

# STORIES TOLD AND UNTOLD: LAWYERING THEORY ANALYSES OF THE FIRST RODNEY KING ASSAULT TRIAL

TY ALPER, ANTHONY G. AMSTERDAM, TODD E. EDELMAN, RANDY  
HERTZ, RACHEL SHAPIRO JANGER, JENNIFER McALLISTER-NEVINS,  
SONYA RUDENSTINE, AND ROBIN WALKER-STERLING\*

*These analyses, arranged as a mosaic article, emerged from the collaboration of five law students, a practicing lawyer, and two clinical law teachers. In the years since our work began, the students have graduated and are practicing or teaching. We have continued to correspond, exchanging ideas and drafts from time to time, in subgroups or as an ensemble. Although the separate tiles of the mosaic are attributed to the members of the group primarily responsible for crafting them, all parts of the article reflect the work and thinking of the whole group.*

## INTRODUCTION

ANTHONY G. AMSTERDAM, RANDY HERTZ, AND  
ROBIN WALKER-STERLING

Our collaboration stems from the *Lawyering Theory Colloquium*, a long-running seminar and workshop at NYU. Faculty and students in the *Colloquium* examine legal practice with the aid of techniques and insights derived from cognitive and cultural psychology, linguistics and semiotics, narrative and dramaturgical theory.<sup>1</sup> Our particular

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\* Ty Alper is a Visiting Acting Clinical Professor of Law at Boalt Hall School of Law; Anthony G. Amsterdam is a University Professor at New York University; Todd Edelman is the Training Director for the Public Defender Service for the District of Columbia, and an Adjunct Professor of Law at Georgetown University Law Center; Randy Hertz is a Professor of Clinical Law at New York University School of Law; Rachel Shapiro Janger is a counsel in the firm of O'Melveny & Myers LLP; Jennifer McAllister-Nevins is a state strategies attorney for the Reproductive Freedom Project of the American Civil Liberties Union; Sonya Rudenstine is a Visiting Professor of Law at Florida Coastal School of Law; and Robin Walker-Sterling is a Supervising Attorney with the Children's Law Center of the District of Columbia.

<sup>1</sup> Brief descriptions of the *Colloquium* appear in Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style*, 66 N.Y.U. L. REV. 1635 (1991); Peggy C. Davis, *Law and Lawyering: Legal Studies With an Interactive Focus*, 37 N.Y.L. SCH. L. REV. 185 (1992); ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 4 - 6 (2000) [hereafter, "MINDING THE LAW"]. Works presented in the *Colloquium* or written in connection with the *Colloquium* include Christopher J. Meade, *Reading Death Sentences: The Narrative Construction of Capital Punishment*, 71 N.Y.U. L.

group undertook to see what we could learn by applying the *Colloquium*'s microanalytic techniques<sup>2</sup> to the study of prosecution and defense lawyers' performances in the trial of a single criminal case.<sup>3</sup>

The case we chose to study was the 1992 state-court trial of the four Los Angeles police officers charged with assaulting motorist Rodney King.<sup>4</sup> One reason for selecting the *Rodney King* case (as we will call it here) was that a videotape of the entire trial was available, allowing us to examine performative aspects of lawyers' trial work that are not captured in a written transcript.<sup>5</sup> Another reason was that

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REV. 732 (1996); David Reiss, *Jefferson and Madison as Icons in Judicial History: A Study of Religion Clause Jurisprudence*, 61 MD. L. REV. 94 (2002); Robert Rubinson, *Client Counseling, Mediation, and Alternative Narratives of Dispute Resolution*, 10 CLIN. L. REV. 833 (2004).

<sup>2</sup> Other studies using these and similar methodologies include NEAL FEIGENSON, *LEGAL BLAME – HOW JURORS THINK AND TALK ABOUT ACCIDENTS* (2000) [hereafter, "FEIGENSON"]; Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992) [hereafter, "Closing Arguments"]; Peggy C. Davis, *Performing Interpretation: A Legacy of Civil Rights Lawyering in Brown v. Board of Education*, in AUSTIN SARAT (ed.), *RACE, LAW, AND CULTURE: REFLECTIONS ON BROWN V. BOARD OF EDUCATION* 23 (1997); Neal R. Feigenson, *The Rhetoric of Torts: How Advocates Help Jurors Think About Causation, Reasonableness, and Responsibility*, 47 HASTINGS L. J. 61 (1995); Philip N. Meyer, "Desperate for Love": *Cinematic Influences upon a Defendant's Closing Argument to a Jury*, 18 VT. L. REV. 721 (1994); Philip N. Meyer, "Desperate for Love II": *Further Reflections on the Interpenetration of Legal and Popular Storytelling in Closing Arguments to a Jury in a Complex Criminal Case*, 30 U.S.F. L. REV. 931 (1996); Philip N. Meyer, "Desperate for Love" III: *Rethinking Closing Arguments as Stories*, 50 S.C. L. REV. 715 (1999); Philip N. Meyer, *Making the Narrative Move: Observations Based Upon Reading Gerry Spence's Closing Argument in the Estate of Karen Silkwood v. Kerr-McGee, Inc.*, 9 CLIN. L. REV. 929 (2002); Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39 (1994). Regarding the theoretical underpinnings of the methodologies, see, e.g., MINDING THE LAW; Anthony G. Amsterdam, *Telling Stories and Stories About Them*, 1 CLIN. L. REV. 9 (1994); Jerome Bruner, *The Narrative Construction of Reality*, 18 CRIT. INQUIRY 1 (1991) [hereafter, "Bruner, Narrative Construction"]; Peggy Cooper Davis, *The Proverbial Woman*, 48 RECORD BAR ASS'N C.N.Y. 7 (1993); Linda Holdeman Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 LEGAL STUDIES FORUM 7 (1996); Richard Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681 (1994) [hereafter, "Sherwin, Narrative Construction"].

<sup>3</sup> We particularly wanted to explore the possibility of doing this through a process of intensive student-faculty collaboration. It has been suggested that collaborations of this kind in clinical scholarship can yield significant benefits. See Gary Palm, *Reconceptualizing Clinical Scholarship as Clinical Instruction*, 1 CLIN. L. REV. 127 (1994). We anticipated – and our anticipations were fully borne out – that the interaction of students, faculty members, and a practitioner in our work would provide a stimulating experience for all of us and substantially enrich our perspectives.

<sup>4</sup> *People v. Powell*, Los Angeles Super. Ct. No. BA 035498. This was the first of two criminal trials of the four officers on charges arising out of the incident. The second trial, in federal court, was based on charges of civil rights violations: *United States v. Koon*, No. CR 92-686-JGD (C.D. Cal. 1993), filed August 4, 1992. See note 6 *infra*.

<sup>5</sup> The disadvantage of choosing so complex and richly elaborated a performance for study is that we have had to limit our microanalyses to a very small part of it. We reviewed the entire tape – plus the full trial transcript, transcripts of some pretrial proceedings, nu-

we expected we would find something worth studying in the dynamics of this trial. The jury, after all, acquitted most of the defendants (and convicted nobody)<sup>6</sup> although the prosecution's evidence included a videotape of the defendants *in flagrante delicto*, beating Mr. King with an apparent savagery that glued prime-time television viewers to their screens in horrified fascination and completely convinced the national viewing public of the defendants' guilt before and even after the jury declined to convict them.

The prevailing wisdom, endorsed by most of the post-trial popular and scholarly commentary, was that the verdict had little to do

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merous court documents, and contemporary news accounts – but we treated only a few specific aspects of the trial proceedings as our “texts” for detailed analysis and relegated the rest to the status of context (after having first viewed it as the menu from which to select the particular “texts” we would concentrate on). A consolation, if not a corrective, for leaving so much untouched in our close-up, high-resolution examination of the trial is that our findings can be collated with those of other studies and analyses of the *Rodney King* case, see, e.g., LOU CANNON, *OFFICIAL NEGLIGENCE: HOW RODNEY KING AND THE RIOTS CHANGED LOS ANGELES AND THE LAPD* (1997); JEWELLE TAYLOR GIBBS, *RACE AND JUSTICE: RODNEY KING AND O.J. SIMPSON IN A HOUSE DIVIDED* (1996); the essays collected in ROBERT GOODING-WILLIAMS (ed.), *READING RODNEY KING - READING URBAN UPRISING* (1993); Anthony Cook, *Cultural Racism and the Limits of Rationality in the Saga of Rodney King*, 70 DENVER U. L. REV. 297 (1993) [hereafter, “Cook”]; Kimberlé Crenshaw & Gary Peller, *Reel Time/Real Justice*, 70 DENVER U. L. REV. 283 (1993) [hereafter, “Crenshaw & Peller”]; Jerome McCristal Culp, Jr., *Notes from California: Rodney King and the Race Question*, 70 DENVER U. L. REV. 199 (1993); Abraham L. Davis, *The Rodney King Incident: Isolated Occurrence or a Continuation of a Brutal Past*, 10 HARV. BLACKLETTER J. 67 (1993); John Fiske, *Admissible Postmodernity: Some Remarks on Rodney King, O.J. Simpson, and Contemporary Culture*, 30 U.S.F. L. REV. 917 (1996) [hereafter, “Fiske”]; ROBERT GARCIA, *RIOTS AND REBELLION: CIVIL RIGHTS, POLICE REFORM AND THE RODNEY KING BEATING* (videodisc 1997); Charles Goodwin, *Professional Vision*, 96 AMER. ANTHROPOLOGIST 606 (1994) [hereafter, “Goodwin”]; A. Leon Higginbotham, Jr., & Aderson Bellegarde Francois, *Looking for God and Racism in all the Wrong Places*, 70 DENVER U. L. REV. 191 (1993) [hereafter, “Higginbotham & Francois”]; Harvey Levin, *Trial by Fire*, 66 SO. CAL. L. REV. 1619 (1993) [hereafter, “Levin”]; Elizabeth F. Loftus & Laura A. Rosenwald, *The Rodney King Videotape: Why the Case Was Not Black and White*, 66 SO. CAL. L. REV. 1637 (1993); Sherwin, *Narrative Construction* at 690 - 692; David Dante Troutt, *Screws, Koon and Routine Aberrations: The Use of Fictional Narratives in Federal Police Brutality Prosecutions*, 74 N.Y.U. L. REV. 18 (1999) [hereafter, “Troutt”], particularly at pp. 97 - 98, 106 - 117; Lawrence Vogelman, *The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom*, 20 FORDHAM URBAN L. J. 571 (1993) [hereafter, “Vogelman”], and of additional studies that we or others may later make of this fascinating artifact and mirror of our times. See also the interesting article on pedagogic uses of narrative in relation to the *Rodney King* case: Judith G. Greenberg & Robert V. Ward, *Teaching Race and the Law through Narrative*, 30 WAKE FOREST L. REV. 323 (1995).

<sup>6</sup> The jury acquitted three of the four officers of all charges against them. It acquitted the fourth officer of charges of assault with a deadly weapon and of filing false reports (to cover up the beating) but deadlocked on a single count charging him with having used excessive force under color of police authority. (The later federal trial resulted in convictions of two of the officers for wilfully depriving Mr. King of his civil rights under color of state law (18 U.S.C. § 242) and acquittals of the other two. See, e.g., *Koon v. United States*, 518 U.S. 81 (1996).)

with either the evidence or the trial lawyering on either side. Instead, the outcome had been foreordained by a pretrial change of venue. As a prosecution of four white cops for beating a black man, the case was innately all about race. So, prevailing wisdom said, when it was transferred out of demographically diverse Los Angeles into Simi Valley – an ex-urb created by white flight from L.A., having an African-American population of about 2% – the prosecutors lost the case. Doubtless, this theory had force.<sup>7</sup> But a similar theory, that a racially-charged, politically-explosive criminal trial was essentially decided when the jury was picked, had also dominated public perception of the Angela Davis case twenty years earlier. And one of us, who knew the Davis trial well, recalled that selection of the jury had been only the starting point for a complicated exercise in trial strategy.<sup>8</sup> So we wondered whether an in-depth examination of the lawyers' strategies and performances at the *Rodney King* trial might suggest that they had more influence on the verdict than the prevailing wisdom declared, and also whether there might have been more opportunities for a conviction, even in the Simi Valley venue, than the prevailing wisdom predicted.

## I. OUR FOCUS ON NARRATIVE

Almost from the outset of our study, we concentrated on the uses that the prosecution and defense lawyers made or could have made of various narrative strategies. In part, this focus reflected the methodological orientation of the Lawyering Theory Colloquium and our interest in trying to apply its analytic techniques to the fully visualized record of a complex criminal trial. In part, it reflected our own view that narrative theory is a particularly useful way of understanding much of what lawyers do in litigation and that narrative analysis is the key to an invaluable toolbox for litigators.

### A. *Why Narrative is Important in Litigation*

"Narrative," as we use the term, means constructing and telling stories and includes the rhetorical creation of an imaginative world in which the story can happen<sup>9</sup> – a world that gives the story its point.<sup>10</sup>

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<sup>7</sup> See Darryl K. Brown, *The Role of Race in Jury Impartiality and Venue Transfers*, 53 MD. L. REV. 107 (1994), particularly at p. 152; Levin at 1620 - 1627; Henry Weinstein & Paul Lieberman, "Location of Trial Played Major Role, Legal Experts Say," *Los Angeles Times*, April 30, 1992, p. 18.

<sup>8</sup> Concerning the 1972 trial and acquittal of Angela Y. Davis on charges of murder, kidnaping and conspiracy, see MARY TIMOTHY, *JURY WOMAN* (1974), and BETTINA APTHEKER, *THE MORNING BREAKS: THE TRIAL OF ANGELA DAVIS* (1975).

<sup>9</sup> Every story simultaneously generates and depends upon a world in which that kind of story is possible. See, e.g., Bruner, *Narrative Construction* at 13 - 14; MICHAEL J. TOOLAN, *NARRATIVE, A CRITICAL LINGUISTIC INTRODUCTION* 227 - 262 (1988); cf. the text at

There are several reasons why this narrative process is crucial in litigation.

*First*, narrative is “a primary and irreducible form of human comprehension,”<sup>11</sup> humankind’s basic tool for giving meaning to experience or observation<sup>12</sup> – for understanding what is going on.<sup>13</sup> It is the way most people make sense of the world most of the time.<sup>14</sup> “[N]arrative . . . gives shape to things in the real world and often bestows on them a title to reality.”<sup>15</sup> We link perceptions into happenings, happenings into events, events into stories; and our narrative expectations tell us how each story hangs together and how it will end. Jurors bring this everyday sense-making process to their work and use it to descry the “facts” from the evidence.<sup>16</sup> Trial lawyers seeking to

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note 45 *infra*. Often in litigation the parties contest not only what happened but the very nature of the world. Is it an orderly, logical place, where people deliberately plan what they do and ordinarily do what they plan; or is it a seething tide of unpredictable events and supervening circumstances in which people are largely swept along willy-nilly? Is it a brightly-lit stage on which well-defined characters enact well-formed plays and where what you see is very likely what is going on; or is it a dark den of doubts and dubieties in which appearances are prone to be deceiving and must always be distinguished from realities? To wage these Wars of the Worlds, lawyers’ story-telling often must include the use of rhetorical procedures to lay the ontological foundations for their stories (that is, to establish the essential features of Reality in the world in which the story takes place) and to develop suitable epistemological perspectives on their stories (that is, to establish how human cognition can detect Reality in that world). See Sherwin, *Narrative Construction*. And for a description of some useful procedures, see Chapter 6 of *MINDING THE LAW*, particularly at pp. 177 - 192, and the portions of Chapters 3 and 7 to which these pages refer for examples.

<sup>10</sup> Stories always have a point. It is generally recognized that the worst pan a story-teller can receive is to be asked: “So, what’s the point?” Jerome Bruner puts it succinctly when he writes that in “narrative generally, ‘what happened’ is tailored to meet the conditions on ‘so what.’” JEROME BRUNER, *ACTS OF MEANING* 86 (1990) [hereafter, “ACTS OF MEANING”].

<sup>11</sup> Louis O. Mink, *Narrative Form as a Cognitive Instrument*, in ROBERT H. CANARY & HENRY KOZICKI (eds.), *THE WRITING OF HISTORY: LITERARY FORM AND HISTORICAL UNDERSTANDING* 129, 132 (1978) [hereafter, “Mink”].

<sup>12</sup> See, e.g., MARK TURNER, *THE LITERARY MIND* (1996).

<sup>13</sup> “[B]oth in Tonight’s News and in the newest fiction, ‘True Romance’ will either Win Through or leave its Poignant Pain; ‘Betrayal’ will bereave both Betrayer and Betrayed; there will Come a Moment and God Help Those Who Fail to Seize It, etc. These narratives, their characters, plots, and predicaments, constantly furnish us a standard library of categories by which to classify and interpret the human scene.” *MINDING THE LAW* at 47.

