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Theodore A. McKee

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Cover Page Footnote

Judge, U.S. Court of Appeals for the Third Circuit. This Essay represents a lightly edited version of the remarks of Judge McKee at this Symposium.

PERSONAL REFLECTIONS ON THE SUBTLETIES OF BIAS

*Hon. Theodore A. McKee**

It is really a joy to be here. It's not often I have a chance to engage in thoughtful discussion about topics that are as interesting and challenging as the topic we're addressing today, and I almost never get to do it in front of an audience as receptive to my perception of the legal landscape as I assume this audience is.

I want to start by making an observation and I will then share some experiences which I think point out the problem of race. I will then conclude with a point which I hope will tie together the first experience I am going to share with you.

I start with a proposition that is neither novel nor unexpected, I don't think, for anyone in this room. That is that the seed of racism has been planted in this society and continues to grow to such an extent that its tentacles reach each and every one of us. None of us inside this arena, or anyplace else in this society, can possibly have lived in this society for any length of time and say, accurately, that we are free from the poison of racism, even though we might believe that to be true at the time we say it.

I want to first mention a standing committee that I was on—it was a task force actually—that was formed by the person who was Chief Judge of our circuit at the time I was appointed by President Clinton. She formed a task force to look into bias in the court system within the Third Circuit.[1] At the time, many of the circuits were doing this. Our mission was to look at not just the bias within the court system per se, but also examine whether bias affected the employees, the defendants, and even the jurors.

It was a very intensive undertaking. We tried to reach jurors, sent them some questionnaires to get an idea of their views of fairness, and we actually tried to reach some defendants. That was a little bit difficult and a little bit dicey, but we tried to get from them their feelings of bias and fairness, and we were able to do that through our questionnaires. I was asked to co-chair the part of the task force looking into racial bias.

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1. 1 Third Circuit Task Force on Equal Treatment in the Courts, Final Report Presented to the Judicial Council (1997).

At the conclusion of that, we came out with a set of recommendations.[2] One of our recommendations was that a standing committee be formed within the Circuit, as part of the Judicial Council, to implement some of the recommendations we had reached.[3]

A debate ensued about whether or not the implementation of our recommendations should be by a special standing committee, or whether or not the ongoing committees of the Judicial Council of the circuit could be sufficient to implement the recommendations of the task force.

During one of the discussions that followed, I was at a meeting of the Judicial Council. I was then too junior to be on the Judicial Council as I am now. I was asked why it was so important that we have some method of implementing these recommendations. And they were not radical recommendations at all. My response was that everyone needs to be sensitized to the problems of bias and racism that the task force uncovered and that touches everybody, including those of us in this room. None of us are free from it as I have already noted, and we need to be sensitized to it.

A response came from a judge who had been on the court for quite a while, and who was a very respected member of the court. He is a very fair judge and I have always respected him a great deal. His response to me was, "I do not need to be sensitized."

I told my wife about that statement and she made a very astute observation. She said, "You know, everyone thinks that somebody else needs to be sensitized. Nobody thinks that they need to be sensitized." I thought about that, and it was very true. I'll come back to that with my last point.

The second thing I want to share with you is an incident that occurred during jury selection. This was a black-on-white rape that occurred at a large university outside of Philadelphia. It was not a rape of a student by another student. The person who was accused of the rape was not a student at all. He was black, as I've alluded to, and the victim was white. It was not a date rape or anything of that sort, nor an acquaintance rape. At least as put forward by the prosecution, it was a stranger-on-stranger rape.

The defense was consent, and I allowed individual voir dire for the prospective jurors. I would not usually do that except in a homicide, but the case had so many potential problems and was so emotionally charged, I thought it a good idea to do it. Before we started, the defense attorney asked me if he could ask each of the prospective

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2. 1 *id.* at 30.

3. *See* 1 *id.* ("The Judicial Council should adopt a mechanism to conduct a periodic review of the equality of treatment throughout the Circuit regardless of gender, race or ethnicity, including the status of implementation or the recommendations of the report.").

jurors whether or not they believed that a white woman could ever consent to having sex with a black man. The assistant district attorney vigorously objected and insisted, "Judge, you can't ask that question."

This assistant district attorney was not someone who was particularly dogmatic. I always regarded him as fair and even handed. He was not the breed of prosecutor who believes his job is to win. He had tried a number of cases in front of me and I had a great deal of respect for him. But he nearly went ballistic at the suggestion that I ask this question of potential jurors.

I'll refer to him as Joe. I said, "Joe, why do you have a problem with that question?" He said, "Judge, this is not a race case. The case is not about race. It is a rape case, and all defense counsel is trying to do is put race into this case and appeal to the bias and the emotions of the jury."

I said, "Joe, you've got a white woman accusing a black man of raping her. Help me understand how that's not racial." I noted his objection for the record, he gracefully conceded, and sat down.

