how with the same facts as the *Goetz* case, except for the races of the assailants and victims, the general public would not find this African American man's story credible.

52. Bill Turque, *He Could Run . . . But He Couldn't Hide*, *NEWSWEEK*, June 24, 1994, at 16. In the 1960s and 1970s, when African American athletes were cheered on the field but were largely invisible in the world of big-money commercial endorsements, Simpson was the trailblazing exception. *Id.* at 18. *Newsweek* describes his appeal as a "genial, race-neutral style" that "went down easily with white audiences." *Id.*

53. *Id.*

The Simpson cases demonstrate how crucial storytelling is before a jury considering the guilt or innocence of an African American male defendant. But what really was going on in the Simpson case was the presentation of two competing stories with ancillary stereotypes. The prosecution wanted the jury to believe that O.J. Simpson was a spousal abuser who killed his ex-wife. Evidence of Simpson's past violent behavior would allow the jurors, especially the Whites, to "blacken" him with the prevailing stereotype of a violent Black brute. In contrast, the defense wanted the jury to see Simpson as an upstanding member of the community and wanted the jury to believe that the police department was racist,⁵⁴ incompetent, and likely to have planted evidence. Evidence of police racism might sink the prosecution's case before Black jurors.

The prosecution and defense debated over whether the allegations of Detective Mark Fuhrman's racism should be introduced into evidence. The prosecution argued that the evidence would inflame the passions⁵⁵ of the largely African American jury.⁵⁶ The defense argued that the evidence of police racism went to the credibility of the prosecution witnesses. Eventually, Judge Lance Ito allowed some of Fuhrman's racist comments

54. Some mainstream publications said that Whites did not see that the Simpson case had anything to do with race. But notice how journalists sometimes contradict themselves:

For many whites, the issue was domestic abuse. Only a small minority of bigots ever viewed Simpson as a symbol of black male violence. Until the murders, most whites saw him best as the kind of star athlete and entertainer who 'transcends race,' at worst as a harmless pitchman. What changed that forever was the airing of the 911 tapes . . . and the photos of Nicole's swollen and bruised face . . .

Mark Whitaker, *Whites v. Blacks*, NEWSWEEK, Oct. 16, 1995, at 28.

What does it mean to "transcend race"? You have to realize that someone has a race to transcend it. To transcend race also implies that you think about a race in a stereotypical way. But the reporters, saying that race did not matter, acknowledge that the supposed transcendence ended when they saw and heard otherwise.

55. This is very stereotypical thinking. There is general belief that African Americans more easily succumb to their passions than Whites. In contrast, the subtext of this African American stereotype is that Whites are more dispassionate, they are more able to parse through the truth than African Americans, and that Whites are more logical, rational, and reasonable. Of course another interpretation of this whole matter should not overlook the fact that Whites may have more access to other Whites spewing racial invective so maybe Whites think that they are immune from its impact.

56. The criminal trial jury consisted of nine African Americans, two Whites, and one Latino. According to *Newsweek*, Los Angeles County cases tend to be tried in courthouses located closest to the scene of the crime. Larry Reibstein, *What Went Wrong*, NEWSWEEK, Oct. 16, 1995, at 40-41. For the Simpson case, that would have been Santa Monica, an affluent, predominantly White area. *Id.* However, the Santa Monica courthouse had been damaged by an earthquake and its security was inadequate. *Id.* Los Angeles County District Attorney Gil Garcetti moved the case downtown "where control was better, access was more convenient, [and] a grand jury was already sitting." *Id.* This meant drawing jurors from surrounding neighborhoods, whose populations tended to be African Americans and Latinos. *Id.*

introduced into evidence.⁵⁷ After the criminal jury deliberated and quickly decided to exonerate O.J. Simpson, there was outrage by many Whites against the jury. They expressed dissatisfaction with the jury process and generally believed the largely African American jury disregarded the so-called "mountain of evidence," and were so overcome with passion over the racial invective of Mark Fuhrman that the jurors must have lost their senses.