<sup>14</sup> “[A]ny narrative, from the very simplest, is hermeneutic in intention, claiming to retrace event in order to make it available to consciousness.” PETER BROOKS, *READING FOR THE PLOT: DESIGN AND INTENTION IN NARRATIVE* 34 (paperback ed. 1992) [hereafter, “BROOKS”]. “In stories, there are agents and actions; there are patterns; there is direction; most of all, there is meaning. Even when the consequences are tragic, there is a point; there is a message, a moral, a teaching. And that is a consolation. It is consoling to believe that our lives have a shape, a purpose and direction . . . .” WILLIAM H. GASS, *TESTS OF TIME* 5 (2002) [hereafter “GASS”].

<sup>15</sup> JEROME BRUNER, *MAKING STORIES: LAW, LITERATURE, LIFE* 8 (2002) [hereafter, “MAKING STORIES”].

<sup>16</sup> See text at notes 185 - 187, 384 - 391 *infra*; FEIGENSON at 87 - 169; ROBERT P. BURNS,

persuade jurors of a particular version of the facts need to tap into the process.<sup>17</sup>

*Second*, the narrative process also tells us how a story *should* end. “[N]arrative is necessarily normative,”<sup>18</sup> providing the interface between facts and values.<sup>19</sup> “Stories fly like arrows toward their morals.”<sup>20</sup> They embody a society’s manifest of moral imperatives.<sup>21</sup> For,

while a culture must contain a set of norms, it must also contain a set of interpretive procedures for rendering departures from those norms meaningful in terms of established patterns of belief. It is narrative and narrative interpretation upon which folk psychology depends for achieving this kind of meaning. Stories achieve their meanings by explicating deviations from the ordinary in a comprehensible form . . . .<sup>22</sup>

So, effective story-telling by a lawyer can help to make the lawyer’s case to jurors who want to reach the *right* result.

*Third* (an elaboration of the preceding point), the narrative process is specialized for reconciling our expectations about the normal, proper course of life with deviations from it.<sup>23</sup> “Deviance is the very condition for life to be ‘narratable.’”<sup>24</sup> The launching pad of narrative is *breach*, a violation of expectations, disequilibrium.<sup>25</sup> The landing pad of narrative is *balance*, the reestablishment of equilibrium.<sup>26</sup> We will have more to say about these things when we come to talk about the structure of narrative soon. For present purposes, the point is sim-

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A THEORY OF THE TRIAL 141 - 176 (1999) [hereafter, “BURNS”], and sources collected there.

<sup>17</sup> See *Closing Arguments*; the articles by Philip N. Meyer cited in note 2 *supra*; W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* (1981), particularly at pp. 89-90. Judges deciding “legal issues” make use of the same narrative process. See, e.g., *MINDING THE LAW*, Chapters 3 and 5; Anthony G. Amsterdam, *Selling a Quick Fix for Boot Hill: The Myth of Justice Delayed in Death Cases*, in AUSTIN SARAT (ed.), *THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS AND CULTURE* 148 (1999).

<sup>18</sup> Bruner, *Narrative Construction* at 15.

<sup>19</sup> See notes 242 - 243, 385 - 386 *infra* and accompanying text; BURNS at 160 - 164.

<sup>20</sup> GASS at 4.

<sup>21</sup> See, e.g., HAYDEN WHITE, *The Value of Narrativity in the Representation of Reality*, in *THE CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION* 1 (1987).

<sup>22</sup> ACTS OF MEANING at 47.

<sup>23</sup> “All sorrows can be borne if you put them into a story or tell a story about them.” Isak Dinesen, quoted by HANNAH ARENDT, *THE HUMAN CONDITION* 175 (1958).

<sup>24</sup> BROOKS at 139. See also Bruner, *Narrative Construction* at 11: “[T]o be worth telling, a tale must be about how an implicit canonical script has been breached, violated, or deviated from in a manner to do violence to what Hayden White calls the ‘legitimacy’ of the canonical script.”

<sup>25</sup> See *MAKING STORIES* at 15 - 20; BROOKS at 26, 85 - 87, 103, 130, 138 - 139, 155 - 168.

<sup>26</sup> See *MINDING THE LAW* at 45 - 47, 121 - 124.

ply that narrative has always done for the human mind what juries are called upon to do for the body politic in every trial, and particularly in criminal trials – to deal with deviance by restoring order.<sup>27</sup> Small wonder, then, if jurors resort to narrative to do much of the work.

*Fourth*, jurors come to their task equipped not only with the narrative process as a mode of thought but with a store of specific narratives channeling that process. Stock scripts and stock stories accreted from exposure to the accountings and recountings that continually bombard us – through television, movies, newspapers, books, the internet, and word of mouth from our earliest childhood<sup>28</sup> – provide all of us with walk-through models of how life is lived, how crimes are committed, how reality unfolds. When a juror perceives the familiar lineaments of one or another of these narratives emerging from the evidence, s/he “recognizes” what is afoot and s/he is cued to interpret other pieces of evidence and eventually the whole of it consistently with the familiar story line.<sup>29</sup> “This means that in order to perform effectively, many lawyers, particularly litigators, may be obliged to keep abreast of (in order to tap into) the popular storytelling forms and images that people commonly carry around in their heads.”<sup>30</sup>

*Fifth*, evidentiary trials in which facts are contested are not conducted on the premise of Kurosawa’s *Rashomon* – that multiple versions of reality are possible and equally true – nor do most jurors operate on this premise.<sup>31</sup> The uncompromising ontological first prin-

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<sup>27</sup> “What Frank Kermode calls the ‘consoling plot’ is not the comfort of a happy ending but the comprehension of plight that, by being made interpretable, becomes bearable.” Bruner, *Narrative Construction* at 16. See also MAKING STORIES at 27 - 31.

<sup>28</sup> ACTS OF MEANING 82 - 84; see also Mink at 133 (“story-telling is the most ubiquitous of human activities, and in any culture it is the form of complex discourse that is earliest accessible to children and by which they are largely acculturated”).

<sup>29</sup> See notes 322 - 328, 387 - 391 *infra* and accompanying text; Paul Gewirtz, *Narrative and Rhetoric in the Law*, in PETER BROOKS & PAUL GEWIRTZ (eds.), LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW 2, 8-9 (1996). For additional discussion of stock scripts and stock stories, see MINDING THE LAW at 45 - 48, 117 - 118, 121 - 122, 186 - 187, 282 - 283; Gerald P. López, *Lay Lawyering*, 32 U.C.L.A. L. REV. 1 (1984); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411(1989) [hereafter, “Delgado”]; and the sources collected in *Closing Arguments* at 114 - 116 n. 146.

<sup>30</sup> Sherwin, *Narrative Construction* at 692.

<sup>31</sup> “The necessity of concluding with a decision about the case distinguishes the popular trial from every other public forum. Formal closure provides the genre with both its aesthetic unity and its ability to stimulate and focus debate. One reason trials continue to be the representative anecdotes of issues . . . is that they of all the occasions for the controversy result in a decision, whereas all the editorials, white papers, documentaries, public hearings, special reports, books, sermons, and so forth do not.” Robert Harriman, *Performing the Laws: Popular Trials and Social Knowledge*, in ROBERT HARRIMAN (ed.), POPULAR TRIALS: RHETORIC, MASS MEDIA, AND THE LAW 17 (1990), at p. 27. Jurors may be more or less tolerant of the notion that alternative interpretations of reality are possible, and more or less prone to discredit conventional interpretations. See text at notes 172 - 222 *infra*. But few are likely to believe that when it comes to what happened “out there” in the world in

principle of every trial is that *something real really happened out there*. Jurors are permitted to vote that they cannot tell what happened, but this verdict is conceptualized as a failure of persuasion on the part of whichever party bears the burden of proof. And every trial lawyer knows that it is very dangerous – a desperation tactic of last resort – to stake his or her case on the argument that the truth is so recondite that the opposing party has failed to meet its burden on that account alone. Even if the lawyer’s aim is simply to cast enough doubt on the opponent’s case to prevent the jury from agreeing that an applicable burden of proof has been met, s/he will almost always want to suggest some alternative thing or things that could plausibly have *really happened out there*, instead of the thing that the opponent needs to prove. Under these circumstances trials of “the facts” tend to turn into story-telling contests. As in the classical dramatic *agon*, there is a hard core of material that the contestants must incorporate and account for in their stories – the Athenian audiences at the Greater Dionysia of the Fifth Century, B.C. knew from the Homeric epics that Agamemnon had summoned Iphigenia to Aulis for the purpose of sacrificing her to Artemis; the juries in the homicide trials of our times know (for example) from seemingly incontrovertible ballistics and fingerprint evidence that at some point in time the defendant handled the gun that fired the fatal shots – and the story-teller is required to encompass these mandatory materials in his or her plot. But where they cease to “tell the whole story,” the story-telling competition begins; and the story-teller whose tale best interprets the mandatory materials consistently with the audience’s understanding of the human scene can hope to carry off the prize.

*Sixth*, story-telling offers the litigator a vital means to expand or change the audience’s understanding of the human scene. And it equips the litigator to explore in his or her own head, as a necessary prelude, a range of *possibilities* for expanding or changing the audience’s perception of that scene. For, in addition to its other functions, narrative serves as the mind’s primary way of surveying alternative possible worlds. It is imagination’s instrument for getting beyond the familiar and the obvious, for playing out never-experienced scenarios and projecting the consequences of counterintuitive conceptions. It enables us to travel paths we have not walked before and to see where they lead, to create realms of *what if* where we can experiment with new varieties of thinking and believing, of doing and being.<sup>32</sup>

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such-and-such a location at such-and-such a time, inconsistent alternative versions are equally true or that, as Gertrude Stein would have it, there is no *there* there.

<sup>32</sup> See text at notes 322 - 327 *infra*; MINDING THE LAW at 235 - 239; JEROME BRUNER, ACTUAL MINDS, POSSIBLE WORLDS (1986); *cf.* Troutt, particularly at pp. 88 - 93, 119 - 121.

So, what follows from all this? Our reason for rehearsing the functions that the narrative process serves in litigation is not to encourage litigators to make greater use of narrative. That would be as superfluous as exhorting fish to make greater use of water. Litigators are inextricably immersed in narrative; they cannot survive without it.<sup>33</sup> Our aim is rather to suggest that they will navigate the medium more effectively to the extent that they *focus consciously* on narrative construction as an integral part of their work, *survey systematically and creatively* the range of options available to them in constructing narratives, and make *strategic choices* among the options with an understanding of the basic elements of narrative construction and how those elements fit together.

In our own work, we have found it possible to jump-start this kind of thinking by drawing up for oneself a few preliminary inventories and compendiums. (Please note that these are where the thinking *begins*, not where it ends.) The first inventory is a roster of the ways in which story-telling can affect litigation, like the roster we set out in the preceding pages. The second inventory, derived from the first, catalogs the specific practical uses that a litigator may be able to make of narrative in any particular case. (Our inventory is in subpart I.B, immediately below.) Then come an outline of the basic structure and process of narrative (subpart I.C below) and a specification of the special features, conditions and constraints on narrative in the litigation setting (subpart I.D below).<sup>34</sup> We emphasize that these are *our* working inventories, designed to help *us* (both in our litigation work and in our collective analysis of the *Rodney King* case). If they lead our readers to say, “no, that hasn’t got it right,” and to make their own inventories – which are more effective for their own litigative use and which may also enable them to improve upon our analyses of *Rodney King* – then our subparts I.A through I.D will have served the most useful purpose we could have hoped for. (One of the chief benefits of inventories – as of theories – is to provoke perception of what is missing or wrong in them. Our checklists and our theories both aspire to perform this office.)

### B. *The Specific Uses that a Litigator Can Make of Narrative*

This inventory enumerates potential uses of narrative in jury-trial litigation.<sup>35</sup> Some involve the litigator’s own thinking (categories 1

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<sup>33</sup> See text at note 404 *infra*; MINDING THE LAW at 110.

<sup>34</sup> Item I.D is a summary of the interface between items I.A and I.B and item I.C, expressed as a set of cautions to be observed in constructing one’s litigation narratives.

<sup>35</sup> Many of the items in the inventory apply *mutatis mutandi* to other litigation settings or to litigation generally. But we describe them all in terms specific to a jury trial.

and 2 immediately below). (We include in the term “litigator” all members of a litigation team.<sup>36</sup>) Some have to do with gauging the thinking of other people in the litigation process (category 3). Some involve making explicit references or implicit allusions to stock scripts in communications aimed at the jury (categories 4, 5 and 6). In subpart 7, we catalog the range of techniques by which a litigator communicates to the jury; and in subpart 8, we briefly discuss the choice between explicit and implicit invocations of stock scripts.

1. *Using narrative to generate hypotheses that guide investigation and to avoid shutting down investigation by making premature judgments.* To be efficient, factual investigation must be directed by working hypotheses about what happened and why. Hypotheses fleshed out in narrative form – with a scene, characters, actions, instruments, and motives<sup>37</sup> – serve this function particularly well, because their projection requires the litigator to construct in his or her imagination a world containing all of the details that are necessary for the plot to unfold. These details in turn suggest others that would probably exist in conjunction with the necessary details, or that could *not* coexist with the necessary details, providing specific focuses for investigation.

Projecting alternative possible causal or explanatory stories that could fit around information already in hand enables a litigator to multiply hypotheses. And having multiple hypotheses in mind throughout a litigation can be crucial to success. In our experience, litigators tend too often to zero in on the first plausible version of events that emerges from available information, or at most the first couple of plausible scenarios. They tend to confine their investigations to attempting to confirm the most immediately obvious favorable scenario (or two) or to refute the most immediately obvious unfavorable scenario (or two). They forget that the fundamental tenet of effective investigation is, *The world is a mysterious, surprising place, where strange things happen.* Narrative provides the best safeguard against these tendencies. Narrative restores the mystery of the world. Insisting upon telling oneself alternative possible stories even after it has become “obvious” what happened is an invaluable check against prema-

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<sup>36</sup> Narratives can be particularly useful in collective thinking and in some communications among members of a litigation team: co-counsel, consultants, investigators, paralegals, experts, and so forth. For example, an attorney who is briefing an investigator on the theory of the case will often find that alternative possible scenarios which would support or undercut this theory, played out in “walk-through” form, provide the most efficient way of focusing the investigator on potentially relevant information without crimping his or her flexibility to develop new leads in the field. And narrative can be a valuable *lingua franca* in communications between attorneys and experts in fields with their own esoteric jargon. But we need not go into intra-team communications in detail for present purposes; it will suffice to make our “litigator” figure stand for the entire team.

<sup>37</sup> See text at note 72 *infra*.

ture closure.<sup>38</sup>

2. *Using narrative to develop a theory of the case.* A litigator's *theory of the case* is a detailed summary of the factual propositions that s/he plans to assert as the basis for a favorable verdict or decision, with the facts organized in such a way that they invoke the application of the normative dictates (substantive rules of law; procedural rules, such as those relating to burdens of proof and presumptions; considerations of fairness, propriety, and other moral values; empathy or sympathy) that the litigator will rely on. A theory of the case informs every aspect of the litigator's trial preparation and presentation.<sup>39</sup> Because of the efficacy of narrative in mediating facts and norms,<sup>40</sup> a litigator's whole theory of the case usually takes the form of a story. When it does, the litigator will often benefit from modeling it on one or more of the stock stories current in the culture, and s/he will almost always benefit by considering alternative possible versions of the story and assessing their relative believability by drawing on the culture's current register of accepted stories as examples of what is plausible and coherent, what makes a tale hang together sufficiently to be convincing.

Even when the litigator's theory of the case cannot be encompassed by a single story, it is likely to depend in part upon the persuasiveness of key facts. Jurors' probable reactions to evidence of those facts can sometimes be usefully gauged by reference to the prevalence of similar factual elements in the scenes, plots, and characters of currently accepted story types. Conversely, if a theory of the case calls for discrediting the opposing party's story or components of it, popular narratives featuring an appearance/reality dichotomy<sup>41</sup> – as many popular detective stories, courtroom dramas and other suspense “thrillers” do<sup>42</sup> – can suggest useful litigation strategies for reducing

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<sup>38</sup> Peter Brooks makes the point that the very structure of narrative wards against “the danger of short-circuit: the danger of reaching the end too quickly.” *READING FOR THE PLOT* at 103 - 104. See *id.* at 90 - 142.

<sup>39</sup> The concept and uses of a theory of the case are discussed in, *e.g.*, Edward D. Ohlbaum, *Basic Instinct: Case Theory and Courtroom Performance*, 66 *TEMPLE L. REV.* 1 (1993); 1 HERTZ, GUGGENHEIM & AMSTERDAM, *TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURT* 170 - 181, 272, 277 - 278, 286 - 287; 2 *id.* at 846, 898 - 906 (1991). A theory of the case has to be developed within a broader framework of strategic planning. See Richard K. Neumann, Jr., *On Strategy*, 59 *FORDHAM L. REV.* 299 (1990).