So we went through voir dire, and it went pretty much without event. We got to this one woman, who I'll refer to as "Mrs. Crenshaw." I have no idea what her name was. This morning as I was thinking about it, for some reason "Crenshaw" seemed to be more appropriate than "Jane Doe," so I'll call her "Mrs. Crenshaw." However, I am sure that was not her name.

"Mrs. Crenshaw" comes through the door. She's about maybe fifty-five to sixty, very nattily attired, hair up in a very smart and conservative and meticulously done hairdo. She sits down and mentions to me that she's from the greater northeast. That is a predominately white neighborhood that tends to be more conservative than the rest of the city. It is fairly divided or stratified, in that there are pockets of Democrats, but it's far more heavily Republican than the rest of Philadelphia.

We go through voir dire. We get through the regular questions. Without leading up to this, I simply said to her, "As you see, the defendant is black. During the course of the trial, you'll see the complaining witness who is white. The defendant is maintaining that the sexual intercourse that he will concede took place was the result of consent and not force or rape. Do you believe that a white woman could ever voluntarily consent to having sex with a black man?" She looked at me as if I were crazy and said, "No."

Of course, the defense attorney immediately jumped up and said, "Your Honor, I move to strike for cause." The assistant district attorney, almost as quickly, jumped up and said, "Judge, she didn't understand the question." I looked at him and I said, "No, Joe, I think she understood the question." However, to err on the side of caution, I told the assistant district attorney "But I will repeat the question."

I repeated the question exactly the same as I've just recounted it to you, and she looked at me and again said, "No."

I said, "Now just so that there's no doubt about this, can you tell me what you think I am asking you, and then can you give me the answer to the question that you think I'm asking of you?"

She looked at me and said, "Judge, you're asking me whether or not one of our girls would ever consent to having sex with a black man, and of course I said no." I said, "Well, Mrs. Crenshaw, why is your answer no?" She said, "Because such a thing just couldn't happen." I looked over at the assistant district attorney and I said, "Joe, do you have any problem with a challenge for cause with this juror?"

He stood up and he said, "No, Judge."

The rest of the day-and-a-half of that voir dire Joe said very little and never again objected to questions intended to probe a potential juror's bias even if the question appeared somewhat ludicrous at first. I sincerely think he was dumbfounded by Mrs. Crenshaw's interaction with me. I think the reason he was so dumbfounded was because it came as a shock to him that this woman could so honestly, innocently, and fervently believe that there could not be consensual sex between a white woman and a black man.

The only thing that astonished me was that she didn't bat an eye during my conversation with her. I mean I'm not someone who can pass for white and she's sitting a few feet away from me as we're having this dialogue. Yet, there was no embarrassment, no hesitation, nothing. It was as though we were having a conversation about the best way to fertilize lilies in her garden. It didn't faze her at all.

I merely said, "Well, thank you very much for your time here, Mrs. Crenshaw, but we're going to excuse you from service on this jury. If you'd be kind enough to go back to the jury room and wait there, you may or may not be asked to go to another courtroom for jury service later on today."

She said, "Thank you very much, Judge. Is there anything else I can do for you?" I wanted to say, "Yes, get your ass out of the courtroom." But I just said, "No, ma'am. Thank you very much. We appreciate your time and sacrifice in reporting for jury duty today."

Then she just kind of moseyed on back to the jury selection room. I don't know if she was ever put on a jury or not, but if she was, I shudder to think that she ended up in a courtroom where a black person was being charged with a crime, whether or not it was an interracial crime. I doubt her deliberations in such a case would have been the kind of detached consideration of the evidence on which we hope juries base their verdicts.

The next case is not nearly so overt; it is much more subtle. It's a habeas case that we got in the Third Circuit.[4] It was a felony murder

4. Werts v. Vaughn, 228 F.3d 178 (3d Cir. 2000).

case involving a shotgun robbery of a speakeasy and a killing in the course of the robbery, which made the killing a murder.

In Philadelphia we still have speakeasies. It's a term that is used—I'm not sure if they still exist anyplace else or not, my guess is that they do. But there are these places in parts of Philly where people can go to get alcohol after hours or on Sundays when the liquor stores are closed. The person who owns the home just sells the liquor out of his or her garage or basement. It's referred to as a speakeasy. The people in the neighborhood know you can go there and get wine or beer or whatever after the stores are closed and on Sundays, when stores in Pennsylvania are closed.

There were a lot of problems with this prosecution and conviction. There are too many actually for me to get into here today, unless I extend my fifteen minutes into the time of the reception.

But one of the things I wanted to share with you occurred during closing argument. One of the problems in the prosecution, and one of the things the defense attorney tried to argue, was that the prosecution's theory of the case did not make any sense. The theory of the case was that these three or four people, of which Mr. Werts, the defendant in this case, was one, were sitting around talking and they just decided to go rob a place, and they knew about this speakeasy, so they went and robbed the speakeasy.