The worry that the jurors (or society at large) may become so inflamed with rage so that they could not decide the case was asymmetrical. It concentrated solely on the passions of the African American jurors concerning the racism of Mark Fuhrman. It did not focus on the passions stirred up in Whites by the abuse of a White woman by her African American ex-husband.

B. Storytelling and Competing Racial Stereotypes in the O.J. Simpson Criminal Case

1. Prosecution Strategy: O.J. Simpson—The Savage Black Brute

The allegation and evidence that an African American man abused his White wife can be highly inflammatory and cause many Whites to rush to judgment given the disdain of our culture and society for interracial relationships.⁵⁸ An African American man violating a White woman has always been one of White America's worst nightmares.⁵⁹ It is the worst manifestation of the "savage Black brute." This stereotype is so deeply embedded in our culture that many Whites may not even recognize the prejudice.

At the criminal trial, the prosecution attempted to "blacken" O.J. by making him into the classic violent Black male stereotype, especially since his previous image was supposedly race neutral.⁶⁰ The largely African American jury was not overcome by that stereotype and did not let it

57. America watched Mark Fuhrman turn from a matinee idol, who received several marriage proposals when he first testified, into the worst example of a racist police officer.

58. This discussion should not be interpreted as condoning spousal abuse. Evidence of past spousal abuse should be introduced into evidence in murder trials when relevant. At the criminal trial, there was sufficient evidence to show that O.J. Simpson had abused his ex-wife. There was also evidence that showed that he may very well have killed her and Ron Goldman.

59. See *ETHNIC NOTIONS*, *supra* note 8.

60. It is also interesting that at this time *Time* magazine ran its famous cover of the darkened O.J., *TIME*, June 27, 1994, which created consternation in the African American community—harkening back to a period of when African American entertainers wore blackface to perform.

influence its decision. The prosecutors told the story of O.J. the wife beater and controller.⁶¹ They presented Denise Brown, Nicole's sister, who testified regarding incidents in which O.J. abused and humiliated Nicole; they introduced the famous 911 tapes that captured O.J. trying to knock down Nicole's door.⁶² And of course, O.J.'s 1989 "no contest" plea to spousal abuse was revealed. The rationale for introducing these facts was clear: if O.J. was violent with Nicole once, he was capable of enough violence to kill her.

This "blackening" of O.J. was particularly threatening to Simpson's defense because the prosecutors painted him as the most horrible symbol of Black male violence: the despoiler of pure, virginal White women. Let us not forget our nation's long history of criminalizing interracial marriages. Thirty-eight states had antimiscegenation statutes at one time or another during the nineteenth century;⁶³ as late as 1951, twenty-nine still had such statutes.⁶⁴ Finally, in the 1967 case of *Loving v. Virginia*,⁶⁵ the Supreme Court found the Virginia statute prohibiting and punishing interracial marriages violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment.⁶⁶

The United States has a long history of White mobs lynching African American men for alleged infractions against White women. These African American men were hung from trees and burned without due process for anything from actual rape to merely whistling at a White woman.⁶⁷ The recent John Singleton film, *Rosewood*,⁶⁸ which is based on a true story, shows how White women sometimes lied about being raped

61. Again, this analysis is not intended to diminish the seriousness of the spousal abuse allegations. Every year, approximately two million men beat their wives and an additional 1400 women are killed by their partners. Tessa Namuth, *When Did He Stop Beating His Wife?*, NEWSWEEK, June 27, 1994, at 21. Experts, however, disagree "whether a history of wife-beating fits the profile of a man who ultimately murders his [wife]." *Id.*; see also Toni L. Harvey, *Batterers Beware: West Virginia Responds to Domestic Violence with Probable Cause Warrantless Arrest Statute*, 97 W. VA. L. REV. 181, 206 (1994) (observing that approximately one-third of all female murder victims were killed by their partner).