<sup>40</sup> See text at notes 18 - 27 *supra*.

<sup>41</sup> CHIAM PERELMAN & LUCIE OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* 415 - 444 (University of Notre Dame Press paperback 1971) [hereafter, “PERELMAN & OLBRECHTS-TYTECA”].

<sup>42</sup> *E.g.*, *Witness for the Prosecution* (United Artists 1957); *House of Games* (Orion 1987); *Dead Again* (Paramount Pictures 1991); *Shattered* (MGM 1991); *Usual Suspects* (Gramercy Pictures 1995); *L.A. Confidential* (Regency Enterprises 1997); *Following* (Zeitgeist 1998); *The Perfect Murder* (Warner 1998); *Arlington Road* (Lakeshore 1998);

the opponent's evidence to the status of deceiving appearances.

3. *Using narrative to fathom or affect the thinking of witnesses and other sources of information, jurors and other trial participants.* Litigators must constantly make strategic decisions on the basis of predictions about how people are thinking or how they will react to something that the lawyer does. In investigative interviewing and in interviews preparing witnesses to testify at trial, the litigator frames questions in ways that are designed both to elicit information and to shape it by structuring the framework within which the witness understands the information and its significance. Because memories are commonly stored and recounted in narrative form and the information remembered is affected by the stories the witness has in mind or can be gotten to think about as giving the information meaning,<sup>43</sup> the litigator needs to be alert to detect those stories and the possibilities for rewriting them. This is equally true in cross-examining the opposing party's witnesses. Witnesses who have had little or no prior experience with the law are frequently playing out in their heads scripts for appropriate witness responses that they have picked up from TV or the movies; this is a setting in which life tends to imitate art almost slavishly. And even witnesses who have had considerable prior experience in a witness role (such as police officers) often have organized aspects of that experience (such as cross-examination by defendants' lawyers) – together with the courtroom stories they have heard (e.g., at the precinct station) – into scripts that can be put to good use by a cross-examiner who discerns them.

*Voir dire* examination of prospective jurors calls for much of the same sensitivity to narrative processes and stock scripts as witness interviewing and examination. So, often, does predicting how opposing counsel will interpret and react to what a litigator does. And whether or not the litigator makes deliberate use of narrative strategies, techniques and allusions in his or her own presentation of the case (in the various ways we catalog immediately below), the jurors are likely to be perceiving and interpreting the evidence they hear as the unfolding of a story that they recognize from familiar models. The litigator has to anticipate the stories jurors will see in the evidence, in order either to deconstruct them or to turn them to advantage.

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*Under Suspicion* (Revelations Entertainment 1999); *Memento* (Newmarket Films 2000); *Nine Queens* [*Nueve Reinas*] (Patagonik Group 2000); *Reindeer Games* (Dimension Films 2000); *Heist* (Morgan Creek 2001); *Confidence* (Lions Gate 2003).

<sup>43</sup> See, e.g., ACTS OF MEANING at 55 - 58, discussing the classic work of Bartlett and Mandler, FREDERICK C. BARTLETT, REMEMBERING: A STUDY IN EXPERIMENTAL AND SOCIAL PSYCHOLOGY (1932), and JEAN MANDLER, STORIES, SCRIPTS AND SCENES: ASPECTS OF SCHEMA THEORY (1984); MAKING STORIES at 63 - 87; JAMES OLNEY, MEMORY & NARRATIVE: THE WEAVE OF LIFE-WRITING (1998).

4. *Using narrative to attune the jury to lines of thinking that advance the litigator's case or set back the opposing party's case.* Narrative involves a special way of thinking, of processing information, of proceeding from premises to conclusions.<sup>44</sup> If a litigator can get jurors into a narrative mindset early in a trial – by, for example, stressing in *voir dire* interchanges with prospective jurors, in an opening statement, and/or in the way s/he talks about the trial process when making and arguing objections in the hearing of the jury – that the jury's job is to [reconstruct the story] [figure out the real story] [get to the bottom of the story] of what happened, s/he can tap into this mode of thinking and use it to shape the jurors' understanding of the case.

One important characteristic of narrative thinking, for example, is that it is inescapably hermeneutic. In a story, the meaning of the whole is derived from the parts at the same time that the meaning of the parts is derived from the whole.<sup>45</sup> In a deductive “evidence-marshalling” jury argument,<sup>46</sup> this process can be derided as “circular” or as “bootstrapping,” but a litigator can make it acceptable, even necessary, to a jury despite this derision if s/he can persuade the jurors that the process is the best way to see how the story hangs together.

Another important characteristic of narrative thinking is that it generates expectations through a presumption of relevancy. This is why a reader knows that if s/he is told in Chapter One there is a gun hanging on the wall, s/he can expect a gunshot and a dead body or at least a near miss by the end of Chapter Three.<sup>47</sup> A related structural feature of stories is that they translate Time into a sequence of events that must be “of relatively equal importance (or value), and . . . of approximately similar ‘kinds.’”<sup>48</sup> Thus, “[i]n a story it won't do to say: after the battle of Waterloo I tied my shoe.”<sup>49</sup> These aspects of narrative thinking can be used to imbue small items or events with large significance. And narrative thinking not only intensifies people's ordinary tendency to regard the actions of other people as a product of

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<sup>44</sup> We discuss narrative structure, which is a principal aspect of this way of thinking, in the text at notes 72 - 93 *infra*.

<sup>45</sup> See, e.g., Bruner, *Narrative Construction* at 7 - 11.

<sup>46</sup> See Graham B. Strong, *The Lawyer's Left Hand: Nonanalytical Thought in the Practice of Law*, 69 U. COLO. L. REV. 759, 781 (1998).

<sup>47</sup> See ANTON TCHEKHOV, *LITERARY AND THEATRICAL REMINISCENCES* 23 (Samuel S. Kotliansky trans. 1927); JOHN GARDNER, *THE ART OF FICTION: NOTES ON CRAFT FOR YOUNG WRITERS* 4 (Vintage Books ed. 1991) [hereafter, “GARDNER”]; *cf. id.* at 192. The film *Gosford Park* (Sandcastle 5 2001) literally goes Tchekhov's famous dictum one better by presenting the audience with two murder weapons early in the movie. Those of our readers who have seen the film know the intriguing result; those who have not will enjoy it more if we don't tell.

<sup>48</sup> GASS at 11.

<sup>49</sup> GASS at 5.

will – indeed, of character – rather than of external circumstances.<sup>50</sup> It also gives this tendency the twist of focusing attention on “‘reasons’ for things happening, rather than strictly [on] . . . their ‘causes.’”<sup>51</sup> By working with these and other distinctive qualities of narrative thinking, a litigator can cue the jurors to process what they see and hear at trial in ways that bolster his or her case, undermine the opposition’s, or both.

5. *Using particular narratives to accredit, discredit, configure or code pieces of evidence or information.* A jury is likely to find evidence persuasive to the extent that the “facts” it portrays conform to the jurors’ understanding of The Way the World Works. Jurors enter a trial with strong views, based on personal experience and on the second-hand information prevalent in their cultural milieu, about The Way the World Works. But these views are neither monolithic nor immutable. We all carry around in our heads an inharmonious assortment of notions, sometimes even flatly inconsistent notions, about what is usual, plausible, probable, possible, right, in human affairs.<sup>52</sup> These notions usually take story form.<sup>53</sup> Depending on which stories are salient when we are trying to make sense of things, we can come to different conclusions about what happened and why. By reminding the jury of apt stories to be thinking about as it receives and evaluates the evidence at a trial, a litigator can prompt the jurors to be more trusting or more skeptical regarding particular kinds of evidence or the facts the evidence is offered to prove.

The stories can be drawn from “news” or fiction. At training programs for criminal defense lawyers after the recent, widely-broadcast media reports of ineptitude at criminalistics laboratories in Oklahoma and Virginia, the lawyers were advised to refer to those exposés when objecting in open court to the admission of crime-lab evidence on *Daubert* grounds<sup>54</sup> or grounds of unreliability. Disparaging comparisons could also or alternatively be made to the crackerjack performance of crime-scene investigators in well-known TV entertainment series like *CSI*, which appear to be leading juries to expect a greater measure of perfection from forensic-science evidence.<sup>55</sup> And it doesn’t

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<sup>50</sup> See, e.g., LEE ROSS AND RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* (1991), particularly at pp. 119 - 144.

<sup>51</sup> Bruner, *Narrative Construction* at 7.

<sup>52</sup> E.g., “People change.” but “A leopard can’t change its spots.” “A rising tide lifts all boats.” but “Every tub on its own bottom.” “Seeing is believing.” but “Appearances are deceiving.” See DOROTHY HOLLAND AND NAOMI QUINN (eds.), *CULTURAL MODELS IN LANGUAGE AND THOUGHT* (1987), particularly at pp. 9 - 10; PERELMAN & OLBRECHTS-TYTECA at 85, 411 - 459; FEIGENSON at 95 - 104.

<sup>53</sup> See *MINDING THE LAW* 39 - 47.

<sup>54</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

<sup>55</sup> See Richard Willing, “CSI Effect,” *U.S.A. Today*, posted August 5, 2004 at <http://>

always take a series to do it. A generation ago, defense attorneys were being advised to refer to the George C. Scott film, *Hospital*, when objecting to medical-center records and were reporting an unusual level of juror skepticism with regard to such records while the film was in vogue and for a time thereafter.<sup>56</sup>

Stories are also useful in coding items of evidence or other pieces of a case. Coding is the process by which words, images, objects, and ideas become associatively linked with others, so that the former bring the latter to mind.<sup>57</sup> Narrative construction involves considerable coding, which contributes heavily to the verisimilitude of good stories.<sup>58</sup> And the conceptual, emotional, even sensory “baggage” packed into an item by narrative coding travels with the item beyond the story where the packing was done. Say, for example, that a prosecutor in a strangulation-murder case uses language in examining witnesses and arguing to the jury which successfully evokes a juror’s recollection of the automobile garroting episode near the end of *The Godfather I*. This can bring the whole vivid scene to the juror’s mind – the victim, Carlo, clawing helplessly at the wire cutting into his neck, Carlo’s legs spasming again and again, his feet fracturing the windshield. It may even suggest that the defendant acted with the pitiless pit-bull savagery of a mafia assassin. These kinds of associations not only invest the physical facts depicted by evidence with powerful emotional and normative significance. They can sometimes give the litigator’s case a gritty corporeality s/he could not otherwise achieve, because of lack of evidence – or inadmissibility of evidence – as when, in a strangulation-murder prosecution, there were no eyewitnesses to the killing and the crime-scene investigators’ reconstruction of the victim’s movements while being strangled are too speculative to pass muster as expert

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[www.usatoday.com/life/television/news/2004-08-05-csi-effect\\_x.htm?POE=click-refer](http://www.usatoday.com/life/television/news/2004-08-05-csi-effect_x.htm?POE=click-refer):

Shows such as *CSI* are affecting action in courthouses across the USA by, among other things, raising jurors’ expectations of what prosecutors should produce at trial.

Prosecutors, defense lawyers and judges call it “the *CSI* effect,” after the crime-scene shows that are among the hottest attractions on television. The shows – *CSI* and *CSI: Miami* in particular – feature high-tech labs and glib and gorgeous techies. . . .

. . . [T]he programs . . . foster what analysts say is the mistaken notion that criminal science is fast and infallible and always gets its man. That’s affecting the way lawyers prepare their cases, as well as the expectations that police and the public place on real crime labs. Real crime-scene investigators say that because of the programs, people often have unrealistic ideas of what criminal science can deliver.

<sup>56</sup> *Hospital* told the story of a patient who was driven mad when his internal organs were progressively removed in error at a hospital where he was repeatedly sent into the operating room accompanied by x-rays and charts of other patients rather than his own.

<sup>57</sup> See MINDING THE LAW at 187 - 192; HERBERT W. SIMONS, PERSUASION IN SOCIETY 96 - 99 (2001).

<sup>58</sup> See MICHAEL RIFFATERRE, FICTIONAL TRUTH (1990).

opinion.

6. *Using particular narratives to cue the jury's interpretation of the case as a whole or to free the jury from sets that dispose it to fit the case into a harmful mold.* The ultimate task of the jurors in any jury trial is not only to decide what happened in terms of physical bodies moving in space and time, or even bodies moved by minds possessing specified mental states. It is also to *interpret and categorize the actions and mental states as understandable human behavior* susceptible to legal and moral judgment.<sup>59</sup> As we noted above, “[p]lacing things, events, and people in these categories is very much a matter of *what stock script one recognizes as being in play or what story one chooses to tell.*”<sup>60</sup> A litigator who taps into stock narratives familiar to jurors – either the conventional story lines of prevalent news and entertainment *genres* or specific books, films, or TV shows that are recognizable by name, by leading characters, or by other signature features – can put those narratives to work as a cognitive framework for the jury’s interpretation of the evidence. S/he can thus shape the jury’s understanding of “what really happened” and what it means.

The collective defense mounted by the lawyers for Officers Powell, Koon, and Wind at the *Rodney King* trial illustrates this tactic. It drew upon the stock story of the heroic team of roving police officers defending civilized society against rampaging hordes of wild inner-city barbarians and barely holding their own by a combination of courage, discipline, skill, strength and teamwork. Always at risk, often at bay, these Brave Survivors of a Thousand Daily Deadly Encounters [with the Third World] are human enough to understand and love, godlike enough to revere and rally ‘round. They are, in two words, the *New Centurions*, immortalized in Joseph Wambaugh’s 1957 book of that name and the 1972 Columbia Pictures version starring George C. Scott and Stacy Keach.<sup>61</sup> Their story was told again, grippingly, in the 1988 Orion Pictures film, *Colors*, directed by Dennis Hopper, starring

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<sup>59</sup> See BURNS, particularly at pp. 221 - 227.

<sup>60</sup> MINDING THE LAW at 47. “Our very definition as human beings is very much bound up with the stories we tell about our own lives and the world in which we live. . . . [I]t is not clear that we could even put together a story, or construe a story as meaningful, without this competence – acquired very early in life – in narrative construction. If narrative form were to be entirely banished from the jury’s consideration, there could be no more verdicts.” Peter Brooks, *The Law as Narrative and Rhetoric*, in PETER BROOKS & PAUL GEWIRTZ (eds.), *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 14, 19 (1996).

<sup>61</sup> In the late 80’s and early 90’s, Wambaugh was one of the country’s most widely read novelists. The five novels he published between 1981 and 1989 – four of them embodying the classic Wambaugh formula of the precinct-cop chronicle – “sold a combined seven million copies. Only a handful of authors have sold more during a similar span.” Edwin McDowell, “Morrow’s All-Out Push Helps Wambaugh Book to the Top,” *New York Times*, March 13, 1989, p. D8.

Sean Penn and Robert Duvall. Variants were repeated to repletion in innumerable episodes of Steven Bochco's immensely popular police drama series, "Hill Street Blues," and other fictional and reality-cop series (e.g., "Rescue 911," "Unsolved Mysteries," "Top Cops," "Miami Vice") that dominated television in the late 80's and early 90's.<sup>62</sup> Throughout the *King* trial, defense counsel had the *New-Centurion/Colors* story sharply in focus and played it to the hilt. It unfolded from their opening statements (delivered in tones straight from the police parade-ground and strictly in order of the rank of their clients, so as to ground their case in the reassuring professional order and discipline of police organization) through their presentation of extensive systematic testimony about police training and weapons-use protocols (evoking all of the rousing police-academy drill scenes that had become standard-issue movie and TV fodder) to their closing arguments (which personified the barbarian hordes in the assertedly PCP-crazed-and-supercharged Rodney King and portrayed their clients' efforts to restrain King's violence as meticulous performances of precision police teamwork).

When an opposing party's case points to an obvious conclusion (that is, fits a convincing stock script with this conclusion as the final chapter), often the best way to dissuade the jury from drawing that conclusion is to produce a story that puts a different spin on the same basic facts. Detective stories are excellent models because that *genre* is specialized to *reinterpret* an apparent episode or chain of events in

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<sup>62</sup> "Police work is portrayed on television more often than any other profession. It has been that way since the cowboys rode off into the television sunset." Bill Carter, "Police Dramas on TV Were Always Popular; Now They're Real," *New York Times*, October 17, 1990, p. C13. See also Judith Grant, *Prime Time Crime: Television Portrayals of Law Enforcement*, 15 J. AMER. CULTURE 57 (1995); Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process - A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 AMER. CRIM. L. REV. 743, 769 - 772 (1995):

Crime is a staple of prime time television. A 1985 survey revealed that more than forty percent of prime time hours during the 1985-86 television season were devoted to shows featuring police officers, detectives, private investigators or other law enforcement agents. . . .

. . . . .  
. . . Law enforcement agents are central heroic figures in prime time crime dramas. Whether police officers, detectives, private investigators, federal agents . . . or even medical examiners or attorneys, the common characteristic shared by crime-fighters is their archetypal role as instruments of crime detection and enforcers of the established order. . . .

