

What is Justice? — Keynote Address

Patricia J. WILLIAMS*

I am quite honoured that you have asked me to come from the United States to speak to you, not only about "justice" but also about "perceptions of justice" given the great complications of public perceptions and justice in the great spectacle I hear you have witnessed no less than we. So, I guess you already know what **not** to do.

I must say that I was distressed, in the sequence of distressing CNN broadcasts, to wake up this morning and see hundreds of women captured on TV, screaming for O.J.'s head. I think the broadcaster — I was going to say the sportscaster because there was certainly that element of theatre, of sports, of grade B Hollywood as well as America's favourite hot button of miscegenation all mixed up into this — was saying "is it black women against white women" as much as one has heard all along "is it white men against black men", is it "police officers against South Central LA" so on and so forth.

What was most interesting to me about this particular screaming scene was, particularly since the verdict came in so quickly, that there was almost a longing at the end of the trial for something else to happen. Maybe there would be a riot, suggested some news commentators, almost longingly. Well, when I looked at the television this morning, there was a riot of sorts but not quite the one they popularly predicted, and the incredible passion which has attended every moment of this really hit me as I wondered "what is it they are **not** screaming about in the United States right now". And I came up with this list : Nobody is screaming about the cutting off of legal services, the attempt actually to do away with it all together, the cutting back of public defenders, the cutting back of health care, of family counselling, which would certainly address many of the issues of domestic violence. Nobody is complaining about the cutting back of Head Start, which is a nutritional and developmental program for pre-schoolers, about the tremendous cuts in welfare even though there are statistics to the effect that about 50% of women on welfare are those who have fallen into poverty because of being battered and 60% of women in homeless shelters are those who have been battered by their husbands. Nobody is crying about the lack of family counselling and so it strikes me that this trial, for all of its lip service to the cause of domestic services, is actually doing it some kind of a disservice, and this is what I would want to explore because, although I realize that the canadian model is different in so many respects, it seems to me that the addictive power of theatre in the United States politics is quite seductive.

Let me pass along whatever insights I can learn, along with suggesting at least two points of entry for any of you analogizing, or any of you who may wish to engage in

* Professeur of law, Law School, Columbia University, New York, New York.

such analogizing. Of course the first point of analogy, I guess, is the obvious one which is the case of Paul Bernardo and his wife. When I landed in Toronto, I went to the airport book store and saw, cheek to jowl, two books. One was a flame red paperback entitled *Fatal Marriage* with a picture of Bernardo and his wife, and the other was a large display of midnight blue paperbacks entitled *Fallen Hero* in leading silver letters, with a picture of O.J. Simpson and his wife.

The second point of entry, perhaps, is a statistic which was tossed to me by a Canadian graduate student at Columbia, as I was leaving for this trip. She cited something which I guess is true, that is, that 29% (12% of all federal admissions and 17% of provincial admission) of the Canadian prison population are First Canadians indigenous people. She also mentioned that tensions exist here between the police and the black population as well as with the asians and certain other ethnic immigrants groups.

Let me say that I think one function of bread and circus wherever it occurs and under whatever circumstances, whether propelled by issues of class, race or gender, is to direct attention away from the insidiously mundane, the intractable social horrors of the everyday. It substitutes myths for empiricism and passion for politics, and the role of theatre and spectacles as driving forces in the United States criminal policy is perhaps exemplified by the recent reinstatement of the chain gang in certain states in the south of the United States. It has come back as a result of pressures from the public excited by false, and indeed, fictional images of luxurious prisons where detainees sit around watching cable television, and of indolent prisoners lying about popping bonbons into their mouths. So, when the governor of Alabama, in the spring of 1995, ordered prisoners' vegetable gardens ploughed under, because they were reported as having too much fun doing even that, and then imported rock into the state of Alabama for chain gangs to break, even in the absence of any need for crushed rocks, he catered to constituents' thirst for "hard labour" as a kind of pointless, non productive display rather than with regard to any data about effective punishment, deterrents or rehabilitation of prisoners. While much of the attendant publicity has been focused on some general desire to teach prisoners discipline or expose them to "real work", it is clear that today's chain gangs are engaged in make work that has little relation to the lessons of any labour market and it cannot even be said, as it was true of the all-black chain gangs of 50 years ago, that the State is exploiting cheap labour. As far as anyone can figure, the State presently has no need of anything to which these prisoners are put. They serve principally as public shaming ceremonies which, it seems to me, increasingly characterize too much of our criminal policy. The degree to which staged humiliation, therefore, has become an unspoken goal of prison policy, suggests that we, as a society, must deal more forthrightly with whether there are limits we want to place on this and other forms of psychological control and with whether public catharsis is adequately related to the goals of punishment and deterrence.