62. In the tapes, Ms. Simpson told the operator that "He's f...ing nuts . . . He's going to beat the s...t out of me." Whitaker, *supra* note 54, at 28. In the background of the tapes a man's ranting voice can be heard. *Id.*

63. See Harvey M. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 GEO. L.J. 49, 50 (1964-65).

64. *Id.*

65. 388 U.S. 1 (1967).

66. *Id.* at 12.

67. See, e.g., Ronald Turner, *Remembering Emmet Till*, 38 HOW. L.J. 411, 414-22, 421 n.78 (1995).

68. ROSEWOOD (Warner Bros. 1997).

by African American men in order to protect themselves.⁶⁹ As a result of this lie, every African American man in the town of Rosewood became suspect, and White mob violence ensued against the Rosewood African American community.

During a lynching, Whites would derive pleasure in the slaughter of a "darkie" who got out of place. In many respects, the Simpson case was a modern example of a high-tech lynching. Similar to those in the past, it had an African American man accused of violating a White woman. Much of the public watched the Simpson criminal trial in awe, and the White population was upset because it did not get revenge when Simpson was exonerated by the jury.

Some social historians believe that the South constructed "Jim Crow" laws separating the races largely to protect White women from Black men.⁷⁰ If these motivations are so deeply embedded in American history and its subconscious and conscious mind, then once Simpson's character is blackened, it may be hard for any White jury to consider any other evidence.⁷¹

2. Defense Strategy:

Racist Los Angeles Police out to Get "Choirboy" O.J. Simpson

The defense in the criminal case tried to show that O.J. Simpson had gotten over his relationship with Nicole Brown Simpson and started a new one with model Paula Barbieri. The defense also introduced into evidence testimony of an interior designer that showed that Simpson and Barbieri were planning to remodel Simpson's bedroom.⁷² Testimony from Simpson's family was offered to show that he was a family man who loved his children and took care of his elderly mother.⁷³ This strategy was designed to debunk the allegations that Simpson still had a "thing" for Nicole Brown Simpson, and to rehabilitate his character in front of the jury. This strategy then played into the next issue that involved police racism and corruption.

69. In the film *Rosewood* the White woman lied because her White lover beat her and she needed some excuse to tell her White husband concerning her bruises.

70. GUNNAR MYRDAL, *AN AMERICAN DILEMMA* 59-61 (1964).

71. See generally David G. DuBois, *Race and the O.J. Simpson Saga, Fascination Lies in Past Sex, Power*, SPRINGFIELD SUN REPUBLICAN, Feb. 23, 1997, at 133.

72. *People v. Simpson*, No. BA097211, 1995 WL 429482, at *49 (Cal. Super. Ct. July 10, 1995).

73. *People v. Simpson*, No. BA097211, 1995 WL 431033, at *1-4 (Cal. Super. Ct. July 11, 1995); *Simpson*, 1995 WL 429482, at *12-14, *30-33, *36-42; *People v. Simpson*, No. BA097211, 1995 WL 429481, at *5-45 (Cal. Super. Ct. July 10, 1995).

It is very understandable that the racially diverse (but largely African American) jury in the criminal case would relate to and understand the defense's story of police racism and corruption. For a large part of the African American community, this is a reality. The clincher for the jury was the Mark Fuhrman tapes, which evidenced his perjury. Under cross-examination by F. Lee Bailey, Fuhrman said that he had not used the word "nigger" in over ten years. In one of the tapes played to the jury, Fuhrman said, "anything out of a nigger's mouth is a fucking lie" ⁷⁴ Witness Kathleen Bell testified that Fuhrman had told her "when he sees a Black man with a White woman driving in a car he pulls them over." ⁷⁵ When Bell asked Fuhrman, "[W]hat if they didn't do anything wrong?" Fuhrman replied "he would find something [wrong]." ⁷⁶

3. Critical Race Analysis

This perjured testimony was enough for the jury to discount everything that Fuhrman testified about, including finding the bloody glove, seeing blood on Simpson's Ford Bronco, and finding blood on Simpson's socks laying on the floor of his bedroom. ⁷⁷ Moreover, there was testimony that Detective Philip Vannatter carried a vial of Simpson's blood to Simpson's home, rather than taking it to the police lab in the same building. ⁷⁸ Given the high evidentiary standard—that the prosecution prove its case beyond a reasonable doubt—it is not surprising that the jury found Simpson not guilty.