Crime dramas rarely focus on complaints of police brutality. When they do, the complaint is belittled and the brutality is characterized as necessary. . . .

Today there are exceptions, to be sure. In the years following the *Rodney King* trial, some TV series have undertaken to present a more balanced and nuanced portrayal of the police and their relationships to inner-city communities, particularly in neighborhoods of color. These series include "Homicide: Life on the Street" (NBC 1993 - 1999) and "The Wire" (HBO 2002 - present).

order to persuade the reader to correct an initial false impression.<sup>63</sup> Satire and comic irony can also do this work.<sup>64</sup> From Petronius to *Pulp Fiction*, they have performed the functions of parodying stock plots and upending the obvious.<sup>65</sup> Other sorts of deconstructive fiction,<sup>66</sup> including Orwellian fantasy, can sometimes do it. Later we will explore whether these *genres* offered resources that the prosecution could have used to counter the *New-Centurion/Colors* defense at the *Rodney King* trial.<sup>67</sup>

7. *Techniques for communicating narratives to the jury.* One virtue of grounding a litigator's case in stock stories is that s/he can begin to evoke the scripts and trappings of the story during pretrial proceedings or at the very outset of the trial. This makes it possible to use the *voir dire* examination of prospective jurors to sound out the jury's likely reactions to a story before the litigator commits to it by presenting evidence or even taking an overt position regarding the facts of the case in opening argument.

In a high-profile case like *Rodney King*, the litigator may be able to shape a public image of the case before trial, by what s/he says in court filings or pretrial motions arguments or to a quotation-hungry media. The extent to which s/he can talk directly to the media will depend, of course, on whether the judge issues a gag order and, if so, its terms. (Some gag orders, forbidding the lawyers and parties to talk about "the facts" of the case, leave leeway to create impressions of the nature of the case, the issues, even the facts, by talking in terms of analogies to other situations – a kind of discourse in which the creative use of stock stories is particularly at a premium.) All of these

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<sup>63</sup> As Tony Hillerman has pointed out, the classic detective story "emerged as a competition between writer and reader," in which the writer was obliged to "introduce the criminal early, produce all clues found for immediate inspection by the reader" and refrain from *deus ex machina* solutions or scams. In other words, the reader was to be deceived *fairly*, then made to appreciate how s/he had got it wrong. See the *Introduction*, in TONY HILLERMAN & ROSEMARY HERBERT (eds.), *THE OXFORD BOOK OF AMERICAN DETECTIVE STORIES* (1996), at pp. 3 - 4. See also BROOKS at 18 - 29, 211, 238 - 263.

<sup>64</sup> See Delgado, particularly at pp. 2412 - 2415; and, for an example in the criminal trial context, see Philip N. Meyer, "*Desperate for Love*": *Cinematic Influences upon a Defendant's Closing Argument to a Jury*, 18 VT. L. REV. 721 (1994).

<sup>65</sup> See NORTHROP FRYE, *ANATOMY OF CRITICISM: FOUR ESSAYS* 223 - 239 (Princeton paperback ed. 1971) [hereafter, "FRYE"]. The contemporary popularity of macabre comedy in film and on TV – stories that vacillate between wisecracking and bloodbaths, horror exaggerated into humor and *vice versa* – make it particularly easy to move back and forth between parody and pathos without alienating the jury even in trials involving crimes of shocking violence. But this, too, is simply the present variation on an age-old theme: the close proximity between comic irony and the demonic. See *id.* at 178 - 179, 226, 235 - 236.

<sup>66</sup> We use the term in John Gardner's sense: "Deconstructive fiction is parallel to revisionist history in that it tells the story from the other side or from some queer angle that casts doubt on the generally accepted values handed down by legend." GARDNER at 88.

<sup>67</sup> See text at notes 314 - 335 and 598 - 616 *infra*.

pretrial image-building communications present the dangers of prematurity: the image they succeed in projecting may not be the one the litigator would prefer after trial preparation is further advanced. Subject to this *caveat*, though, three points are worth noting: (1) A litigator's freedom to refer explicitly to film or TV analogs of his or her client's situation – or to label an opponent's position as, *e.g.*, “worthy of Jack Nicholson playing Colonel Jessup in *A Few Good Men*”<sup>68</sup> – while arguing to a judge at a pretrial motions hearing is usually greater than it will be in any open-court proceedings during a jury trial. (2) Such pop analogies are frequently the kind of sound-bite stuff the media like to broadcast. And (3) once broadcast, they may stick to the case in later reporting.

If story-based images have attached to a case in pretrial publicity, that makes it easier for the litigator to advert to them in connection with *voir dire* examination of prospective jurors. But if they have not, it may still be possible to use language evocative of stock narratives in talking with the jurors on *voir dire* or in framing written *voir dire* questions in courts where the judge conducts the oral questioning. These evocations have the dual purpose of priming the jury early to think in terms of the narratives that a litigator expects to tap into later and of giving the litigator an opportunity to observe any reactions of prospective jurors to the narrative. Their reactions may suggest that s/he will be wise to play it down – or, conversely, to play it up – or to strike particular jurors.

Means for suggesting narratives to the jury at later points in the trial abound. During opening and closing argument, the litigator may or may not be permitted to make explicit references to stories current in public discourse,<sup>69</sup> but s/he will usually be able to trigger recognition of widespread and recurrent stock narratives – and even of the better-known books or films or TV series that exemplify them – by implicit allusions. She can usually find occasions for similar allusions in questioning witnesses and in making and arguing objections. Witnesses can be prepared to testify in ways that make the narratives come to mind. The very order of a litigator's presentation can imply the narrative.<sup>70</sup> The litigator's style of witness examination and even his or her physical activity in the courtroom can be designed to summon up the narratives s/he wants the jurors to recognize in the evi-

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<sup>68</sup> See text at notes 329 - 336 *infra*.

<sup>69</sup> See A. Leo Levin & Robert J. Levy, *Persuading the Jury with Facts Not in Evidence: The Fiction-Science Spectrum*, 105 U. PA. L. REV. 139 (1956).

<sup>70</sup> As we have previously mentioned, the order of defense opening arguments at the *Rodney King* trial was regimental – in order of the defendants' respective positions in the police command chain. This portrayed the defendants from the outset as rule-bound, respectful of authority, playing it by the book.

dence.<sup>71</sup> (Criminal defense lawyers will consult their clients extensively at the defense table in cases where the prosecution is seeking to depict the client as impulsive and lacking in self-control but not in cases where the prosecution's theory is that the defendant was a criminal mastermind.)

8. *Choosing between explicit and implicit invocation of stock stories.* When a litigator has the option of making more or less explicit references to the stock stories that s/he wants jurors to have in mind, s/he needs to balance the values of clarity and dramatic emphasis against their risks.

One risk is related to the risk of premature commitment. The more unequivocally a litigator has announced his or her reliance on a particular narrative, the more difficult it will be to back off it if subsequent developments weaken that theory of the case or reveal a better one. Overt or overly clear identification of a particular stock story as the theme of a litigator's case invites opposing counsel to argue that the case is built around a fable or that the facts don't fit the fable. More oblique reference to the stock story would confront opposing counsel with a hard choice between ignoring it or reinforcing it by recognizing it and undertaking to refute it. And if a refutation seemed sufficiently persuasive, the litigator could always reply, "That isn't what I meant at all." Similarly, the clarity of a reference increases the extent to which it offers traction for resistance. A juror may be roused to quarrel with the story who would not have reacted to a more ambiguous reference that was nonetheless sufficient to engage the imaginations of jurors more in tune with the tale.

### C. *The Basic Structure and Process of Narrative*

Journalists learn and teach that the recipe for making stories is the Five W's: *Where? Who? What? When? Why?* There is a conspicuous resemblance between this formula and Kenneth Burke's Pentad or "Five Key Terms of Dramatism":

1. Scene - the situation, the setting, the where and when
2. Agent - the actors, the cast of characters
3. Act - the action, the plot
4. Agency - the means, the instruments of action
5. Purpose - the motivations, goals, aims of the characters<sup>72</sup>

Either roster will serve as a handy checklist of the elements that need

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<sup>71</sup> See text at notes 479 - 489 *infra*.

<sup>72</sup> KENNETH BURKE, *A GRAMMAR OF MOTIVES* xv (1945) [hereafter, "BURKE"]: "any complete statement about motives will offer *some kind of* answers to these five questions: what was done (act), when or where it was done (scene), who did it (agent), how he did it (agency), and why (purpose)."

attention in constructing stories for the uses we identified in the preceding subsection. “Elements” as in *elemental*. For each element represents a whole dimension in which choices are possible and arrays of variables should be canvassed before making the final choices.

The five dimensions are, of course, interconnected. They need to be in tune.<sup>73</sup> (Sherlock Holmes could not solve crimes on the scenes of Dostoevsky’s *Brothers Karamazov* or Graham Greene’s *Brighton Rock*. He would be as clueless as the County Attorney at the scene of Susan Glaspell’s *A Jury of Her Peers*. The characters’ motivations in the worlds created by Dostoevsky, Greene, and Glaspell are simply too disordered, their actions too unpredictable, to be puzzled out by Holmes’ brand of linear cause-effect logic.) Choices made in one dimension affect each of the others. (For example, adding characters to a story may require an expansion of the scene to encompass a longer period of time or a wider stage. It may also, by increasing the complexity of the interpersonal dynamics, change the motivations of the characters previously onstage. Furio’s addition to the cast of *The Sopranos* necessitated an episode set in Italy and considerably complicated the emotional chemistry of Carmela’s and Tony’s breakup.) Intensifying the focus upon one dimension may diminish the significance of another.<sup>74</sup> (If Upton Sinclair had devoted less attention to the Chicago stockyard scene and the general plight of the proletariat in *The Jungle*, Jurgis would have been a more complex character and would “naturally” have come to a more tragic end.) And transmutations from one dimension to another can be accomplished by the narrative alchemy that Kenneth Burke describes as re-forging distinctions in the “great central moltenness” where all of the dimensions have a common ground.<sup>75</sup> (Capital defense attorneys, for example, transmute Scene into Agent when they construct mitigation stories in which the defendant’s childhood environment becomes the Villain of the plot.<sup>76</sup>)

The interdependence and partial interchangeability of Scene, Agent, Act, Agency, and Purpose make narrative a highly variable and flexible medium. Still, there is a certain constancy in the way in which agents act to pursue their purposes within the temporal framework of the scene. This constancy resides in what is usually called “plot” – the “principle of interconnectedness and intention [necessary] . . . in moving through the discrete elements – incidents, epi-

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<sup>73</sup> See BURKE at 3 (“It is a principle of drama that the nature of acts and agents should be consistent with the nature of the scene”).

<sup>74</sup> See BURKE at 17.

<sup>75</sup> See BURKE at xix.

<sup>76</sup> See, e.g., Alex Kotlowitz, “In the Face of Death,” *New York Times Magazine*, July 6, 2003, pp. 32 - 38, 46 - 50; Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547 (1995).

sodes, actions – of a narrative.”<sup>77</sup> It reflects “a ‘mental model’ whose defining property is its unique pattern of events over time.”<sup>78</sup> Most stories have a common plot structure. The unfolding of the plot requires (implicitly or explicitly):

- (1) an initial *steady state* grounded in the legitimate ordinariness of things
- (2) that gets disrupted by a *Trouble* consisting of circumstances attributable to human agency or susceptible to change by human intervention,
- (3) in turn evoking *efforts* at *redress* or *transformation*, which lead to a *struggle*, in which the efforts succeed or fail,
- (4) so that the old steady state is *restored* or a new (*transformed*) steady state is created,
- [(5) and the story often concludes with some *point* or *coda* – say, for example, Aesop’s characteristic *moral of the story*: “Birds of a feather flock together,” or “One lie will lead to another and ultimately seal one’s doom ” – a/k/a “*This is the Way the World Works.*”]<sup>79</sup>

To illustrate, let us look at a couple of stories. We have chosen very short ones, so that we can set out the entire story in our text. That will give the reader a chance to identify the *anterior steady state*, the *Trouble*, and so forth, for himself or herself before we comment further.

### *The Water Nixie*

A little brother and sister were once playing by a well, and while they were thus playing, they both fell in. A water-nixie lived down below, who said: “Now I have got you, now you shall work hard for me!” and carried them off with her. She gave the girl dirty tangled flax to spin, and she had to fetch water in a bucket with a hole in it, and the boy had to hew down a tree with a blunt axe, and they got nothing to eat but dumplings as hard as stones. Then at last the children became so impatient, that they waited until one Sunday, when the nixie was at church, and ran away. But when church was over, the nixie saw that the birds were flown, and followed them with great strides. The children saw her from afar, and the girl threw a brush behind her which formed an immense hill of bristles, with thousands and thousands of spikes, over which the nixie was forced to scramble with great difficulty; at last, however, she got over. When the children saw this, the boy threw behind him a comb which made a great ridge with a thousand times a thousand teeth,

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<sup>77</sup> BROOKS at 5.

<sup>78</sup> Bruner, *Narrative Construction* at 6.

<sup>79</sup> This chart is based on one at pages 113 - 114 of *MINDING THE LAW*. For illustrations of the structure in appellate opinions, see *id.* at 77 - 99; 143 - 164.

but the nixie managed to keep herself steady on them, and at last crossed over. Then the girl threw behind her a looking-glass which formed a hill of mirrors, and was so slippery that it was impossible for the nixie to cross it. Then she thought: "I will go home quickly and fetch my axe, and cut the hill of glass in half." Long before she returned, however, and had hewn through the glass, the children had escaped to a great distance, and the water-nixie was obliged to trundle back to her well again.<sup>80</sup>

Get it? The *steady state* – an idyllic domestic portrait of two children playing near their home – is abruptly shattered by the Trouble (they literally fall out of this happy scene into a hell-world) which worsens (they are enslaved and abused) until they initiate *efforts* (to escape) that precipitate the *struggle* (which, as in so many folktales, lasts for three rounds), in which they defeat the villainous nixie, and then all's back to the original idyllic state, with everybody firmly anchored in their proper places again. Now consider:

### *The Star-Money*

There was once upon a time a little girl whose father and mother were dead, and she was so poor that she no longer had a room to live in, or bed to sleep in, and at last she had nothing else but the clothes she was wearing and a little bit of bread in her hand which some charitable soul had given her. She was good and pious, however. And as she was thus forsaken by all the world, she went forth into the open country, trusting in the good God. Then a poor man met her, who said: "Ah, give me something to eat, I am so hungry!" She handed him the whole of her piece of bread, and said: "May God bless you," and went onwards. Then came a child who moaned and said: "My head is so cold, give me something to cover it with." So she took off her hood and gave it to him; and when she had walked a little farther, she met another child who had no jacket and was frozen with cold. Then she gave it her own; and a little farther on one begged for a frock, and she gave away that also. At length she got into a forest and it had already become dark, and there came yet another child, and asked for a shirt, and the good little girl thought to herself: "It is a dark night and no one sees you, you can very well give your shirt away," and took it off, and gave away that also. And as she so stood, and had not one single thing left, suddenly some stars from heaven fell down, and they were nothing else but hard smooth pieces of money, and although she had just given her shirt away, she had a new one which was of the very finest linen. Then she put the money into it, and was rich all the

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<sup>80</sup> JACOB AND WILHELM GRIMM, *THE COMPLETE GRIMM'S FAIRY TALES* 364 - 365 (Margaret Hunt, trans., revised by James Stern, 1972).

days of her life.<sup>81</sup>

Here, the initial happy-family steady state exists only momentarily. (It is created by implication, in the scene with which a reader reflexively surrounds “a little girl.”) It is immediately destroyed by Trouble – the death of the girl’s parents – which worsens into penury, homelessness, imminent starvation. The Trouble drives her to initiate efforts at self-help. (These take a classic folktale form, the Departure on a Journey, assisted by a classic folktale Helper-figure, the “charitable soul.”) Notice that the Trouble here is less dramatic, more a part of the ordinary pattern of human life (children losing parents to death), than in *The Water Nixie*. Indeed, the real indication that the Trouble is unusual enough to require a story to work it out is the *disequilibrium* resulting from the parents’ death, signaled by the word “however.” Since the little girl is good and godfearing, she doesn’t deserve the unhappy condition into which life has plunged her.

The great Russian folklore scholar and theoretician of narrative, Vladimir Propp, described the basic structure of narrative as a sequence of steps similar to ours but more elaborate. Propp’s scheme has 31 steps (Propp calls them “functions”), instead of our 5. The point of present interest is that Propp identified two alternative versions of the Trouble by which “the actual movement” of a story is launched: – “Villainy” (which he labeled Function VIII) and “Lack” (Function VIIIa).<sup>82</sup> *The Water Nixie* is a Villainy story; *The Star Money* is a Lack story.