The prosecutor's closing argument then picked up on that by saying, "[If you're wondering how that could happen,] [b]ear in mind, this is the way the people are up there."[5]

"In that remark," I'm reading now from the dissent, "the prosecutor pulled the genie of racial bias out of the bottle.... As the majority notes, during his closing argument the prosecutor sought to explain why people would be sitting around drinking and decide to commit a robbery 'out of the clear blue' [sky]."[6] I'm quoting now from the prosecutor's closing:

> [One of the witnesses, Moore,] testified that... in the evening,... he was at home drinking and they came to the house and Butch Jones came up to him and they went outside and Butch Jones was looking for a place to rob. Bear in mind, this is the way people are up there. They are sitting at home doing nothing and they decide to rob a place just out of the clear blue.[7]

Then back to the dissent, which stated as follows:

> The majority deftly parries this blatant appeal to bias by concluding that the "remark of the prosecutor appears to be a fair comment on the evidence presented at trial, which established that Werts' accomplices were at Moore's house on the day of the crime, trying

5. *Id.* at 222 (McKee, J., dissenting) (citation omitted).
6. *Id.* at 221.
7. *Id.* at 222 (second omission in original).

> to decide on a place to rob." Had the prosecutor argued: "This is the way those people are up there," I would hope that my colleagues would better be able to recognize this remark for what it was. I hope that they would concede that the latter is nothing more than a cheap, highly inappropriate attempt to exploit the fact of the defendant's race and class.[8]

Werts, as will be evident to most from the prosecutor's comment, is black and the neighborhood where Moore lives is an impoverished black neighborhood in north Philadelphia. I cannot imagine that the prosecutor would have ever made such a remark if Moore lived in an area of northern Philadelphia that is predominantly white and upper-class. Chestnut Hill is such a neighborhood, and it strains credulity to the breaking point to suggest that the prosecutor would have argued that "this is the way people up there are" had the same set of circumstances occurred in Chestnut Hill, yet that community is no less "up there" than north Philadelphia. There is a little more to that, but I am being flagged here, so let me leave it at that.

I will mention one more thing. The ironic and sad thing, when you talk about "this is the way people are up there," is that the evidence showed that two of the people in the speakeasy who were robbed, who were from the neighborhood, were discussing how one of them was going about completing stage one of his college associate's degree in computer programming, how he was going to finish up his associate's degree, then go on to stage two, and then apply to a four-year school in computer programming, because that would help him get the promotion he needed to help support his family. So that was the way people "up there" were, but that was not what the prosecutor focused on.

The last thing I want to focus on is a thought that I had, and something that really impressed me greatly when I read Nelson Mandela's autobiography.[9] Some of you may be familiar with it. It says something about just how deep, poignant, and sharp is the barb of racism.

It's an incident that occurred when he was head of the military wing of the African National Congress. He was being smuggled out of South Africa to go to a meeting in, I believe, Tanzania, and I think it was a meeting of the Pan-African Congress, although I'm not sure of that.

He finally got out of South Africa. He is taken to an airstrip where there is a small plane that is going to take him to the meeting that he has been trying to get to. He got on the plane and he recounted how relaxed he was, that having now escaped capture, which he was afraid of, in South Africa, sitting on this plane, he was on his way to the

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8. *Id.* at 222 (citation omitted).
9. Nelson Mandela, Long Walk to Freedom (1994).

conference, and he was able to sit back and relax for the first time in weeks.

As he was doing that, he looked through the curtain that separated the cockpit from the passenger cabin and he saw that the plane was to be flown by a black pilot. He talked about the fear that seized him at that moment, knowing that he was on a plane that was going to be flown by a black pilot.

He said his initial reaction was to get off the plane, and he then realized what was happening inside of him, that he had spent weeks and months trying to get out of South Africa to go to this conference. Now that he was out of South Africa, all he knew about this pilot was that he was black, and he could assume by the fact that he got the plane there and that he was a pilot, he was a professional pilot and a skilled pilot. But yet, the fact that the pilot was black was enough to make Mandela momentarily want to flee the plane and rush back to the open arms of apartheid rather than trust his life to a black pilot.[10]

I think that says something about how deep racism is ingrained in all of us. If Nelson Mandela can have that thought upon seeing a black pilot, I would submit to you that none of us is beyond the destructive and poisonous reach of racism. And it is a sad commentary on my colleague's belief that he did not need to be sensitized. It's a much more subliminal and subtle form of what "Mrs. Crenshaw" was expressing when she so kindly looked me in the face and explained why none of her young girls would ever want to have consensual sex with a black man.

I don't know how we deal with it, but hopefully through the discussion today we can begin to get at it.

10. *Id.* at 250-55.