Given the negative police actions in some of our communities, it is reasonable for many African Americans to accept that police racism exists,

74. Whitaker, *supra* note 54, at 28. The other statements made by Fuhrman in the tapes were much worse.

The defense also impeached the credibility of Detective Philip Vannatter by introducing evidence—the testimony of an FBI informant—that Vannatter lied when he said that he did not consider Simpson as a suspect early in the case. *People v. Simpson*, No. BA097211, 1995 WL 632325, at *17–21 (Cal. Super. Ct. Sept. 19, 1995).

75. *People v. Simpson*, No. BA097211, 1995 WL 540595, at *5–7 (Cal. Super. Ct. Sept. 5, 1995).

76. *Id.* at *8.

77. In fact Judge Ito's charge to the jury allowed the jurors to distrust all of Mark Fuhrman's testimony. His instruction provided that:

[A] witness who is willfully false in one material part of his or her testimony is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point unless from all the evidence you believe the probability of truth favors his or her testimony in other particulars."

Simpson, 1995 WL 632325, at *11.

78. Mark S. Miller & Donna Foote, *The Verdict: How the Jury Saw It*, NEWSWEEK, Oct. 16, 1995, at 37.

and that this racism would lead to the framing of African American defendants. There have been several very well-publicized cases in New York City where a large percentage of officers in a Harlem police precinct was charged with dealing in crack cocaine.⁷⁹ Several of the police officers have pled guilty to perjury—jeopardizing the legitimacy of many of the cases in which they have testified.⁸⁰ In Philadelphia, six officers pled guilty to charges of perjury, planting evidence, and obtaining search warrants illegally.⁸¹ Five of the officers were White, and nearly all the cases involved Blacks or Hispanics.⁸² Additionally, we should not forget the Rodney King incident, in which several Los Angeles police officers severely beat a speeding motorist and reportedly called African Americans “gorillas.”

Given that many African Americans view police racism and corruption as reality, it is not surprising that the largely African American jury in the criminal trial would vote to exonerate Simpson.

C. Storytelling in the O.J. Simpson Civil Case

1. Plaintiffs' Strategy: O.J. Simpson—The Savage Black Brute

In the O.J. Simpson civil case, Ron Goldman's birth parents each brought individual wrongful death actions and Nicole Brown Simpson's parents brought a battery claim. Although these were civil and not criminal actions, they involved the same type of storytelling and racial stereotypes because they involved allegations of violent acts. Whenever there are allegations of violent acts committed by African American men, the stereotype of the savage Black brute rears its ugly head. This was especially true in the civil trial, which took place before a predominantly White jury in Santa Monica. The civil jury consisted of nine Whites, two Latinos, and one bi-racial Asian/Black. Moreover, the plaintiffs had the advantage of hindsight to learn from the mistakes of the prosecution lawyers.

79. See Andrew Jacobs, *Bad Cop*, N.Y. TIMES, Nov. 10, 1996, at 1; David Kocieniewski, *New York Pays a High Price for Police Lies*, N.Y. TIMES, Jan. 5, 1997, at 1.

80. Kocieniewski, *supra* note 79, at 16; see also Sarah Terry, *Experts Try To Pin down Extent of Police Misconduct*, N.Y. TIMES, Nov. 19, 1995, at 33.

81. *9 Cases Tossed out in Philadelphia Scandal*, WASH. POST, Oct. 11, 1995, at A22; Debbie Goldberg, *For Many in North Philadelphia, Police Corruption Is No Surprise*, WASH. POST, Oct. 5, 1995, at A3; Michael Janofsky, *Philadelphia Police Scandal Results in a Plan for a Suit Claiming Racism*, N.Y. TIMES, Dec. 12, 1995, at D23.