Once launched, the two stories proceed in a similar manner through a series of efforts and struggles (“tests,” “trials,” “challenges”) of the protagonist[s], to a final resolution that rectifies the imbalance wrought by the Trouble, so that things are once again stable and orderly. But the nature of the resolution is different in the two kinds of stories. In *The Water Nixie* we see the classic outcome of a *restoration narrative*: a return to the original, anterior steady state. In *The Star Money*, we see the classic outcome of a *transformation narrative*: the emergence of a new steady state. Stories launched by *Lack* are inevitably *transformation narratives*, for the obvious reason that whatever was missing or out of kilter in the anterior steady state has to be *supplied* by the action of the story, thereby creating a new steady state. Stories launched by *Villainy* are usually *restoration narratives*, although they may be *transformation narratives* if the Villain succeeds in wreaking enough havoc so that Eden in its original form

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<sup>81</sup> *Id.* at 652 - 654.

<sup>82</sup> VLADIMIR PROPP, MORPHOLOGY OF THE FOLKTALE (1928) 30 - 36 (Laurence Scott trans., 2d ed., 1990).

cannot be restored.<sup>83</sup>

Notice that if *The Water Nixie* had been written by and for nixies instead of humans, it would either have to be told as a *Lack* story or have to begin at a different point in time. As a *Lack* story, the opening scene would depict the good, godfearing, penurious nixie needing but lacking servants. A providential Helper would pitch the idle, good-for-nothing children into the well, but they would prove refractory. After the obligatory three high-speed chases (motorized, if the

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<sup>83</sup> Contemporary stories exhibit the same basic plot structure, for the most part. In those that are relatively straightforward, the basic structure is all you see and all you get. (Watch any crime or international-intrigue or terrorist-threat thriller on TV or rent anything in the Action section of your local Blockbuster.) Stories with more intellectual aspirations and catchier styles may obscure the structure a bit and will usually abjure the happy ending. Take (for another example short enough to reproduce in full), Leonard Michaels' story:

*The Hand*

I smacked my little boy. My anger was powerful. Like justice. Then I discovered no feeling in my hand. I said, "Listen, I want to explain the complexities to you." I spoke with seriousness and care, particularly of fathers. He asked, when I finished, if I wanted him to forgive me. I said yes. He said no. Like trumps.

Here, the anterior steady state is not spelled out, but is created by implication. The phrase "my . . . boy," particularly when conjoined with "little," implies that an ordinary domestic scene – a parent-and-child-relationship-as-usual – existed before the slap. This technique, commonplace nowadays because of the penchant of contemporary writers to cater to the impatience of contemporary readers by starting *in media res*, is nevertheless no invention of recent date. (Witness *The Star Money*.) The slapping of the author's child, with its suddenness and violence emphasized by the verb choice, "smacked," is altogether classic Trouble. So are the ensuing efforts and struggles to come to terms with the Trouble. And there is a decisive resolution – a psychological and moral plateau – at the end ("trumps"!), although it is neither happy nor clean-cut. But endings that are happy and clean-cut are only one, not the exclusive, kind of terminal stasis in the traditional structure. (Witness all extant classic Greek tragedies.) As Jerome Bruner has observed:

Narrative outcomes vary, of course, from the banal to the sublime; they may be inner, like a cleared conscience, or outer, like a safe escape. A wholesome setting-right of what the peripeteia put asunder may be the stuff of true adventure and other old-fashioned stories, but with the growth of the novel – and it is scarcely two centuries old – outcomes have taken an increasingly inward turn, as has literature generally. Story action in novels leads not so much to restoration of the disrupted canonical state of things as to epistemic or moral insights into what is inherent in the quest for restoration. Perhaps this is fitting for our times, though it is scarcely new. If it can be said, for example, that Thomas Mann's "Death in Venice" or *The Magic Mountain* gains its power from an inward resolution of the peripeteia, the same can be said of Sophocles' *Oedipus at Colonus* two millenia before. There may be many fashions in literary narrative, but deep innovations are scarce.

MAKING STORIES at 19 - 20. True, there are forms of post-modernist stories that disregard the traditional basic structure. Many of these obtain their shock effects by visibly flouting that basic structure – often by arousing and then violating the reader's expectation that the basic structure will hold. The latter stories are, in many ways, the best demonstration of the grip that the basic structure continues to have on contemporary readers. Without it, the stories would could not work; they would fall flat for want of expectations to cross. See DAVID LODGE, *THE ART OF FICTION* 188 (1992).

story were filmed for nixie TV), the children would at length be apprehended and reconciled to righteous labor, duly enriching the nixie (if the story were filmed for *bourgeois* nixie TV). As a *Villainy* story, it would have to start at a later time. The anterior steady state would be the solid, satisfying social order in WellWorld during the period when the children were dutifully and productively employed by the nixie before their rebellion. Then, after their villainous rebellion (read as Trouble) and the obligatory three high-speed chases, the restoration of this anterior steady state would inexorably follow.

We believe that the choice of the point in time at which Trouble is depicted as occurring – let’s call this the Trouble Point – is both more unconstrained and more important than are commonly understood. It is more unconstrained because history and daily life *considered apart from their organization into story* seldom offer unmistakable, view-point-free criteria for distinguishing between trouble and solution. All of us know this only too well in the round of our everyday existence: Today’s solution to today’s Problem A becomes tomorrow’s Problem B, and so on – one damn thing after another.<sup>84</sup> So, too, in world affairs. Was the imposition of much-resented restrictions on Germany the solution that fixed the problem of World War I or the trouble that started the problem of World War II? Was regulation or was deregulation of air fares [the problem] [the solution]? So, too, in the familiar barroom sequence. Where exactly is the Trouble Time when X jocularly insults Y, Y angrily insults X back, X threatens Y, Y spits at X, X slaps Y, Y punches X, X stabs Y, Y shoots X dead?

It is only “stories [that] break up the natural continuum of life into events.”<sup>85</sup> “Really,” as Henry James pointed out, “universally, relations stop nowhere, and the exquisite problem of the artist is eternally but to draw, by a geometry of his own, the circle within which they shall happily *appear* to do so.”<sup>86</sup> Peter Brooks puts it just right when he says that the story-teller’s work is “to wrest beginnings and ends from the uninterrupted flow of middles, from temporality itself.”<sup>87</sup> An altogether commonplace strategy for doing this is to create the familiar binary movement of the classic revenge-tragedy (Titus *versus* Tamora, the Hatfields *versus* the McCoys, X *versus* Y), by describing the ascent of either leg of the eternal seesaw as “the origi-

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<sup>84</sup> You probably didn’t notice anything unusual in our use of the word “round” when you read it halfway through this sentence. That’s revealing, right?

<sup>85</sup> GASS at 5.

<sup>86</sup> HENRY JAMES, RODERICK HUDSON (1875), *Preface*, vii (1917 ed.). See JAMES B. STEWART, *FOLLOW THE STORY: HOW TO WRITE SUCCESSFUL NONFICTION* 171 (1998), discussing the writing of a newspaper story about a flood following a torrential rain: “As is often the case, the starting point of any chronology is at least a little arbitrary.”

<sup>87</sup> BROOKS at 140.

nal act . . . [that] sets up an antithetical or counterbalancing movement, . . . [so that] the completion of the movement resolves the tragedy.”<sup>88</sup> The story-teller gets to pick which leg.

For illustration, consider the ways in which we Americans (or at least Northerners) tell ourselves the stories of the American Civil War and of the American Revolution, respectively:

THE AMERICAN CIVIL WAR STORY. Once there was a nation composed of peoples with a common language and heritage but very different regional conditions and customs. Convinced that the central government was oblivious to local needs and hostile to local interests, the partisans of regional self-determination rebelled. A fratricidal war was fought; death and destruction ravaged the land. But in the end the rebels were put down and unity was restored.

THE AMERICAN REVOLUTION STORY. Once there was a nation composed of peoples with a common language and heritage but very different regional conditions and customs. *The central government insisted on imposing its authority everywhere.* Convinced that it was oblivious to local needs and hostile to local interests, the partisans of regional self-determination rebelled. A fratricidal war was fought; death and destruction ravaged the land. But in the end the rebels won their freedom.

Prior to the word “end” in both stories, the only difference is the insertion of the italicized sentence into the Revolution story, immediately following the “Once-there-was” description of the anterior steady state. That sentence creates a Trouble that turns the rebels’ uprising into an Effort at Redress. Without it, the rebels’ uprising was the Trouble. The different endings of the two stories therefore rectify different Troubles. (And notice: (1) The italicized sentence does the trick even without attributing any especially villainous behavior to the central government; indeed (2) the same sentence could have been inserted into the Civil War story with impeccable historical propriety.)

For another example, consider the contrast between two appellate opinions reaching opposite results in the same case. In the first opinion, the Alabama Court of Criminal Appeals (“CCA”) is affirming the conviction and death sentence of Dennis McGriff. In the second, the Alabama Supreme Court is reversing the CCA and ordering a new trial for McGriff on the ground that the trial court erred in failing to instruct the jury properly on McGriff’s heat-of-passion defense that would have reduced his crime to manslaughter.

The CCA opinion begins:

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<sup>88</sup> FRYE at 209. Consider, for example, the manifold tragedies recounting the tale of the House of Atreus; or Shakespeare’s *Titus Andronicus*; or compare John Wayne in *The Searchers* with Burt Lancaster in *Apache* (a film whose only redeeming virtue is that it starts with the unconventional leg of the seesaw up).

The appellant, Dennis Demetrius McGriff, was convicted of murdering Michael McCree by shooting McCree while McGriff was in a motor vehicle, a violation of § 13A-5-40(a)(18), Ala.Code 1975. The jury found, as the only aggravating circumstance, that McGriff had “knowingly created a great risk of death to many persons” and recommended, by a vote of 10 to 2, that McGriff be sentenced to death. The trial court accepted the jury’s recommendation and sentenced McGriff to death by electrocution.

The State’s evidence tended to show the following. On October 22, 1996, as McGriff, Ebra “Yetta” Hayes, and Gabriel Knight, were driving by a residential area on 7th Avenue in Ashford, McGriff leaned out of the car window and fired three shots. One shot hit McCree in the back, fatally wounding him. The coroner testified that McCree died from a gunshot wound that entered his chest cavity through his back; the bullet pierced both lungs and his aorta.

Jeffery McCree, the victim’s brother, was present at the shooting and testified to the events surrounding his brother’s death. [*Two and a half paragraphs are omitted here. They relate in graphic detail how McGriff was observed shooting McCree, how the police apprehended him with the murder weapon, and how he told them he shot McCree, hadn’t intended to kill McCree, but “would not lose any sleep over it.”*]

At trial McGriff admitted that he had fired the fatal shot. In opening statement, counsel said that McGriff had fired the shot that had killed McCree but that the crime was not a capital offense because, he said, McGriff did not intend to kill McCree. McGriff’s defense was that he had been aiming at the car McCree was standing near when he fired the fatal shot. He called witnesses who testified that earlier in the day of the murder, McCree and McGriff had had a confrontation and that McCree and two others, Jerry Thompson and “Scat” Walker, had been chasing McGriff and his companions and throwing gasoline bombs at the car McGriff was riding in. According to witnesses, these events occurred about five hours before McCree was shot and killed.<sup>89</sup>

Now, here is how the Alabama Supreme Court opinion begins:

Dennis Demetrius McGriff was indicted, tried, and convicted for capital murder committed by shooting from a vehicle. [*The balance of this paragraph is omitted. It cites the statute under which McGriff was convicted and relates the procedural history of the case ending with the affirmance of McGriff’s death sentence by the Court of Criminal Appeals.*]

#### *Facts*

According to McGriff, Michael McCree and others accompanying McCree tried to injure or to kill McGriff and his companion by

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<sup>89</sup> *McGriff v. State*, 908 So.2d 961, 972 - 974 (Ala. Crim. App. 2001) [footnotes omitted].

throwing a firebomb at them and pursuing them in a high speed car chase, on October 22, 1996. A disputed period of time thereafter on the same day, McGriff rode as a passenger in a car driven slowly by an abandoned club and its parking lot, where McCree mingled with 30 or 40 others near the car McCree and his companions had used in the preceding chase. McGriff fired one “warning shot” into the air and then two shots in rapid succession toward the people in the parking lot by some accounts, or toward the car used by McCree and his companions in the earlier chase by McGriff’s own account. One of the shots hit and killed McCree. In a statement to the police, while McGriff did not deny that he had fired the shot which killed McCree, McGriff insisted that he had not intended to kill McCree or anyone else and claimed that he had wanted only to scare McCree and the others involved in the incident earlier that day.

Similarly, at trial McGriff did not dispute that he had killed McCree. Rather, a principal feature of McGriff’s trial strategy was his effort to persuade the jury to find him not guilty of capital murder but guilty only of manslaughter because he had fired the shots in a heat of passion provoked by the assault initiated and perpetrated by the victim and his companions.<sup>90</sup>

In the CCA’s version, the anterior steady state – a brief but placid scene of three people riding in a car through “a residential area on 7th Avenue in Ashford” – was abruptly shattered by Trouble when “McGriff leaned out of the car window and fired three shots.” It is not until three paragraphs later, after McGriff and his lawyer have both admitted his guilt in shooting McCree to death, that the CCA tells us about evidence of a pre-shooting episode in which McCree and companions chased McGriff and hurled Molotov cocktails at him. This episode enters the narrative as *testimony* rather than *fact*. Its location in the story makes it a *post hoc* excuse-abuse defense concocted by McGriff at trial in the hope of getting away with murder. By contrast, the Alabama Supreme Court tells the story in a sequence that makes the Trouble the episode in which McCree pursues McGriff in a high-speed car chase and firebombs him. (The Alabama Supreme Court prefaces the episode with the qualifying phrase “According to McGriff,” but it counteracts the tendency of the phrase to reduce the episode from *fact* to *testimony* by baldly labeling the entire tale “*Facts*”.) This change of sequence from the CCA’s account turns McGriff’s shooting of McCree from Trouble into a part of the struggle aimed at redressing the Trouble, and it thereby points to a very different outcome than the CCA’s. (Notice how the choice of a different Trouble Time changes even the physical scene. What was a “residential neighborhood” – a fitting part of the anterior steady state in the CCA’s account – be-

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<sup>90</sup> *Ex parte McGriff*, 908 So.2d 1024, 1026 - 1027 (Ala. 2004).

comes a war zone in the Supreme Court's: "an abandoned club and its parking lot, where McCree mingled with 30 or 40 others.")

The defense lawyers in the *Rodney King* trial used precisely the same sequence-shifting technique. They did to the prosecution's version of the assault on Rodney King what the Alabama Supreme Court did to the CCA's version of the shooting of Michael McCree and what the American Revolution story does to the American Civil War Story. They started the narrative earlier, with Rodney King speeding outward from Central L.A. – an embodiment of the dangerous inner-city, nonwhite horde heading for the city's vulnerable exurbs like Simi Valley.<sup>91</sup> They made that the Trouble, compounded by King's high-speed flight when a California Highway Patrol vehicle tried to pull him over, and by his belligerent exit from the vehicle when it was finally stopped by the CHP vehicle and cars from two other police agencies. This turned the episode of the police officers beating Rodney King, captured on the videotape that had horrified so many TV viewers, from Trouble into part of the redressive struggle. Thus, without altering the videotape, they could alter its meaning entirely.<sup>92</sup> And they then proceeded to do again at the micro level what this time-change maneuver had done at the macro level. By breaking the beating episode shown on the tape down into a sequence of baton strokes and kicks by the officers and showing that each stroke or kick had been preceded by some (often minuscule) movement of King's body which could be interpreted as threatening, they made the jerkings of King's limbs the Trouble and turned the officers' truncheon blows from Trouble into Solution.<sup>93</sup> Later parts of this article will examine in detail how this transformation of the narrative was carried off.

#### D. *The Special Features of Narrative in a Jury-Trial Setting*

Although stories have a core of common elements and a common basic structure, they obviously differ widely depending upon the purposes for which they are told, the setting in which they are told, and the conventions and constraints of that setting. Fictional stories told for didactic purposes (in the tradition of Aesop's Fables) have different conventions and constraints than do cautionary tales, or novels

<sup>91</sup> See Vogelmann at 574 & n.6; Cook at 310.

<sup>92</sup> See text at notes 264 - 270, 429 - 435 and 662 - 672 *infra*; Judith Butler, *Endangered/Endangering: Schematic Racism and White Paranoia*, in ROBERT GOODING-WILLIAMS (ed.), *READING RODNEY KING – READING URBAN UPRISING* 15 (1993) [hereafter, "Butler"]; Troutt at 110 - 111.

