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THE BIG BLACK MAN SYNDROME: THE RODNEY KING TRIAL AND THE USE OF RACIAL STEREOTYPES IN THE COURTROOM

Lawrence Vogelmann*

I. Introduction

Nearly everyone had a reaction to the verdict in the “Rodney King Case”¹ — some ignored the trial and concentrated on the “riots” in Los Angeles; others, with broad strokes, dismissed the population of Ventura County, California, as obviously stupid, blind and racist; others maintained it was just another example of the criminal justice system’s failure to deal with the victimization of people of color. Then there were the trial lawyers and trial advocacy pundits. The ultimate “monday-morning quarterbacks,” we dissected the case to try to figure out where the “mistakes” were made.

In this Essay, I will first make some observations about trial advocacy. Then, I will address the Rodney King case, specifically discussing what I have coined the “Big Black Man Syndrome.” Next, I will discuss some ethical and practical considerations in the use of ethnic or racial stereotypes in the courtroom. This Essay will then turn to my one sentence, disturbing analysis of what really happened in that Simi Valley courtroom. I conclude with some thoughts about what my analysis means to the students, teachers and practitioners of the “art of advocacy.”

II. The Art of Advocacy

The easiest, and most serious trap that any teacher of trial advocacy can fall into is forgetting that trial advocacy is an art, and treating it as a craft. I stand in front of a room full of students or lawyers

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1. I use the phrase “Rodney King Case” deliberately. Some criticized this terminology, pointing out that Mr. King was a *victim* and the case should more accurately be called the Los Angeles police officer beating case, or the like. I found this argument politically very attractive. Upon reflection, however, I believe that the case was much more about Rodney King than it was about the officers. That is the thesis behind this Essay.

and talk with them about the courtroom as theater. The trial lawyer is the author, choreographer, actor and dancer. Every move in the courtroom is purposeful; every word is planned.² Every witness examination or argument becomes a performance.

A trial is not a theatrical performance, however. The jury is not made up of theater critics judging the competence of the lawyer by his or her adherence to the rules and the slickness of his or her performance. The job of the advocate is to persuade, and often the most effective persuasion is the least obvious. The job of the trial attorney is to make the jury "believe." A trial attorney's job is *not* to entertain. Boring and believable is better than charismatic and far-fetched.

Of course, trial lawyers should strive for technical "smoothness" and a captivating, interesting style and presentation. Those things are part and parcel of making a lawyer's presentation believable. A lawyer who is perceived as interesting and competent will be far more convincing than one who is tentative and boring. There is far more to persuasion, however, than the performance of the lawyer. The message must be *palatable* no matter how skilled and personable the messenger. For the trial lawyer, the message must be one the jurors can live with. The late, master trial attorney, Moe Levine, in his legendary lecture on closing arguments, posited a related notion.³ It was his belief that the measure of the palatability of a verdict was whether an individual juror would be comfortable bringing that verdict back to her community. Can the juror go back to her friends and neighbors and say: "This is the case I sat on. These were the facts. This is what we voted." And having done so, will the community greet that verdict with approval?

Related to this, of course, is the notion that most jurors come from a community where most people think alike. It is the rare individual who manages to live life assimilated into a community of people with ethical, moral and political beliefs markedly different from his or her own. These people usually stand out in the community, and in the jury panel. Unfairly, they are often dubbed "psycho jurors" by trial lawyers, and are rarely found on selected petit juries.

What follows in this Essay is a discussion of the community beliefs that factored into the Rodney King case. This Essay examines ethnic

2. This notion comes as a surprise to the nontrial lawyer. Most people would analogize the courtroom more to improvisational theater than to a scripted, choreographed performance. The truly talented trial lawyer *is* a master of improvisation. The real secret of great lawyering, however, is to minimize the necessity for improvisation. "Thinking on one's feet" is a necessary tool of trial work. The consistent path to success, though, is paved with hours of preparation.

3. CLOSING ARGUMENTS (National Institute for Trial Advocacy videotape).

and racial stereotypes and how they play out in the courtroom. I call this the "Big Black Man Syndrome." My conclusion is that as the jury perceived Rodney King, the police officers, and the world they live in, the King verdict truly represented the fundamental values of the community. That is, the police officers acted toward Rodney King the way the jury wanted police officers to act.