A friend of mine who is Australian observed recently that she thought that some Americans would rather die at the hands of a white person than be mugged by a black person. She said this in a particular context : that is, in the wake of the terrorist bombing of the Oklahoma City Federal Building — a disaster that claimed at least 167 lives — my friend who is white, but again not American, was referring to the scrambling media coverage following the arrest of white suspect Timothy McVey. She had been in the United States only a few weeks during which she was consistently struck by the contrasting rate she heard white and black crime discussed. Blacks who commit crimes are

not talked about as though they were citizens or even human, she said, and "animal" is such a shockingly common word. She said that the humanity of whites never seems so precarious, no matter how heinous the crime. It would be hard, she observed, to imagine a black kid who shoplifted so much as a piece of bubble gum being called "All American" as the FBI described Timothy McVey, the accused in the Oklahoma City case.

At the time we spoke, it was alas a moment of unrelievedly tormented media hangst about the general racial divide in the public at large about O.J. Simpson's innocence : "[...] how ever could black people give such credence to all this trumped up conspiracy stuff of police brutality". I heard one jury expert opine that blacks are just relatively less educated and, therefore, possibly more gullible.

In the meanwhile, in the same newspaper, but with significantly less coverage, it had been another interesting week on the thin blue line. Fifteen more police officers were indicted in the Bronx for corruption and racketeering. In Jersey City, a man died from a beating while in police custody. Hundreds of New York police officers went on a drunken rampage during a conference in Washington, D.C., firing automatic weapons in the air, setting off fire alarms, running naked through hotel lobbies, spraying fire extinguishers at other guests and vandalizing cars. It was also a week in which Earl Graves, who is senior vice-president for advertising and marketing at Black Enterprise Magazine, was casually stopped and frisked from top to bottom on his way to work. Mr. Graves asked the police officers what kind of man they were looking for and was told "a black man with short hair". Well, that narrows it down to about six million people, Mr. Graves replied.

Now, please don't get me wrong, I am not suggesting that blanket condemnation or cynicism about police is an appropriate response to these realities. In the Simpson case, for example, a police conspiracy would have had to have been a pretty intricate matter involving an unlikely number of people, although again, in the wake of Mark Fuhrman's testimony, the question of what is likely or not is probably enlarged to new limits. But, be that as it may, one should not have to be black to be worried that serious abuses of state sponsored force occur with far too much frequency not to have eroded some measure of institutional legitimacy. One should not have to be black to be worried about having created a virtual caste system in which civil society is divided up into racially and ethnically presumptive, so called "suspect profiles" — black man with short hair — on one hand and those all exceptional "All American" types on the other. Just what do we, as a society, lose if the captains of law enforcement see McVey as "All American" but not Earl Graves.

I think the blindness of too many Americans to the long, long history of abuses in black communities, — not just videotaped abuses such as those that fuelled the L.A. riots, — this blindness has resulted in a remarkably undemocratic tolerance for police violence and corruption, in practice if not in principle. But scandalous practices don't stay confined to racial or ideological tiers for ever. The erosion of public trust in police and other institutions of law enforcement has repercussions at every level of American society and when fear of the black bogeyman makes Robocop a hero, then we can hardly be surprised when those same high-tech cowboy tactics, gun a-blazing, wires a-tapping, precipitate disasters in which members, not just of black communities, but also of white survivalist communities like Waco, Texas, perish. In fact, I think the only sentiment I

share with those in the Militia movement, perhaps, is the belief that the tragedy in Waco was preventable and somewhat more within the government's control than we would like to think.

I think that you can pick up a newspaper on almost any day of the week and read between the lines for this kind of unselfconscious erasure of fiduciary role in civic responsibility. Not long ago, there was a series of stories in the New York Times chronicling the shooting of a black undercover officer, in the back, by a white undercover officer. The police chief of New York called the mistake "tragic but understandable" and promised to "consider" instituting training to teach officers to be sensitive to the "possibility" that a person who "appears to be a suspect" might actually be an undercover officer. So, in this particular description — even the upstanding hard-working model police officer kind, — were defined as those who are "apparently" and categorically suspect. It is "understandable" to shoot them, in the back, several times, when there is only the slimmest possibility that they may "actually" be any one other than a suspect. The police department just might "consider" training its officers about that presumption of innocence every one is always telling black people to have such faith in.