<sup>93</sup> See text at notes 261 - 263, 271 - 284, 436 - 457, 461 - 465, 500 - 503 *infra*; Crenshaw & Peller, at 285 - 286; Goodwin at 616 - 621; Darryl K. Brown, *Trial Advocacy as Legal Reasoning – and Legal Realism*, 24 N.Y.U. REV. LAW & SOC. CHANGE 315, 326 - 327 (1998).

and dramas aimed at exploring the human condition, or novels and movies and TV shows aimed at entertainment. (Only in the fourth of these *genres* – and perhaps in some homiletic variants of the second – is the rule “[i]f you get bogged down, just kill somebody.”<sup>94</sup>) Purportedly nonfiction stories told by historians<sup>95</sup> have different conventions and constraints than those told by ethnographers and anthropologists<sup>96</sup> or by propagandists.<sup>97</sup> Certain conventions and constraints binding the stories that litigators can tell in jury trials deserve special attention:

*First, the stories that litigators ask the jury to believe are “the facts” of the case* (although not necessarily the stories to which they refer for analogies or illustrations) *must appear to be true*. Jurors view their job as getting at the truth of what happened. A litigator’s version of events must appear to be true not only from the standpoint of verisimilitude (lifelikeness) but from the standpoint of external referentiality (conformity to any information that jurors will take to be objective “fact”). In the *Rodney King* trial, the videotape of the defendants beating Mr. King was a brute fact that defense counsel had to accommodate into whatever narrative they chose to tell. (Indeed, the brute was a 500-pound gorilla, requiring considerable narrative ingenuity to housebreak.) And a trial litigator’s resources for creating facts are limited. S/he cannot, like a novelist or playwright, conjure physical props out of thin air or put into the mouths of witnesses any words that s/he cannot convince them to utter under oath. If admissible evidence of fact *X* just isn’t out there (or if bad luck or a client’s inability to pay for thoroughgoing investigation prevents the litigator from obtaining evidence of fact *X*), then the litigator’s story at trial has either got to jibe with the nonexistence of fact *X* or contain a sub-story that explains why fact *X* is unprovable though true.

Further, some jurors have an unshakeable belief that truth is a matter of objective fact to be discerned exclusively by logical deduction from physical evidence and the accurate testimony of reliable wit-

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<sup>94</sup> Michael Maren, “How to Manufacture a Best Seller,” *New York Times Magazine*, March 1, 1998, p. 30, at p. 32.

<sup>95</sup> There has been much useful analysis of the role of narrative in writing history. See the sources cited in *MINDING THE LAW* at 365 n. 10; ARTHUR C. DANTO, *NARRATION AND KNOWLEDGE* (1985); SIMON SCHAMA, *DEAD CERTAINTIES: (UNWARRANTED SPECULATIONS)* (1991).

<sup>96</sup> See, e.g., CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* (1973); CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* (1983); CLIFFORD GEERTZ, *WORKS AND LIVES: THE ANTHROPOLOGIST AS AUTHOR* (1988).

<sup>97</sup> See, e.g., JACQUES ELLUL, *PROPAGANDA: THE FORMATION OF MEN’S ATTITUDES* (Konrad Kellen & Jean Lerner trans. 1973); ANTHONY R. PRATKANIS & ELLIOT ARONSON, *AGE OF PROPAGANDA: THE EVERYDAY USE AND ABUSE OF PERSUASION* (1992).

nesses. These jurors will resent and resist any suggestion by a trial attorney that the jury needs to *interpret* the evidence. They will be positively outraged at the idea that *stories* have anything to do with truth-finding. Such jurors are not immune to the influence of narrative. Indeed, their denial of the need for interpretation in fact-finding may make them peculiarly prone to reach uncritical conclusions on the basis of stories that they do not realize they have in their heads – like the very story that the only way to get at truth is Sherlock Holmes'. But a litigator facing jurors of this sort needs to tell his or her stories in the manner advised by the classic rhetors, using art to conceal his or her art.<sup>98</sup>

*Second, a litigator's story to a jury usually needs to accommodate the opposition's story* (because it needs to trump it) *and always needs to be made as immune as possible against challenge*. Trial stories are stories told in contemplation of contest.<sup>99</sup> Except on the rare occasions when a story can be unveiled for the first time in rebuttal closing argument, the opposition will get a chance to refute it or coopt it. This means that, to the extent possible, stories should be built in such a way that an assault on any piece will not bring down the whole; vulnerable pieces should be eliminated; loose ends are usually better left hanging than tucked in, if the opposition is likely to pull them out again. And, the litigator always needs to consider whether something s/he is thinking of putting into his or her story can be spun by the opposition to support a competing story.

*Third, a litigator's story to a jury will invariably be an incomplete story, a story without a last chapter*. It has to point to a concluding chapter that the jury's verdict will write. It has to have a role for the jury to play, and that role has to be made an attractive one – sleuth, quester-after-Truth, avenger, righter-of-otherwise-irremediable-wrongs.

*And, fourth, of course, the last chapter that the jury is called upon to write must be a verdict in favor of the litigator's client*. Q.E.D.

## II. THE BACKTRAIL AND THE BACKDROP OF THE TRIAL

So much for our analytic orientation. We need now to get oriented to the setting of the *Rodney King* trial itself. We first summarize the procedural posture of the case at the outset of the trial, identify the people principally involved, and remind ourselves and our readers of the general positions of the parties on the issues to be tried. (Sub-

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<sup>98</sup> See, e.g., [Cicero], *Rhetorica ad Herennium*, book IV, ch. vii, ¶ 1; Quintilian, *Institutio Oratoria*, book I, ch. xi, 11; book IV, ch. i, 55 - 60 and ii, 58 - 60.

<sup>99</sup> See BURNS at 164 - 166; cf. Delgado at 2418 ("there is a war between stories. They contend for, tug at, our minds.").

part II.A below.) We then sketch the cultural surround, with a focus on the prevalent public images of urban crime, its perpetrators, and the job and plight of the police. (Subpart II.B.)

*A. Foreground Orientation: Time, Place, Persons, Case*

On February 24, 1992, *voir dire* examination of prospective jurors began in the case formally styled *People of the State of California v. Laurence Powell, Timothy E. Wind, Theodore Briseno, and Stacey Koon*. For the better part of a year before this day, the court and counsel had been occupied with pretrial motions. The most important of these for our purposes was the defendants' motion for a change of venue out of Los Angeles, the site of the beating of Rodney King. As a consequence of that motion, the case was transferred to Simi Valley, Ventura County, for trial.<sup>100</sup>

The four defendants were uniformed officers of the Los Angeles Police Department ("LAPD"). The indictment against them contained five counts. Count I charged all of the defendants with Assault with a Deadly Weapon (Baton or Shod Foot) upon Rodney King.<sup>101</sup> Count II charged them all with Excessive Force Under Color of Authority.<sup>102</sup> Counts III and IV charged Officer Laurence Powell and

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<sup>100</sup> The grand jury that indicted the four defendants was a Los Angeles Grand Jury. See Leslie Berger & Tracy Wood, "At Least 4 Officers Indicted in Beating - Police Probe: Grand Jury Goes Beyond Gates' Recommendation that Three Be Prosecuted and 12 Be Disciplined," *Los Angeles Times*, March 15, 1991, p. A1. The four defendants then moved for a change of venue; the trial court denied the motion; but its ruling was overturned on appeal. See *Powell v. Superior Court*, 232 Cal. App. 3d 785, 792, 802, 283 Cal. Rptr. 777, 781, 788 (2d Dist. 1991). The Court of Appeal concluded that "there is a substantial probability Los Angeles County is so saturated with knowledge of the incident, so influenced by the political controversy surrounding the matter and so permeated with preconceived opinions that potential jurors cannot try the case solely upon the evidence presented in the courtroom," and directed the trial court to grant a change of venue, leaving to that court "the ultimate selection of a site for a fair trial." *Id.* at 803, 283 Cal. Rptr. at 788. On remand, the trial court selected Ventura County as the site for the trial. See Andrea Ford & Daryl Kelley, "King Case to be Tried in Ventura County," *Los Angeles Times*, November 27, 1991, p. A3. For further discussion of the change of venue and its ramifications, see text at notes 196 - 222 *infra*; sources cited in note 7 *supra*.

<sup>101</sup> See *People v. Powell*, Reporter's Daily Transcript of Proceedings, vol. 44, page 5255, lines 16 to 20 (March 5, 1992) (opening statement of Deputy D.A. Terry White [hereafter, "White opening"]). [The transcript of the trial will hereafter be cited as "Tr." with references to volume, page and line numbers and the date of the proceedings.] As the judge instructed the jury at the close of the trial, California law (Cal. Penal Code § 245(a)(1)) defined the elements of Assault with a Deadly Weapon as (1) "an unlawful attempt, coupled with a present ability, to apply physical force upon the person of another," by an individual possessing "the present ability to apply such physical force," with "general criminal intent"; and (2) "with a deadly weapon or instrument [defined as "any object, instrument or weapon which is used in such a manner as to be capable of producing and likely to produce death or great bodily injury"] or by means of force likely to produce great bodily injury." Tr. vol. 78, 14096/29 - 14101/4 (April 23, 1992).

<sup>102</sup> See Tr. vol. 44, 5255/20 - 24 (March 5, 1992) (White opening). In the jury instructions,

Sergeant Stacey Koon, respectively, with Submission of a False Police Report.<sup>103</sup> Count V charged Koon with being an Accessory After the Fact to a Felony.<sup>104</sup> The defendants pleaded not guilty to all charges.

The roster of major players at the trial included the four defendants, Judge Stanley M. Weisberg, and the following six lawyers:

FOR THE PEOPLE: Terry White and Alan Yochelson  
Deputy District Attorneys in the Office  
of Ira Reiner, Los Angeles County  
District Attorney

FOR THE DEFENSE: Darryl Mounger  
Counsel for Defendant Stacey Koon  
Michael P. Stone  
Counsel for Defendant Laurence  
Powell  
Paul R. De Pasquale  
Counsel for Defendant Timothy E.  
Wind  
John Drummond Barnett  
Counsel for Defendant Theodore  
Briseno

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the judge defined the crime of Excessive Force Under Color of Authority (Cal. Penal Code § 149) as having the following elements: “One, the defendant was a police officer; Two, a person was assaulted or beaten by a police officer; Three, the assault or beating was committed under color of authority and without lawful necessity.” Tr. vol. 78, 14101/19 - 25 (April 23, 1992). The judge explained that “[i]n making an arrest the officer may subject the person being arrested to such restraint as is reasonable for the arrest and detention . . . [and] may use reasonable force to make such arrest or to prevent escape or to overcome resistance . . . [but] is not permitted to use unreasonable or excessive force in making an otherwise lawful arrest . . . [and a] person being arrested may use reasonable force to protect himself against such excessive force.” *Id.* at 14102/17 - 14103/28. “The reasonableness of a particular use of force,” the judge explained, “must be judged from the perspective of a reasonable officer under the same or similar circumstances.” *Id.* at 14105/26 - 14106/2.

<sup>103</sup> See Tr. vol. 44, 5255/25 - 5256/5 (March 5, 1992) (White opening). The judge defined the crime of “Filing a False Police Report by a Peace Officer” (Cal. Penal Code § 118.1) as having the following elements: (1) “the defendant was acting as a peace officer at the time of the offense”; (2) “the defendant filed a report with the agency which employs him regarding the commission of any crime or investigation of any crime”; (3) “the defendant made any statement regarding any material matter in the report which he knew to be false, whether or not the statement was certified or otherwise expressly reported as true”; and (4) “the defendant had the specific intent to make a false statement regarding any material matter in the report.” Tr. vol. 78, 14109/11 - 27 (April 23, 1992).

<sup>104</sup> See Tr. vol. 44, 5256/3-5 (March 5, 1992) (White opening). The judge defined the crime of “Accessory to a Felony” (Cal. Penal Code § 32) as the conduct of a “person who, after a felony has been committed, harbors, conceals or aids a principal in such a felony with the specific intent that such principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that such principal . . . has committed such felony or has been charged with such felony or convicted thereof.” Tr. vol. 78, 14110/22 - 14111/9 (April 23, 1992).

In this lineup of defendants, judge, and lawyers, only one individual was African-American: Deputy District Attorney Terry White.

In later portions of this article, we will meet other important actors in the trial – the jurors, defense expert witness Charles Duke, and prosecution witness Melanie Singer, in particular. *Not* onstage as a player – at least in the events that unfold as courtroom drama – is Rodney King himself. The prosecutors did not call him to the witness stand and, as one might expect, defense counsel did not do so.<sup>105</sup> His story and his perspective, to the extent that they were presented at all, were conveyed to the jury by the testimony of other people, by the videotape of the defendants' beating of Mr. King, and by expert witnesses' interpretations of the events that appear in the videotape.

As the jury would soon learn during the opening statements for all parties, the events leading up to the encounter between Rodney King and the four defendants on March 3, 1991, were not in dispute.<sup>106</sup> At about 12:30 a.m. that day, California Highway Patrol Officers Melanie and Tim Singer (spouses assigned to the same patrol

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<sup>105</sup> Although Mr. King was on the list of possible prosecution witnesses at the beginning of the trial and Deputy D.A. Terry White stated to reporters early in the trial that “Rodney King will testify at some time during this trial” (see Richard A. Serrano, “Prosecution to Rest Without Calling King,” *Los Angeles Times*, March 17, 1992, at p. B1), the prosecution rested without calling him to the witness stand in the state’s case-in-chief (see *id.*; Henry Weinstein, “Keeping King Off Stand Was a Wise Move, Experts Say,” *Los Angeles Times*, March 19, 1992, at p. B1) or in rebuttal to the defense case. In the subsequent trial of the four officers in federal court on charges of civil rights violations, Mr. King did take the witness stand in the prosecution’s case-in-chief. See Jim Newton, “2 Officers Guilty, 2 Acquitted,” *Los Angeles Times*, April 18, 1993, p. A1 (“And in the [federal] trial’s emotional climax, King took the stand, testifying in public for the first time about the beating.”); Jim Newton, “‘I Was Just Trying to Stay Alive,’ King Tells Federal Jury,” *Los Angeles Times*, March 10, 1993, p. A1.

<sup>106</sup> The events leading up to the encounter were described by Deputy District Attorney Terry White at considerable length in his opening statement. See Tr. vol. 44, 5257/13 - 5265/5 (March 5, 1992). White’s description was not contested by the lawyers for the four defendants in their opening statements. See *id.* at 5279/21 - 5280/1 (opening statement of Darryl Mounger on behalf of Stacey Koon [hereafter, “Mounger opening”]) (“Now, the evidence is going to show you that approximately, like the district attorney has given you and the way the facts will come out, and I’m not going to cover a lot of those in detail because I don’t want to go over the same thing, but you are going to hear that at about 12:37 in the morning that the California Highway Patrol did in fact see a car speeding and they did try to stop it.”); *id.* at 5296/16 - 5303/13 (opening statement of Michael Stone on behalf of Laurence Powell [hereafter, “Stone opening”]) (describing the initial events, with occasional asides like “[a]s Mr. White mentioned to you” (5296/17-18) and “as Mr. White told you” (5299/28)); *id.* at 5331/18 - 5333/17 (opening statement of Paul De Pasquale on behalf of Timothy E. Wind [hereafter, “De Pasquale opening”]) (“I’m not going to speak to you at great length about the evidence. You’ve already heard it discussed by three attorneys from their various perspectives. . . . [A]fter a process that you’ve heard described in various ways and emphasizing various details, the King vehicle stopped.”); *id.* at 5343/8 - 10 (opening statement of John Barnett on behalf of Theodore Briseno [hereafter, “Barnett opening”]) (“I’m not going to rehash what the other lawyers have said and I’m sure you are kind of tired of listening to lawyers not argue this case.”).

vehicle that night) attempted to stop a car for speeding and, when the car did not stop, pursued it and radioed the Los Angeles Police Department to send a unit to assist them. As the Singers continued to pursue the motorist at high speeds, they were joined by LAPD patrol cars, one of which contained Officers Timothy Wind and Laurence Powell and another of which contained Sergeant Stacey Koon. Eventually the car stopped and, in response to a police order to exit the car, the driver and two passengers emerged. The two passengers left the car first and, one by one, obedient to police orders, assumed a prone position, face-down, on the ground. The driver, Rodney King, then got out of the car.

What happened next was the subject of intense dispute and was the central focus of the trial. The prosecution's version, spelled out in Terry White's opening statement to the jury, was that Mr. King "was initially uncooperative" but did comply with the officers' orders to lie down on the ground. CHP Officer Melanie Singer approached to handcuff him but was told by LAPD Sergeant Koon to "Stop, we'll handle this." The LAPD officers then attempted to subject the recumbent Mr. King to "some type of control move . . . [that] was done in an ineffective manner." Mr. King, "while he was not actually punching anyone or hitting anyone, was not allowing them to get control of him." Sergeant Koon attempted to subdue him with a taser dart,<sup>107</sup> but "the taser apparently was not effective," and Mr. King "rose to his feet" and began to run, in a move that "could be viewed either as an attack of Officer Powell or running away from Officer Powell." Powell "struck him a blow to the face with a [metal police] baton much as a baseball batter would swing at a pitch," knocking Mr. King off his feet. Then, when King was on the ground, no longer resisting, Powell and the other officers swarmed around him, beating him with their batons and kicking him in a torrent of violence that "continued and continued and continued for no just reason."<sup>108</sup> And, according to the prosecution, Sergeant Koon and Officer Powell later wrote false police reports to try to "cover up" this misconduct.<sup>109</sup>

The defense versions of these events were sharply at odds with the prosecution's, although the four defendants did not completely agree among themselves. Koon, Powell and Wind made common cause, contending – as their lawyers told the jury in their opening

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<sup>107</sup> A taser is a device that fires darts tailed by electric wires. When the dart sticks in a person's skin or clothing, the device discharges a powerful electric current through the person's body, causing him or her to lose muscle control and fall to the ground.