82. Janofsky, *supra* note 81, at D23.

Unlike the criminal trial, Simpson testified at the civil trial. He was actually called by the plaintiffs to testify. During direct examination, he denied that he ever hit Ms. Simpson,⁸³ denied that he ever owned the now-famous Bruno Magli shoes, like the ones worn by the killer,⁸⁴ and denied that Paula Barbieri left him a voice mail indicating that she was breaking up with him because of his relationship with Nicole Brown Simpson.⁸⁵ Plaintiffs introduced evidence at the civil trial that undermined each of these denials.⁸⁶ So plaintiffs portrayed Simpson not only as the savage Black brute, but as a lying savage Black brute.

Judge Hiroshi Fujisaki also allowed the plaintiffs to introduce new testimony against Simpson, such as Ms. Simpson's diaries, in which she wrote that Simpson vowed to get her.⁸⁷ Unlike the prosecution in the criminal case, the plaintiffs' attorneys in the civil case introduced evidence of the Bronco freeway chase so the jury was able to mull over evidence of Simpson's disguise and passport—perhaps evidencing flight.⁸⁸ The plaintiffs' attorneys also introduced a tape of the freeway conversation between Los Angeles Police Department Detective Tom Lange and Simpson. During this conversation, Simpson, carrying a gun and considering suicide, uttered what could be considered an incriminating statement: "I'm the only one that deserves [to get hurt]."⁸⁹

83. *Rufo v. Simpson*, Nos. SC031947, SC036340, SC036876, 1996 WL 674551, at *5 (Cal. Super. Ct. Nov. 22, 1996).

84. *Rufo v. Simpson*, Nos. SC031947, SC036340, SC036876, 1996 WL 679699, at *27–30 (Cal. Super. Ct. Nov. 25, 1996). The plaintiffs came up with thirty photos of Simpson wearing shoes that appeared to be the shoes worn by the killer. *Rufo v. Simpson*, Nos. SC031947, SC036340, SC036876, 1997 WL 15060, at *6–7 (Cal. Super. Ct. Jan. 16, 1997).

85. *Rufo v. Simpson*, Nos. SC031947, SC036340, SC036876, 1996 WL 15663, at *1–2 (Cal. Super. Ct. Nov. 25, 1996).

86. Plaintiffs introduced evidence of several people who testified to allegations of prior hitting of Nicole by O.J. Simpson. *Rufo v. Simpson*, Nos. SC031947, SC036340, SC036876, 1996 WL 692366, at *17 (Cal. Super. Ct. Dec. 3, 1996). They introduced 30 pictures of O.J. Simpson wearing what appeared to be the type of Bruno Magli shoes that were allegedly worn by the killer. *Simpson*, 1997 WL 15060, at *6–7. They introduced telephone records to show that Simpson received a voice message from Paula Barbieri breaking up with Simpson. *Simpson*, 1996 WL 15663, at *1–2. They introduced testimony indicating that he was angry at Nicole the day of the murders. *Rufo v. Simpson*, Nos. SC031947, SC036340, SC036876, 1996 WL 698112, at *25–26 (Cal. Super. Ct. Dec. 6, 1996).

87. *Rufo v. Simpson*, Nos. SC031947, SC036340, SC 036876, 1996 WL 674552, at *9 (Cal. Super. Ct. Dec. 6, 1996).

88. *Simpson*, 1996 WL 679699, at *33–34.

89. *Id.* at *36.