III. The Big Black Man Syndrome

The talented trial attorney is a student of human nature, all too often concentrating on its dark side.⁴ That is, she will exploit stereotypes. For example: Colombians sell cocaine, Nigerians sell heroin, Dominicans sell crack, Jamaicans sell marijuana, Jews cheat on taxes, Italians belong to the mafia, Albanians carry guns, the Irish are all drunks and "Big Black Men" defile our women.⁵ Trial lawyers

4. In the ordinary course of my writing, I would edit out the phrase "dark side." Our societal notion that dark is bad and light is good, while arguably rooted in nonracial rationales (e.g., fear of darkness, the worship of the sun, etc.), reinforces racist stereotypes. I am under the firm belief that all "teachers" — educators, parents, political leaders — have an obligation to examine carefully their use of language. Words educate in more ways than the obvious. The phrase stays in this Essay, however, for two reasons: first, it points out that it was the first phrase that came to my mind (a mind that some folks believe is too concerned with notions such as the contents of this footnote); and second, it gives me the opportunity to write this footnote in the first place.

5. This "fear" of black men is not born of these times. It dates back to the days of slavery, when "young bucks" faced cruel punishment, even death, for even looking the wrong way at a white woman. Reality, however, was very different. Despite the number of young black men hanged for such conduct, there are few documented cases of attacks upon white women by black slaves. Mary Church Terrel, *Lynching from a Negro's Point of View*, 178 NORTH AM. REV. 853-68 (1904), excerpted in GERDA LERNER, BLACK WOMEN IN WHITE AMERICA 205-11 (1972); c.f., LILLIAN SMITH, KILLERS OF THE DREAM 121-22 (1961). Legion, however, are the episodes of white men, masters and servants alike, physically or psychologically forcing themselves upon young slave women. LERNER, *supra*, at 172-73.

Fear is rarely a product of fact, however. The unfortunate truth is that historically in our society, black men have been portrayed as a people to be feared; savages, unable to be tamed. Frantz Fanon discussed this phenomenon 25 years ago when he described the black man as a "phobogenic object, a stimulus to anxiety." FRANTZ FANON, BLACK SKIN, WHITE MASKS, 151 (1967).

Whenever this issue arises, I cannot help recalling an incident some ten years ago. I was coming home from a date with a woman that lived on Avenue B in the East Village. It was sometime after 2:00 a.m., and the streets were empty. I began walking quickly up toward 14th Street in the hopes of finding a taxicab. Suddenly, I heard the sound of footsteps behind me. I turned and saw, about 100 feet away, a young African-American man walking in my direction.

My "Big Black Man" was in his early twenties, stood about five feet ten inches tall, was of a medium build and was dressed in jeans, sport shirt and sneakers. I immediately "knew" I was about to be mugged. I quickened my pace, but the footsteps kept gaining

often evoke these stereotypes to obtain an emotional response from the jurors.

Rodney King was portrayed as the prototypical "Big Black Man." He was portrayed as larger than life, with superhuman strength. It was in this context that jurors, while watching the video of King being brutally beaten, described him as being "in control." He had to be stopped. After all, as the map introduced by the defense so clearly indicated, his "destination" was Simi Valley.⁶

IV. Ethical Considerations

Having recognized the existence of the Big Black Man Syndrome as a factor in the King case, two issues present themselves. First, what are the ethical and moral implications of allowing defense counsel to so cleverly play upon the racial fears they evidently recognized? The answer is not a simple one. It pits two fundamental values of our society against one another: the need to have our system of justice do its work free from the shackles of racial, ethnic, or religious prejudice, versus the rights of those accused of crimes to zealously and creatively defend themselves. At the outset, it must be clear that I am not suggesting that under any circumstances a trial lawyer should interject his or her own moral or social-political beliefs into a case at the expense of the client. An attorney, particularly a criminal defense attorney, is under an ethical obligation to zealously represent her client to the best of his or her abilities, and to do so assertively, creatively and without hesitation. The only restrictions that may be placed on an advocate is that an advocate must always act legally and ethically.⁷

It goes without saying that an advocate may not allow personal notions of political correctness or morality to interfere with his or her

on me. I nonchalantly crossed the street, discreetly looking back over my shoulder. My fears were being realized, he followed me across the street.