<sup>108</sup> See Tr. vol. 44, 5263/25 - 5269/24 (March 5, 1992) (White opening). The quoted passages are in *id.* at 5269/21, 5265/5, 5265/11 - 13, 5265/18 - 21, 5266/22, 5266/27 - 5267/2, 5267/5 - 7, and 5269/4 - 8.

<sup>109</sup> *Id.* at 5269/9 through 5275/23.

statements – that King exhibited “bizarre behavior from the very moment he was first sighted by the CHP officers through the point that he was finally taken into custody” after the LAPD officers had subdued his resistance by the necessary use of force.<sup>110</sup> Because of this bizarre behavior, King’s physical appearance, and King’s apparent imperviousness to electric shocks from the taser that would have floored a normal human being,<sup>111</sup> the officers all concluded that King was under the influence of PCP, “angel dust,” a drug that they asserted makes a “duster” highly dangerous and difficult to control.<sup>112</sup> When ordered to assume a prone position, King got down on his hands and knees but refused to lower himself all the way to the ground.<sup>113</sup> He shook off four officers who tried to seize his arms and legs, and “began to rise up.”<sup>114</sup> Koon then fired two taser darts into King but, “rather than causing Rodney King to fall down, . . . Rodney King rose up to his feet and groaned, “Ahh, ahh,” and started advancing toward Koon.”<sup>115</sup> Koon shot him twice more with the taser and then “managed to talk Rodney King down to the prone position”; but a moment later, “King, without warning, with no one touching him, rose to his feet and turned, within two seconds . . . in a violent charge to[ward Officer] Powell.”<sup>116</sup> After Powell responded by knocking King to the ground with a baton stroke, King continued to show signs of efforts to

<sup>110</sup> *Id.* at 5326/1- 13 (Stone opening). For example, when Mr. King first got out of the car he laughed, put one hand on the vehicle, “waved at a helicopter . . . [and then] reached down and put his hands to his rear, and when Melanie Singer ordered him ‘Get your hands away from your butt,’ Rodney King turned to her and shook [his rear end] at her.” *Id.* at 5282/12 - 16 (Mounger opening); see also *id.* at 5302/27 - 5303/11 (Stone opening); *id.* at 5335/5 - 25 (De Pasquale opening).

<sup>111</sup> See *id.* at 5289/3 - 12 (Mounger opening); *id.* at 5304/15 - 5305/7, 5325/14 - 19 (Stone opening); *id.* at 5336/25 - 5337/3 (De Pasquale opening).

<sup>112</sup> See, e.g., *id.* at 5282/17 - 25 (Mounger opening) (“Rodney King displayed the objective symptoms of being under the influence of something, and Sergeant Koon will tell you, ‘I knew he was under the influence of something.’ I saw a blank stare in his face. I saw watery eyes. I saw perspiration. I saw that he swayed. I saw that he was slow to follow the command of the officers. I saw him looking through me.”); *id.* at 5325/17 - 5326/19 (Stone opening) (“The conclusion of every officer who was there at the scene was that they had a duster on their hands, a person who was under the influence of phencyclidine, PCP, or angel dust.”; “Police officers are trained not to tie up with persons that are violent or possibly under the influence of drugs. In particular, PCP is . . . one of the most dangerous drugs that confronts police officers in the course of their duties.”); *id.* at 5334/24 - 5335/4 (De Pasquale opening) (“It was Tim Wind’s awareness, upon hearing this advice, ‘Watch out, he’s dusted,’ that not only for police officers, but even for the subject, even for the person suspected of being under the influence, you have a very dangerous situation, the potential for life-threatening confrontation.”). See also note 269 *infra*.

<sup>113</sup> *Id.* at 5283/13 - 15 (Mounger opening); see also *id.* at 5303/12 - 13 (Stone opening).

<sup>114</sup> *Id.* at 5304/15 (Stone opening); see also *id.* at 5288/7 - 25 (Mounger opening).

<sup>115</sup> *Id.* at 5289/7 - 10 (Mounger opening).

<sup>116</sup> *Id.* at 5289/13 - 27 (Mounger opening); see also *id.* at 5305/1 - 16, 5320/19 - 21 (Stone opening).

rise, presumably to renew his assaultive behavior.<sup>117</sup> Under these circumstances, counsel for Koon, Powell and Wind argued, the officers were compelled to use force to overcome King's resistance; the amount of force they used was reasonable; hence, it was justified as necessary to effect a lawful arrest. Defense counsel for Officer Briseno, who presented his opening statement last, told the jury that Briseno had been trying to protect King and had, in particular, tried to stop his fellow officer and co-defendant Powell from repeatedly striking King in the face with a metal police baton.<sup>118</sup>

### B. Background Orientation: Race and the City

Setting the scene for our analysis of the trial requires that we look beyond the case itself and the confines of the Simi Valley courtroom. As we have noted, an estimation of the probable mindsets of the jurors – and of the opportunities the lawyers had for influencing the jurors' views and ultimately their verdict – requires familiarity with the stock scripts and stock stories common at that time in television, movies, newspapers and books. Particularly relevant are scripts and stories about the police, especially those that feature encounters between white police officers and African-American civilians in an urban setting like Los Angeles.

Of course we cannot assume that any individual member of the jury venire was exposed to these stock narratives – let alone influenced by them. Nor could the lawyers in the *Rodney King* trial make such assumptions about a particular juror. But the lawyers could consider narratives current in the culture as indicia of likely predispositions of the jurors generally and as raw material for stories to be embedded in *voir dire* questions, opening statements, witness examinations, and closing arguments. So those narratives can serve a similar function for us as we reconstruct the lawyering choices made by the prosecutors and defense attorneys in the trial and as we imagine alternative choices that could have been made.

Our task, then, is to cast our minds back a decade and a half . . .

In the years preceding the Rodney King trial in 1992, the driving force in national criminal justice policy was the so-called “War on Drugs.” This militant initiative was generating an ever-growing num-

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<sup>117</sup> See *id.* at 5292/23 - 27 (Mounger opening) (“[W]hen he starts to rise Sergeant Koon believes, based upon observing his body actions . . . , that he is attempting to get back up to attack.”); see also *id.* at 5305/1 - 16 (Stone opening); *id.* at 5339/9 - 12, 5340/11 - 14 (De Pasquale opening).

<sup>118</sup> See *id.* at 5344/10 - 27 (Barnett opening) (“And when he [Briseno] saw . . . the torrent of blows [by Powell], he went over to Officer Powell, who was . . . poised to strike again. ¶ And he stopped him. . . . And he pushed Powell back . . . because Officer Briseno was afraid . . . that Mr. King was going to be further beaten and so he pushed him away.”).

ber of arrests of African-Americans in the inner city and an ever-increasing over-representation of African-American men in prisons.<sup>119</sup> Politicians were advancing their careers by “talking tough” on law-and-order issues, typically portraying the inner city as a dangerous war zone that could be pacified only by expanding the police force, arresting more drug dealers, lengthening prison sentences, and building more prisons.<sup>120</sup> Many of the mainstream media were propagating these images by prominently featuring stories about drug wars, youth gangs, and the prevalence of violence in the inner city.<sup>121</sup>

Jurors who watched crime films or television shows were typically exposed to portrayals of the inner city that made the world of a metropolitan police officer appear a relentlessly dangerous one. It was hardly surprising that Sergeant Phil Esterhaus of “Hill Street Blues” would end each week’s roll call with the admonition: “Let’s be careful out there.” At least for fictional police officers, danger lurked everywhere and violence could erupt at any moment. The pilot episode of “Hill Street Blues” ended with Officers Bobby Hill and Andy Renko gunned down in an abandoned building by drug dealers. The climax of the movie *Colors* comes when Robert Duvall’s character, Officer Bob Hodges is shot to death in a burst of gunfire that erupts without warning (to Duvall/Hodges, although the viewing audience has been cued to expect it) during the arrest of partying gang members. In Joseph

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<sup>119</sup> See e.g., STEVEN R. DONZIGER (ed.), *THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION* 115 - 118 (1996); MARC MAUER, *RACE TO INCARCERATE* 143 - 151 (1999); JEROME MILLER, *SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM* 80 - 86 (1996); MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995).

<sup>120</sup> See e.g., Michael deCourcy Hinds, “The Primary for Mayor is Leaving Many in Philadelphia Befuddled,” *New York Times*, May 20, 1991, p. A13 (“former Mayor Frank L. Rizzo [then running for Mayor of Philadelphia] . . . is, for the fifth time in 20 years, bearing the standard of law and order here in what he calls ‘Dodge City,’ . . . [and] has said he would find the money to hire 1,500 more police officers by doing things like eliminating programs for AIDS victims and the homeless”); Joseph Treaster, “Drug Office Would Have New Voice Under Florida’s Low-Key Governor,” *New York Times*, November 30, 1990, at p.16 (“As the Governor of Florida, Bob Martinez doubled the state’s prison cells, [and] stiffened penalties for drug dealers . . . Mr. Martinez is known primarily as a tough law-and-order man.”); “The Candidates on the Issues: Comparing Their Answers: Crime and Punishment,” *New York Times*, August 30, 1989, at p. B3 (quoting Rudolph Giuliani, then running for Mayor of New York City, that “we’re going to need 4,000 to 5,000 more cells over a five-year period . . . [a]nd we’ve got to look for military camps that can be used as prison camps, for both the city and the state . . . [and] we need somewhere between 4,000 and 5,000 [more] police officers over the next three to four years”).

<sup>121</sup> See e.g., David Freed, “Crime Overloads L.A. Justice System,” *Los Angeles Times*, December 16, 1990, at p. A1; Donatella Loch, “Record Year for Killings Jolts Officials in New York,” *New York Times*, December 31, 1990, Metropolitan Section, at p. 1; Tom Coakley & John Ellement, “As 1990 Ended, So Did 3 More Lives,” *Boston Globe*, January 1, 1991, at p. 1; Roger Cohen, “Poor Youths Swarming to Las Vegas Are Blamed for Rise in Gang Violence,” *New York Times*, October 15, 1991, at p. A16.

Wambaugh's novel, *The New Centurions*, the rookie officers are warned by their Police Academy instructor that "[w]hen you guys leave here, you're going out where there's guys that aren't afraid of that badge and gun."<sup>122</sup> And, in a speech that could not have been better designed to prime jurors to credit the standard defense storyline of police officers in a case like Rodney King's, the instructor explains to the cadets that "it's goddamn hard to take a man who doesn't want to be taken"; "[t]hat's why you see these newspaper pictures of six cops subduing one guy"; "[b]ut try explaining it to the jury . . . . They'll want to know why you resorted to beating the guy's head in."<sup>123</sup> In preparing for the King trial, the prosecutors and defense attorneys could reasonably expect that at least some of the jurors were conditioned by such books, movies, and television shows to see the world through the eyes of a beleaguered police patrol officer and to regard that world as frighteningly perilous.

At that time, by contrast, there were relatively few movies and television shows that presented the world through the eyes of ordinary citizens harassed by abusive police officers, and even fewer that presented such a scenario involving an African-American civilian and white police officers. Our twenty-first century readers will find this scenario familiar, but virtually all of the movies and television shows that have made it a part of their cultural experience postdated the *Rodney King* trial and may well have been spawned by the Rodney King incident itself. These include *The Glass Shield* (Miramax 1995), *Dark Blue* (United Artists 2003), and *Crash* (Lions Gate 2005), all portraying racism on the part of officers in the LAPD or the L.A. Sheriff's Department.<sup>124</sup> At the time of the *Rodney King* trial, movies such as this were only beginning to appear. Indeed, when John Singleton's movie *Boyz N the Hood* (Columbia Pictures) was released in 1991, it was hailed for its unusually sympathetic and nuanced portrayal of inner-city African-American youth trying to escape the dead-end trap of a world defined by gang violence and police oppression.<sup>125</sup>

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<sup>122</sup> JOSEPH WAMBAUGH, *THE NEW CENTURIONS* 8 (Dell paperback ed. 1987).

<sup>123</sup> *Id.* at 11.

<sup>124</sup> The Sheriff's Department was the object of a widely publicized police-brutality suit filed by attorneys for the NAACP Legal Defense Fund about five months before the Rodney King episode. See, e.g., *Thomas v. County of Los Angeles*, 978 F.2d 504 (9th Cir. 1992, as amended February 12, 1993); [Special to the New York Times] "Los Angeles County Deputies Accused of Brutality," *New York Times*, September 30, 1990, at p. 23; Seth Mydans, "Los Angeles's Sheriff Also Under Fire," *New York Times*, September 17, 1991, at p. A12.

<sup>125</sup> See e.g., Rita Kempley, "'Boyz': In the Neighborhood of Fears," *Washington Post*, July 12, 1991, at p. F1; Janet Maslin, "A Chance to Confound Fate," *New York Times*, July 12, 1991, at p. C1. See also ED GUERRERO, *FRAMING BLACKNESS: THE AFRICAN-AMERICAN IMAGE IN FILM* 182 - 186 (1993). In its portrayal of police abuse, the movie eschews

The lawyers in the King trial could probably assume that Singleton's film and movies like it would not be part of the popular culture repertory that Simi Valley jurors would bring with them into the courtroom. Newspaper accounts at the time reported that *Boyz N the Hood* was drawing largely African-American audiences.<sup>126</sup> To the extent that Simi Valley jurors were familiar with the film, it was likely to be from articles recounting that its opening in Los Angeles prompted violent confrontations between rival gangs.<sup>127</sup>

What, then, were the images popular at the time in *mainstream* films portraying interactions between white police officers and African-American civilians? The 1988 film, *Colors*, which opened to favorable reviews<sup>128</sup> and solid box-office figures,<sup>129</sup> has already provided us with an example of the cinematic portrayal of the police officer as Hero, besieged by the lawless elements of society and beset by danger at every turn. Equally significant for our purposes are the messages about race that are implicit in the movie's storytelling and casting.<sup>130</sup> The central characters, through whose eyes the story is told,

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the facile story line of white racism. The officer who places a gun to the throat of an African-American main character is himself African-American. As film historian Guerrero observes, the barriers to "survival or escape . . . [are] made chillingly real . . . when a rabid, self-hating black cop arbitrarily terrorizes the 'hood's best and brightest." GUERRERO, *supra* at 185. At the time the movie was released, Singleton criticized the Black Police-men's Association for being "one of the first groups to support Police Chief Darryl Gates." Patrick Goldstein, "His New 'Hood is Hollywood," *Los Angeles Times*, July 7, 1991, at p. 6.  
<sup>126</sup> See Richard Bernstein, "Hollywood Seeks a White Audience for New Black Films," *New York Times*, July 17, 1991, at p. C13 ("Although Columbia Pictures, which financed 'Boyz N the Hood,' supported the film in the hope that Mr. Singleton's work would appeal to white audiences, 'Boyz' has played to an audience estimated at 75 percent black, said a studio executive, who spoke on condition of anonymity.").

<sup>127</sup> See Richard W. Stevenson, "An Anti-Gang Movie Opens to Violence," *New York Times*, July 14, 1991, at p. 10 (reciting that "[g]unfire and pandemonium broke out at movie theaters around the nation," when *Boyz N the Hood* opened; and featuring a photograph of "police looking after an injured teen-ager after a showing of the film 'Boyz N the Hood' in Los Angeles"). See also, *e.g.*, John Lancaster, "Film Opens with Wave of Violence," *Washington Post*, July 14, 1991, at p. A1.

<sup>128</sup> See *e.g.*, Janet Maslin, "Police vs. Street Gangs in Hopper's 'Colors,'" *New York Times*, April 15, 1988, at p. C4; Judy Stone, "'Colors' - Mirror of Madness: Hopper's Vision of Violence in Gang Warfare," *San Francisco Chronicle*, April 15, 1988, at p. E1.

<sup>129</sup> See Pat Berman, "Box-Office Figures Can Be Deceptive," *Columbia State*, April 22, 1988, at p. 4B (reporting a very strong showing by *Colors* even though it had only opened in some areas and was not due to open in the remaining areas until the following week).