2. Defendant's Strategy: Minimize Spousal Abuse Allegations and Claim Police Corruption

In the civil case, Simpson's defense team attempted to minimize allegations of Nicole Brown Simpson's abuse at O.J. Simpson's hand. Simpson's lawyer, Robert Baker, questioned the veracity of each of the witnesses who claimed that they saw O.J. hit Nicole.⁹⁰ He also asked the jury to consider why none of Nicole Brown Simpson's good friends testified about the alleged abuse.⁹¹

Baker also tried to minimize the 1989 incident for which Simpson pled "no contest" for spousal abuse. Baker said that O.J. and Nicole had both been drinking that particular night.⁹² They had an argument over whether O.J. bought earrings for Kathryn Allen, the wife of friend Marcus Allen.⁹³ Baker termed the fight "wrestling" and said that O.J. did not hit her, although she was injured in some way, perhaps from coming into contact with a wall.⁹⁴ Baker suggested that O.J. Simpson was very angry at himself after this event and went to counseling.⁹⁵ Baker also suggested that there were several other incidents between O.J. and Nicole where he showed restraint, demonstrating that Simpson was incapable of blind rage.⁹⁶ Baker also tried to minimize the 911 call that Nicole made to the police with O.J. Simpson knocking down the door. He said that Nicole did not seem frightened and that the fight was about Nicole's involvement with drugs and hookers.⁹⁷

The defense also attempted to introduce evidence of police racism, but Judge Fujisaki limited the introduction of such evidence because Mark Fuhrman did not testify in the civil case.⁹⁸ The defense still tried to create doubt by questioning whether the murders could have taken place within

90. For instance, Baker questioned why India Allen, who testified that she saw O.J. slap Nicole in front of a veterinary clinic come forward so late in the proceedings and why she did not report it to the police at the time the incident allegedly occurred. *Rufo v. Simpson*, Nos. SC031947, SC036340, SC036876, 1997 WL 23184, at *7 (Cal. Super. Ct. Jan 22, 1997). Moreover, Baker argued that Ms. Allen was testifying only for the publicity. *Id.* Baker also charged that plaintiffs' witness Mr. Aguilar, who testified that he saw O.J. abuse Nicole on Victoria Beach, was lying because the date he supposedly saw the incident of spousal abuse was the same date that O.J. was participating in a softball tournament. *Id.* at *8.

91. *Id.* at *8.

92. *Id.* at *9.

93. *Id.*

94. *Id.*

95. *Id.* at *9-10.

96. *Simpson*, 1997 WL 23184, at *10-11.

97. *Id.* at *14.

98. Donna Foote & Larry Reibstein, *Two for the Show*, NEWSWEEK, Feb. 3, 1997, at 40, 41.

the very short time line or whether they could have been committed in such a brief period of time by just one person.⁹⁹ The defense strategy still suggested that the police rushed to judgment, did not properly investigate any other leads, were still out to get Simpson, and may have planted evidence. The defense pointed to the missing samples of Simpson's blood and the fact that Vannatter carried the vials of Simpson's blood to Simpson's home instead of following department procedures.¹⁰⁰

3. Critical Race Analysis

The defense strategy did not prevail before a largely White jury for several reasons. First, White jurors are predisposed to the stereotype of the African American savage male brute. Whenever any evidence of prior violent acts by an African American male defendant is introduced before a largely White jury, the White jurors are likely to conclude that the African American male has committed the charges for which he is being tried. Simpson was so tainted with allegations of spousal abuse that any attempt to minimize it would not work and would look like he was defaming his late ex-wife's memory.

Second, Whites do not experience police racism and corruption to the same extent that African Americans do. In White communities, the police officer is seen as a dutiful public servant. In contrast, in African American communities, the police officer is considered an occupying force. The civil jurors did not have Mark Fuhrman's testimony as the linchpin to hold all the police inaccuracies together. But even if the White jury had evidence of Mark Fuhrman's racial invective and the fact that he perjured himself on the witness stand, it would probably not be enough for the largely White jury to find Simpson not liable. I believe some Whites feel that they are more logical and dispassionate than African Americans. Therefore, they believe that they can parse out all of Mark Fuhrman's racist invective and be levelheaded about deciding whether he acted wrongfully. However, these same individuals, if they were truly honest with themselves, would realize that they are guilty of the same sin of which they accuse African Americans—they were enraged by the spousal abuse allegations, especially those involving an African American man and a White woman, and they could not see how that was influencing their belief that Simpson was guilty.