Similarly, the coverage following the arrest of Timothy McVey was amazing for the serious gymnastic back flips negotiated as commentators brought to screeching halt discussions of "these Middle Easterners", because it was certainly assumed at first that it was a Middle Eastern motivated attack. Suddenly they did these mid-air turns, back flips into flowery discussions of how careful we must be not to pre-judge individuals nor indict all militias. And I think one saw a reawakening of that kind of back flipping vocabulary as Mark Fuhrman's perjury came to the fore and suddenly people were talking about being careful not to generalize because of one rogue cop and it was really, I believe, rationalized in a way that while certainly one does not want to do that in the context of the trial, the public debate I think really does need to broaden to Mark Fuhrman as being, again, not typical but symptomatic of a larger problem. It is repeated too often no to.

In the United States, and again I think that the peculiar level of violence we have is aggravated by absolutely no gun control — you now have, in Houston, for example, laws which say that it is just fine to have concealed weapons. They even have social rituals associated with it : restaurants where they make you check your weapons at the door, or those restaurants that will let you come in and dine with utter concealed-weapon comfort. There is a way in which we have progressed in some parts of the country, to not just a chicken in every pot and a car in every garage but a gun in every pocket and a grenade launcher in every backyard. So violence, it seems to me, is just, in any form, a kind of particularly resistant virus that carries its structure of ancient trauma and its impenetrable core infecting this world over and over again. And, in doing so, it seems to have an odd habit of disguising itself sometimes as its conceptual opposite, certainly the grenade launcher in the backyard phenomenon has been justified in the country as either crime control or peace keeping, for example. Furthermore, it often disguises itself as fun or as sport. It is quite remarkable how gosh darn entertaining the exercise of those unauthorized as well as state forces seems to have become : Terminator movies, television shows, Cops, Rescue 911 are about the most visible examples of this trend, as well as phenomena like the cheering crowds that have shown up at some executions. There is an unfortunate degree of emotional catharsis vented in the call for the death penalty these days.

Witnessing executions is the kind of civic responsibility people can feel good about and television stations are actually suing for the constitutional right to broadcast it all, live.

There was a story, some years ago, about a penitentiary in Texas where State prison officials asked inmates to volunteer to help train their tracking dogs. The inmates would be dressed up in padded clothing, given a head start and then the hungry hounds would be loosed with the prison officials riding on horseback after them. It became quite a sport, the chasing of what they called "the dog boys" and it eventually embarrassed, though not scarcely enough, quite a number of politicians who had joined in the frolic to the degree that it had become such a jolly pastime, sort of like fox hunting, that it came to the public light.

The degree to which official exercises of power become major league sports events give me a lot of pause these days as I cautiously turn on the TV, searching for the weather report while trying to avoid the overtaking swamp of O.J. Simpson mania.

Part of the reason we sequester a jury is not to influence the outcome by noisy string-them up gladiatorial rhetoric and rumours running amok. I gather that you Canadians, do a much better job of not just sequestering jurors but of sequestering that evidence which is not admissible, which is certainly not what has happened in the O.J. Simpson case. The media had access to inadmissible evidence, and while the jury did not get it, it was replayed over and over again on TV, which certainly is part of the reason why there is such an enormous dichotomy between public perception and juries. But still troubling, even to the unsequestered of us, might be the extent to which, again, this public hearing was used to divert political attention away from some very great divisions.

One of the most common things one hears is that the Simpson's trial was supposed to undo the "misperceptions" created by the "Rodney King thing". I have heard more than one commentator on morning news shows say that. This seemingly pervasive pairing of the Simpson and King trials, as though each balanced the other, astonishes me for a number of reasons. It reduces black anxieties about the justice system to superficial and singular television encounters, as though "the Rodney King thing" may have created a bad "impression" but the system is apologizing by making up for it with O.J. Simpson's sixteen lawyers. It trivializes, or ignores, the day to day experiences of blacks who are treated as those suspects profiles, and it dangerously misreads the discontent of a significant population that is not merely disaffected, but enraged, whose fury is barely captured in the staggering rate of black criminalization and imprisonment — I think the statistics just in the last two weeks went up from one in four black young men being involved with the criminal system to one in three black men somewhere in the United States either in jail or on probation — and the cheap thrill of media reassurances that blacks can always get a fair trial in America is dangerously obscuring against such a volatile backdrop.