My mind was racing. If I ran he would no doubt catch me within a block. Should I fight back? Should I calmly fork over my precious few dollars and negotiate for my wallet? What if he was a nut job and got kicks out of hurting his victims, no matter how compliant?

I heard and felt him immediately behind me. I braced for the encounter and turned toward him. "Scary neighborhood, isn't it," he stated, "mind if I walk with you?" Thankfully the night's darkness hid my flush of embarrassment as I stammered "sure," and we silently walked together to the safety of 14th Street.

6. The defense, as a demonstrative aid, blew up a large highway map depicting the route Rodney King was travelling when he was stopped, and the precise location of his encounter with the police. That diagram was a presence in that courtroom throughout the trial. Prominently displayed on the map, seemingly irrelevant to the uninitiated, was where Rodney King's route would have taken him — the town of Simi Valley.

7. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101 (1981).

duty to zealously represent her client. A lawyer may not substitute his or her own views of morality for those of the client's. This is true whether the lawyer is the drafting a will, rendering tax advice or conducting the defense in a criminal trial.⁸ The most significant moral decision made by a lawyer is his or her choice of clients and choice of cases.⁹

The real issue is whether the use of racist arguments by defense counsel in a criminal trial is *unethical*. A further issue is, if such conduct can be unethical, whether the defense attorneys in the Rodney King case crossed those ethical lines. My short-form answers to those questions are: yes, I believe that the blatant exploitation of racism, homophobia or ethnic prejudices by a defense lawyer is unethical, and no, the defense attorneys in the Rodney King case did not step over this ethical line. However, I would not have done what they did. Instead I would have exercised my moral judgment by not taking the police officers' case.

In analyzing the ethical propriety of criminal defense counsel's pandering to the prejudices of juries, two basic ethical precepts come into play. As mentioned earlier, every lawyer is bound to zealously represent her client within the bounds of the law and the disciplinary rules.¹⁰ On the other hand, a lawyer is prohibited from making arguments not based on the evidence or not legally relevant to the matters at issue¹¹ and from engaging in "undignified . . . conduct which is degrading to a tribunal."¹² Arguments catering to racism or other prejudices are not legally relevant¹³ and surely assault the dignity of our courts and are degrading toward our system of justice.

The best solution to resolve the tension between the two rules, however, would be to follow Professor Pepper's advice and make conduct that society does not want lawyers to engage in "explicitly unlaw-

8. For an excellent discussion of the issue of the "amoral lawyer," see Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, and the subsequent articles by David Luban and Andrew L. Kaufman commenting on Professor Pepper's thesis. See also Monroe H. Freedman, *Personal Responsibility In a Professional System*, 27 CATH. U. L. REV. 191 (1978); Charles Fried, *The Lawyer As Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

9. See Pepper, *supra* note 8, at 618 n.20; David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637-38 (1986).

10. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101 (1981).

11. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106 (c)(1) (1981).

12. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106 (c)(7) (1981).

13. Not every "racial" argument is an irrelevant "racist" argument. For instance, cross-racial identification is more suspect than an identification made by a witness of the same race as the person being identified. "They all look alike," therefore, might be a relevant, ethically permissible argument under certain circumstances.

ful."¹⁴ Courts have already clearly taken that step regarding the use of improper arguments by prosecutors.¹⁵ Obviously prosecutors are bound by a stricter ethical standard than defense lawyers, they must "do justice."¹⁶ It is time for us, however, whether by disciplinary rule, statute or judicial decision, to explicitly prohibit the use of racist, homophobic or otherwise prejudicial arguments in our tribunals.¹⁷

Such proscriptions are not unusual. Many jurisdictions have enacted "rape shield" laws, prohibiting the questioning of alleged victims of sexual assault about their prior sexual conduct unless particularly relevant to the case at bar.¹⁸ Courts now prohibit trial attorneys from exercising peremptory challenges of a juror based upon their race.¹⁹ The same legal and public policy reasons come into play in a decision to rid our courts of racist and otherwise morally repugnant, irrelevant arguments.