99. *Rufo v. Simpson*, Nos. SC031947, SC036340, SC036876, 1997 WL 29311, at *3-4, *27-28 (Cal. Super. Ct. Jan. 27, 1997).

100. *Rufo v. Simpson*, Nos. SC031947, SC036340, SC036876, 1997 WL 2505, at *2-6 (Cal. Super. Ct. Jan. 23, 1997).

Because the defense was so limited in its allegations of racist and corrupt police officers, all the defense was left with was the possibility of mitigating Simpson's image as a spousal abuser. This was not possible as Judge Fujisaki allowed the plaintiffs more leeway in introducing such evidence. In the jurors' eyes, once Simpson became "Black," there was no turning back. Once "Black," they could easily picture him in the role of a stereotypical Black savage with out-of-control anger and passion, who killed his ex-wife and Ron Goldman. O.J. Simpson was ultimately found liable for the death of Ron Goldman and the battery of his ex-wife, Nicole Brown Simpson. Plaintiffs were also aided by a standard of proof—preponderance of the evidence—that is much lower than in a criminal case.

IV. CONCLUSION

In these cases, we have seen that the prevailing stereotype of the Black savage male brute is still operating. This stereotype may be very hard to combat before an all-White jury, especially if there is evidence suggesting that the defendant is capable of violence, as in the Tyson and Simpson cases. This stereotype is overcome in *A Time to Kill*, where John Grisham portrays the African American defendant in the best possible light. The defendant Carl Lee Hailey was a hard-working, decorated Vietnam war veteran and family man who killed two White "rednecks" to avenge the honor of his ten-year old daughter whom the two rednecks had raped. Here the African American male clearly committed the murder. In order for the stereotype of the African American savage male brute not to operate, the attorney representing the defendant had to get the jury to imagine that the defendant was a White man. The message of the book *A Time to Kill* is that only White men can have the legitimacy and justification (such as, avenging a horrific crime against the defendant's family) for killing another White man.

In contrast, in the recent criminal case brought against O.J. Simpson, he had the good fortune of being tried before a largely African American jury. The prosecution tried to "blacken" him to fit him into the stereotype of the African American male brute. The defense countered this stereotype with that of racist and corrupt police officers. The jury exonerated Simpson because it was less likely to be influenced by the stereotype of the savage Black male brute, and it did not believe that the spousal abuse allegations necessarily meant that he killed his ex-wife. Conversely, the jury may have been more likely than a mostly White jury to believe that the police were racist and planted evidence against Simpson.

In the civil proceeding against O.J. Simpson before a largely White jury, Simpson was not allowed to introduce evidence of police racism because Mark Fuhrman did not testify. The defense attorneys did introduce some evidence of police overreaching, but without Fuhrman's testimony there was no linchpin to hold all of the police overreaching together. But even if Fuhrman's testimony was presented, the mostly White jury probably would have found Simpson liable because they would have seen some of the police actions and Fuhrman's testimony as isolated incidents.

The jury was left solely with the issue of spousal abuse. Simpson's attorneys tried to minimize it, but that made Simpson look like he was defaming his late ex-wife's character. Moreover, whenever such allegations of prior violent acts are introduced against an African American male, it has the potential of so tainting him with prevailing stereotype of the savage Black brute that White jurors may not be able to look beyond those allegations. In addition, Simpson compounded the stereotype by denying that he ever hit Ms. Simpson or owned a pair of Bruno Magli shoes. As a result of his discounted testimony, Simpson morphed into the lying savage Black brute, and his character became so "blackened" in the largely White jury's mind that they probably could not see past it.

In presenting a criminal case to a jury, a lawyer needs to think about linking all the evidence together to present a credible story that the jury will believe. In representing African American male defendants, storytelling becomes even more crucial. There is the prevailing stereotype that African American men are "savage brutes." The role of the defense counsel in representing an African American defendant is to acknowledge that stereotype may be operating and to try to combat it in some way. Sometimes this may be next to impossible.