If we are truly interested in why certain populations are disaffected with the justice system, perhaps we should be donating even one quarter of the resources spent in the Simpson trial to cover the cost of studying the level of police corruption, drug dealing, racketeering, assault or even attempted murder revealed in reports involving political as well as police corruption throughout the country or even on a global level.

I think the ingredients of the Simpson coverage are as follows : This singular and possibly most bizarre trial of this century was mythologized into the mundane, the typical trial of a black man. The simultaneous failure to cover what else is going on in the dark tombs of ordinary courtrooms, with anything like the same spotlight, allows that mythologizing to trump the empirical in very dangerous ways. And when the empirical becomes so thoroughly disconnected from political or policy discussion, it is a sure formula for social tensions.

If the O.J. Simpson's trial played out as the typical trial of a black man, you know, mired in the indulgences of due process, time consuming and more expensive than the national budget, then it seems to me that it also got played out as the typical trial of a domestic violence case. But what if O.J. Simpson had killed, not his second wife but his first wife who is a black woman and who does not fall within the stereotypical idealized canons of beauty or eroticization. And what if in fact he had not been a movie actor or sports hero, but an ordinary man, black or white and the domestic violence had not occurred, again, within the hot cauldron of miscegenation anxiety gone Hollywood.

A friend of mine said *that she couldn't help wondering how much of this trial would be seen if Nicole Brown Simpson had been black*. When she said this, we both shook our heads in unison, caught short by the tragically ironic contrast of that image and, in retrospect, I would like to think that we were being too cynical, too globally convinced that a black woman's death would not have been treated with the same round the clock obsessive voyeurism that now grips the nation. But, honestly, if O.J. Simpson, superstar that he be, were on trial for murdering that hypothetical black woman, I just cannot imagine the network yanking General Hospital off the air. I can't imagine Peter Jennings solemnly summarizing the day's testimony as though it were the War of the Worlds. What is more, I am convinced that the hyper-visible, pornographic, media desecration of Nicole Brown Simpson's memory as the blond bombshell in spandex gym-wear as detailed by her glitzy friend Fay Resnick's tawdry biography, is conceptually if paradoxically linked to the invisibility of black and poor white women who die at the hands of their spouses.

My friend made her observations against the backdrop of a news item about Mike Tyson's, the boxer, imminent release from jail and I guess we were thinking about all the grief the raped Desiree Washington and the battered Robbin Gibbons had to go through before anyone took Tyson's violence seriously, even though they had something of the media Hollywood spotlight. We were thinking about the group of ministers who prayed that Myke Tyson would not be given too much jail time because there were so few "role models" black kids had to turn to. We were remembering Donald Trump having taken out an eighty thousand dollar ad in the New York Times calling for the execution of the Central Park jogger defendant, the young black man who was tried for the rape and beating of a white woman in Central Park, and Donald Trump took this ad out even before he was convicted and then, about a year and a half later, this same Donald Trump appealed to the state of Indiana not to give Mike Tyson any jail time after he was convicted, and in consideration of this, Trump offered to set up a rape crisis and counselling centre with the proceeds of Tyson's next fight. We were remembering the public sense of the pricelessness, in some way, of the Central Park jogger's life which was too good for those who had violated her and were thinking of how perplexed and betrayed we felt with Trump's suggestion that a black woman's rape was so relatively insignificant that it could be paid for just by donating some beneficently big bucks to the crisis centre of your

choice. What travesty Trump's equation seemed to shout. Some evil, inefficient court, locking away a perfectly good generator of capital like Tyson and in these recessionary times yet.

But Trump's gesture was not beneficence, it was an attempted purchase. He was not proposing giving money to the state of Indiana, although that was the word he used and this is how it was widely understood. He wanted to purchase Tyson's release and he wanted to let out a rapist so he could make some very big money and if more women are raped, then he has got a very good counselling program he is willing to build to make it all even out on the balance sheet. Rather than punish the rapist, let us just pay for the cost of his breach, so to speak, the classic formulation of what, in contract law, is called an efficient breach.