V. Practical Considerations

The second issue that arises is more specific to the trial of the Rodney King case itself. The prosecutors in the King case failed miserably either in their analysis, or in their execution of a strategy in presenting to the jury the "persona" of Rodney King. The prosecutors apparently believed the trial was only about the police officer defendants and their conduct. It was not. It was in great part about Rodney King and the Big Black Man Syndrome; the prosecutors failed to confront that. Their decision not to put King on the stand was a fatal one.

The defense successfully took Rodney King, the person, out of the case. The issue was framed not as to the propriety of the police conduct toward Rodney King, but as to the propriety of police conduct toward "them" — the Big Black Men. How are Los Angeles police

14. Pepper, *supra* note 8, at 618.

15. For a detailed annotation of some of the hundreds of cases dealing with this issue, see Debra T. Landis, Annotation, *Prosecutor's Appeal In Criminal Case To Racial, National, Or Religious Prejudice As Ground For Mistrial, New Trial, Reversal, or Vacation Of Sentence — Modern Cases*, 70 A.L.R.4th 664 (1989). See also *Developments in the Law: Race and the Criminal Process: VI. Racial Bias and Prosecutorial Conduct at Trial*, 101 HARV. L. REV. 1588 (1988).

16. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1981); see also *Berger v. United States*, 295 U.S. 78 (1935).

17. One commentator has already suggested, in a limited fashion, such a rule. Ellen Yaroshesky, *Balancing Victim's Rights and Vigorous Advocacy for the Defendant*, 1989 ANNUAL SURVEY OF AMERICAN LAW 135 (1989).

18. See, e.g., FED. R. EVID. 412; N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1992).

19. See, e.g., *Georgia v. McCollum*, 112 S. Ct. 2348 (1992); *Batson v. Kentucky*, 476 U.S. 79 (1986).

trained to deal with "them?" How do we as a community want the police to deal with "them?" How can we, in the safety of our living room or jury room, second guess our police when they are dealing with the likes of "them?" These were the questions that became the focal point of the trial.

The defense, overtly and subliminally, portrayed Rodney King as a crazed savage on his way to do evil in the bedrooms of Simi Valley. This image had to be confronted and dissipated, and there was only one way to do that — with Rodney King. The jury should have been given the opportunity to see and hear from the real Rodney King, blemishes and all. Only then could they weigh King against the image presented by the defense. The prosecution deprived the jury of that opportunity and now live with the consequences.²⁰

VI. Conclusion

And now my promised one-sentence analysis, an ugly reality: The majority of white Americans, deep in their psyches, want the police to act just the way the police did in the Rodney King videotape.

We have been living with the myth of the "Big Black Man" for too long. For too long the police have perpetuated the fraud that they are the "thin blue line" protecting "us" from "them". Fear, however, has transformed these fictions into reality. The defense attorneys in the King case asked the jury how they wanted the police to attack when faced with the "Big Black Man." By its verdict, the jury spoke.

So long as racism continues to pervade every pore of society's fabric, the neutralization of the "Big Black Men" will be tolerated and encouraged. The courtroom is but a tiny window into the realities of everyday living. What happened in the streets of our cities was not a result of the verdict in the King case. The verdict in the King case was a product of what happens in the streets of our cities, the quiet of our bedrooms and the deepest reaches of our souls.

What does all this mean to the artful advocate? Do not avoid your role as persuader. Do not choose to believe that people are better than they are, because you fear confrontation. Do not convince yourself that *this* jury will not be driven by racial, ethnic and religious stereotypes. Do not convince yourself that *this* jury will not be blinded by an aversion to drugs. Do not convince yourself that *this* jury will not revere doctors and despise politicians.

Confront the values of your community — good and bad. Expose

20. As the Essay is being written, the jury is deliberating in the federal civil rights prosecution of the police officer's alleged to have beaten Rodney King. Among many other differences between the two prosecutions, King testified at the federal trial.

those values to the light of day and the scrutiny of study. Force the juries in our courtrooms to meet the Rodney Kings amongst them. Had the Simi Valley jury met the real Rodney King they may not have feared him. Without that fear coloring every frame, that videotape might have taken on a different meaning. What I propose here is not easy. Community values are the product of years of indoctrination. The notion that a lawyer can transform those values in a courtroom, bound by the rules of evidence and procedure, is a foolish one. To ignore community values in the trial of a lawsuit, however, is even more foolish. The trial attorney's role is to analyze, educate, and if necessary, agitate. That is the art of advocacy.