What all of this is not taking into account of course is the status of the non-parties to such a contract, society, Desiree Washington, the victim of Mike Tyson, all women ultimately, even the so-called high-priced ones like Nicole Brown Simpson. Part of the reason Desiree Washington got raped to begin with was that too many people did not see Tyson beating Robbin Gibbons, and this was nothing that a little alimony could not assuage. And why had O.J. Simpson's long term domestic abuse of his wife attracted so little media attention, until after her death, was it because there were so many movie deals and Hertz's franchises on the line, and hey, battering ordinarily can be bad for business. Since the trial, it seems to have driven up Ted Turner's stocks and I mean that quite literally, it was reported on the Business News page of the New York Times.

I am not one, therefore, who believes that the Simpson trial is performing some kind of public service by focusing attention on the problems of either wife beating or race. If that were so, we would be seeing more about the actual effects of domestic violence on the lives of real people, black and white, men and women, children in particular as well as adults. We would be investigating the links between violence and women driven into poverty. If we were truly concerned about domestic violence, we would be looking into the cost of that violence as related to the cost of welfare, and again, it is not that violence occurs among poor people, what I mean is that violence drives people, women in particular, into poverty. We would not be reforming welfare by seeking to stigmatize women who try to make their way in the world without a man. We would be talking about how to make women's salaries equal to those of men and, maybe, we would even be talking about the role of sports in socializing otherwise good men into the assumptions that smacking, whacking and scoring are the essence of masculinity.

Rather than performing anything like a social good, I think that the Simpson trial is big business. Everything near it turned to gold. There is not a lawyer in my acquaintance who has not achieved his fifteen minutes of fame by appearing on Good Morning America with what the Network desperately hopes will be a new angle. Six figures book contracts are raining down on anyone who has seen a white Bronco parked anywhere in Southern California, ever. Ex-spouses of alternate jurors are hiring publicists if they know what is good for them. A lot of people have already observed that this trial is really a football game. At least as many have noted its resemblance to a soap opera and, personally, I am in the camp that, as I said, thinks it is a circus in which puritan repression and tabloid prurience have jointly taken hold of the collective sensibilities. All the breathy eagerness

to peer into miscegenation's legendary bedroom antics — oh for a peak of the fragile blond features so bruised, so battered, but so so fascinating, manipulated, sometimes even computer-generated photographic slices of every inch of her body, in this pose or that, the whole body, the clothed body, the healed body, the resurrected pre-traumatic body. The press with binoculars and helicopters greedily straining and pressing forward to get a better look at the courtroom, the crime scene, the sheet covered shape of the beautiful dead. The body becomes sensual in the aftermath of great violence. Such is the media sensation. A striptease in which, as Roland Bathes once hypothesised, the clothed middle class female is the real focus. A striptease in which the object of unclenching, of dissection, is really the eroticization of the fully covered female body in which "dressed to kill" becomes the ultimate titillation.

What I finally find, ultimately, most troubling about the Simpson trial is the way in which whether as sports, soap or circus it operates as a kind of civic pageant. This theatre is our legal system. This battle of the Titans contains important lessons, we are told every twenty minutes by newscasters trying hard to earn those hearty wages. They scratch and dig for meaning like desperate chickens.

Perhaps it would be better to think about whether it is all of us who are on trial in the Simpson case. Perhaps it would indeed reveal important lessons about our much contested family values if we see the boundaries of this farce lapping out into the world, like a piece of theatre with no stage. I remember reading once about a Brazilian playwright who had sent actors out into the marketplace and who had them stage some arguments amongst themselves. The argument would spill over into the audience as passersby and merchants got caught up in the heat of the thing and, as more and more people got their dander up, the actors would fade away as the so-called non-actors continued the so-called play amongst themselves. The drama would finish not in the marketplace but as it rippled home with the participants, to dinner tables and to dreams.

It seems to me that the unbound acuteness of the Simpson drama unfolds in just such ways, in just such concentric tremors, in circles of repercussive sensations from the courtroom. What we may want to learn, to hold ourselves more cognizant of, particularly in our most public trials is their function as passion plays which do not unfold merely as chronologies that begin with the bang of a gavel and the selection of jurors but which have been rehearsed a million times before the crime even occurs, whose script will determine the perceptions of everyone who comes into the courtroom, whose outcome has already been written even as it is being invented, and which will go on being re-invented — business as usual — until the next awful but ever so fascinating time.