<sup>130</sup> See Troutt at 21 - 22:

Familiar accounts by state and federal prosecutors that police brutality is nearly impossible - and therefore futile - to prosecute reflect a range of experience in expensive and unsuccessful investigations, grand jury proceedings, trial outcomes and, if they get that far, punishments. This . . . results from the powerful influence of myths in our culture, often communicated through authority narratives (*e.g.*, by police union officials, defense lawyers, and judges), many of which are offered and received through the medium of unconscious racism.

These myths are flexibly adapted plots and storylines of cognitive near-certain-

are two white police officers, played by Robert Duvall and Sean Penn.<sup>131</sup> The Trouble that afflicts them – and ravages the city of Los Angeles that they struggle to protect – consists of warring gangs, made up of African-American and Latino young men.

Lawrence Kasdan's film, *Grand Canyon* (20th-Century Fox), which opened in Christmas week, 1991, and similarly enjoyed good reviews<sup>132</sup> and financial success,<sup>133</sup> also presents viewers with a stark interracial confrontation in the inner city, again using Los Angeles as the setting. The central character, a white, well-dressed lawyer played by Kevin Kline, avoids traffic on his way home from a Lakers game by cutting through the city. He gets lost and is pictured driving through mostly empty streets, trying to find his way. Suddenly the sound of a hip-hop score fills the air, followed immediately by the appearance of an expensive-looking car containing five African-American young men, in the lane next to Kline's. As Kline stares into the other car, the driver stares back and one of the occupants waves at Kline. The music, the look of the other car and its occupants, and their behavior (which was, it bears noting, a response to Kline's staring at them) all are clearly designed to signal impending menace. At that point, Kline's car breaks down and we witness him stranded in a low-income neighborhood.<sup>134</sup> He telephones for road service and, in the course of the

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ties which many of us simply regard as normal: that, for example, desperate, often hardened criminals inhabit the poorest sections of our cities and make law enforcement difficult and dangerous; that most people stopped or arrested by the police are young black men with little education and uncontrolled impulses living unstructured lives; that criminal suspects in custody frequently resist arrest; and that police officers protect us from random harm. Some of these notions are partially true, so that is not what makes them myths. Myths are constructed out of the epistemological reflex to assume that these and other ideas govern virtually all situations between the police and civilians, especially low-income black male civilians.

<sup>131</sup> The decision to cast white actors in both leading roles reflected the predominant race of the LAPD at that point in time. But a person of color could have been cast as a lead without offending realism. The LAPD was then 23.3% Latino and 14.1% African-American. See Peter Kilborn, "New York Police Force Lagging in Recruitment of Black Officers," *New York Times*, July 17, 1994, at p. 26 (presenting statistics on demographics of police forces in various cities, including Los Angeles, in 1992). At the conclusion of *Colors*, after Duvall's death, Penn is partnered with an African-American officer who swaggers through a brief braggadocio scene before being instructed in street lore by the now sadder-but-wiser Penn.

<sup>132</sup> See e.g., Janet Maslin, "The Accidents and Miracles in Everyday Life," *New York Times*, December 25, 1991, at p. 118; Gene Siskel, "Kasdan's 'Grand Canyon' Is Well Worth a Visit," *Chicago Tribune*, January 10, 1992, Friday section, at p. C ("one of the year's very finest films").

<sup>133</sup> See Bernard Weintraub, "Director Criticizes 'Grand Canyon' Critics," *New York Times*, January 16, 1992, at p. C17 (reporting that the film "seems to be moving toward financial success" and has received "general praise" but has generated some criticism for its "glib look at serious urban problems," prompting Kasdan to defend the film).

<sup>134</sup> The viewer is obviously intended to regard this as a dangerous area. That is the way it was characterized by reviewers at the time (see, e.g., Maslin, *supra* note 132 ("dangerous

phone conversation, says that if the repair truck “takes that long, I might be, like, dead.” He hangs up and, immediately thereafter the African-American youths reappear, ordering Kline out of his car and showing him that they are armed. The encounter is cut short by the arrival of the tow-truck driver (played by Danny Glover), who convinces the youths to leave.

The *Grand Canyon* episode takes advantage of racial stereotypes likely to be held by large numbers of viewers – using visual and audio cues at the beginning of the sequence to create the sense of foreboding – and then reinforces those stereotypes by having the youths turn out to be precisely as dangerous as the lawyer (and many viewers) initially assumed. In this respect, the scene is like many in *Colors* and other movies of the time<sup>135</sup> that used hip-hop music and race to set the viewer to perceive an individual as prone to crime and violence.

These negative images of young African-American men in the inner city reflected perceptions and fears that had been simmering for years in the public consciousness. A decade earlier, in 1984, Claude Brown, who had written eloquently about his own Harlem childhood in *Manchild in the Promised Land* (1965), published an article in the *New York Times Magazine* in which he described the Harlem of the early '80's as plagued by “more violence, more crime, and more violent crime than at any other period in its history” and characterized its “present-day manchild” as a “considerably more sophisticated adolescent . . . and more likely to commit murder.”<sup>136</sup> Such views – that the conditions of life in the inner city had reached an all-time low and that the modern generation of youth was dramatically different (and worse) than previous generations – were echoed in many other articles of the time.<sup>137</sup> And the prognosis was that things could only get

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neighborhood”); Siskel, *supra* note 132 (“tough neighborhood”)) and the way it is described in the synopsis that appears on the back cover of the commercial packet for the videotape (“dangerous neighborhood”). But all that the film actually shows about the neighborhood is that there are broken-down cars on the street and the kind of urban market commonly found in low-income areas. Thus, low-income neighborhood signals “dangerous neighborhood.”

<sup>135</sup> These included *Juice* (Paramount 1992) (which opened on January 17, 1992, shortly before the start of the Rodney King trial), *New Jack City* (Warner Brothers 1991), and *Ricochet* (HBO 1991).

<sup>136</sup> Claude Brown, “Manchild in Harlem,” *New York Times*, September 16, 1984, Sunday Magazine.

<sup>137</sup> See generally FRANKLIN E. ZIMRING, *YOUTH VIOLENCE* 6 - 7 (1998), recounting the results of a survey of accounts of youth crime “in the print media of the mid-1970s and mid-1990s,” which commonly portrayed young offenders as “*qualitatively* different from young persons who had violated the law in previous times.” Zimring quotes, as illustrative, a 1975 *Time* article reciting that “[t]he youth who are terrorizing the cities often belong to gangs, but gone are the old style rumbles with switch-blade knives and zip guns” and that “[e]ven criminals are frightened to work the streets in big-city areas.” See also, *e.g.*, Edi-

worse. At the end of the '60's, the National Commission on Violence had at least hedged this pessimistic prognosis with a quasi-optimistic "unless," followed by a broad social-reform agenda.<sup>138</sup> But by the mid-1990's, sociologist John DiIulio and his influential co-authors were predicting – erroneously, as it would turn out – that there was bound to be a terrifying increase in youth violence by the turn of the century.<sup>139</sup>

In the kind of feedback loop that often marks the relationship between popular culture and popular opinion,<sup>140</sup> the movie scriptwriters and directors of the day absorbed these prevailing attitudes and then sent them back out to the public in vivid, gripping images likely to solidify and enhance those very attitudes. Thus, in contrast to the almost romanticized treatment of white adolescent gangs in literature throughout much of the twentieth century<sup>141</sup> and to *West Side Story's*<sup>142</sup> sanitized images of white and light-skinned Latino youth "gang" members dancing on urban roof tops, Hollywood had moved

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torial, "No Kid Gloves for Teen Criminals," *New York Post*, March 7, 1995, at p. 22 ("Treating young offenders differently from adults – offering them light punishment and numerous opportunities for rehabilitation – made sense in an earlier era when juvenile delinquency meant little more than stealing hubcaps or joy-riding in stolen cars. Today's juvenile delinquents aren't petty thieves or pranksters – they're hardened criminals, many if not most beyond hope of meaningful 'rehabilitation.'").

<sup>138</sup> FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE: TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY (1969).

<sup>139</sup> See WILLIAM J. BENNETT, JOHN J. DI IULIO, JR., & JOHN P. WALTERS, *BODY COUNT: MORAL POVERTY – AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS* (1996); John J. DiIulio, "The Coming of the Super-Predators," *The Weekly Standard*, November 27, 1995, at p. 23. In direct contravention of DiIulio's prophesies, the juvenile crime rate *decreased* during the period from 1994 to 2000 despite increases in the juvenile population during this period. See David S. Tanenhaus & Steven A. Drizin, "Owing to the *Extreme Youth of the Accused*": *The Changing Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 642 - 643 (2002). DiIulio later expressed regret about the position he had taken. See Elizabeth Becker, "As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets," *New York Times*, February 9, 2001, at p. A19 (reporting that DiIulio's "chief theory was discredited: instead of rising, the rate of juvenile crime dropped by more than half"; quoting criminologist Franklin E. Zimring as saying that DiIulio's "'prediction wasn't just wrong, it was exactly the opposite [of what happened] . . . His theories on superpredators were utter madness"; and stating that DiIulio himself "wished he had never become the 1990's intellectual pillar for putting violent juveniles in prison and condemning them as 'superpredators'").

<sup>140</sup> See *MINDING THE LAW* at 47; Susan Bandes & Jack Beermann, *Lawyering Up*, 2 GREEN BAG 2d 5, 6 (1998), and sources cited. For a discussion of the relationship between media accounts of criminal cases and the public's views of the criminal justice system, see RICHARD L. FOX & ROBERT W. VAN SICKEL, *TABLOID JUSTICE: CRIMINAL JUSTICE IN AN AGE OF MEDIA FRENZY* (2001).

<sup>141</sup> See e.g., JAMES T. FARRELL, *YOUNG LONIGAN* (1932), *THE YOUNG MANHOOD OF STUDS LONIGAN* (1934), *JUDGMENT DAY* (1935); IRVING SHULMAN, *THE AMBOY DUKES* (1947); RICHARD PRICE, *THE WANDERERS* (1974).

<sup>142</sup> *West Side Story* (MGM 1961).

on to depicting the inner city as an apocalyptic hellworld,<sup>143</sup> its denizens tormented by gangs of youths of color.<sup>144</sup>

The story lines that were playing on the big screen were equally apparent in the directions taken by contemporary music and by the debates about it that were appearing in the print and broadcast media. In the years immediately preceding the *Rodney King* trial, “gangsta rap” had emerged as a prominent *genre* in the world of hip-hop music.<sup>145</sup> Those in mainstream America (and Simi Valley) who had never heard any of the music would certainly have heard *of* it, due to newspaper, magazine and broadcast media reports about rap lyrics glorifying hate and violence<sup>146</sup> and (according to some articles of the time) endorsing attacks upon the police.<sup>147</sup>

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<sup>143</sup> Science fiction books and movies of the time provide, as they often do, the most graphic extrapolations of contemporary views about the state of society and fears about where things are headed. Thus, we have, in 1981, the release of John Carpenter’s film, *Escape from New York*, which looks ahead to a not-so-distant future in 1997, and imagines that the high crime rate has resulted in the conversion of Manhattan to a maximum-security prison. See also, *e.g.*, SPIDER ROBINSON, *NIGHT OF POWER* (1985); BEN BOVA, *City of Darkness*, in *FUTURE CRIME 7* (1990); STEVEN BARNES, *STREETLETHAL* (1983; Tor mass market ed. 1991); MARGE PIERCY, *HE, SHE AND IT* (1991); CHARLES DE LINT, *SVAHA* (1989). For an inversion of the theme, see the low-budget film *City Limits* (SHO Films 1984) (featuring a future mega-corporation so evil that it turns the street gangs into rebels with a cause).

<sup>144</sup> That evolution was not lost upon the critics and moviegoers of the time. See *e.g.*, Mark Muro, “Coming to Grips With . . . Gangs,” *Boston Globe*, May 1, 1988, Focus section (“From the musical romance of ‘West Side Story’ to the gritty violence of ‘Colors,’ youth gangs have long exerted romantic attraction. But in the 1980s, urban gangs dramatize the story of America’s invisible society, the underclass. . . . [T]he raging kids in Chicago and LA bear little resemblance to the confected dash of ‘West Side Story,’ or even to the disciplined bureaucracies of the Mafia.”)

<sup>145</sup> JEFF CHANG, *CAN’T STOP WON’T STOP: A HISTORY OF THE HIP-HOP GENERATION* 320 - 322 (2005). For an indication of gangsta rap’s popularity in the period immediately preceding the *Rodney King* trial, see, *e.g.*, Wendy Cole, “Rapid Rap Rise,” *Time Magazine*, June 24, 1991, at p. 67 (reporting that N.W.A.’s latest album “is No. 1 this week on Billboard’s pop-album chart after just two weeks in release” and observing: “You know rap has cracked the mainstream when even the most radical fare hits the top of the pop charts”); Jon Pareles, “Should Ice Cube’s Voice Be Chilled?,” *New York Times*, December 8, 1991 (reporting that Ice Cube’s album *Death Certificate* “zoomed up to No. 2 on Billboard’s album chart”).

<sup>146</sup> See *e.g.*, Edna Gundersen & James T. Jones IV, “Rap’s Violent Edge: When Does Art Become Anarchy?,” *USA Today*, January 16, 1992, at p.1D; Jim Sullivan, “Pop’s New Voices of Rage,” *Boston Globe*, December 22, 1991, at p. A1; Jon Pareles, “Distributor Withdraws Rap Album Over Lyrics,” *New York Times*, August 28, 1990, at p. C11; Jon Pareles, “Outlaw Rock: More Skirmishes on the Censorship Front,” *New York Times*, December 10, 1989, section 2, at p. 32. And see MICHAEL ERIC DYSON, *BETWEEN GOD AND GANGSTA RAP: BEARING WITNESS TO BLACK CULTURE* 181 - 182 (1996): “Many critics argue that since gangsta rap is often the only means by which many white Americans come into contact with black life, its pornographic representations and brutal stereotypes of black culture are especially harmful. The understandable but lamentable response of many critics is to condemn gangsta rap out of hand.”

<sup>147</sup> See *e.g.*, Elmer Ploetz, “Bang You’re Dead: Ice-T Takes Metal to the Streets,” *Buf-*

It does not seem like a stretch to imagine that the racially polarizing images in the media and popular culture, fueling the ever-present Fear of the Other,<sup>148</sup> would have had an effect on the attitudes of white Simi Valley residents who supplied the venire for the *Rodney King* trial.<sup>149</sup> For a contemporary illustration of the degree to which racial stereotypes and assumptions could shape – and distort – perception and judgment, we can look to an incident of a few years earlier, the New York City “Central Park Jogger” case of 1989. Shortly after the jogger was found, unconscious, the police settled upon a theory that the crime must have been the work of a group of African-American young men, even though no physical evidence or eyewitness testimony linked them to the crime.<sup>150</sup> The case for the prosecution rested entirely on confessions extracted by the police.<sup>151</sup> Despite the early disclosure that DNA evidence did not link the young defendants to the crime,<sup>152</sup> there was a widespread public assumption that they *must* be guilty,<sup>153</sup> and the defendants were convicted.<sup>154</sup> Yet, in 2002, after

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*falo News*, April 24, 1992, at p. G37 (stating that the Ice-T album *Body Count*’s “opening and closing, ‘Smoked Pork’ and ‘Cop Killer’ . . . are flat-out endorsements of killing police”); Jim Sullivan, “Ice-T Proves Street-Smart – And Stupid,” *Boston Globe*, February 24, 1992, at p. 33 (Ice-T’s “‘Cop Killer,’ the song, is like NWA’s ‘. . . tha Police,’ an incendiary rant directed at the men in blue, a slashing, hard-rocking, chant-along slab of rage in which the outlaws get to rule the roost. And yes, kill a cop.”). The controversy over Ice-T’s song “Cop Killer” was growing during the months of the *Rodney King* trial but it did not erupt into a high-profile national story until a couple of months after the verdict, when Vice-President Dan Quayle publicly attacked the song. See [Associated Press], “The 1992 Campaign: Vice President Calls Corporation Wrong for Selling Rap Song,” *New York Times*, June 20, 1992, at p. 19.

<sup>148</sup> See, e.g., Kenneth B. Nunn, *The Child As Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679, 690 - 706 (2002); Jane Harris Aiken, *Striving to Teach “Justice, Fairness and Morality,”* 4 CLIN. L. REV. 1, 11 - 22 (1997); Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989); and the sources collected in MINDING THE LAW 333 - 334 n. 34.

<sup>149</sup> See Troutt at 117; Leonard M. Baynes, *White Out: The Absence and Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment Programming*, 45 ARIZ. L. REV. 293, 304 (2003). Defense counsel appear to have made the assessment and to have played systematically on racial stereotyping to depict Rodney King as a dangerous beast because he was black and big. See Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TULANE L. REV. 1739 (1993); Vogelman at 573 - 577; Cook at 298, 310; Higginbotham & Francois at 192.

<sup>150</sup> See Ronald Sullivan, “Scientific Link is Still Missing in Jogger Trial,” *New York Times*, July 20, 1990, at p. B1 (prosecutors, “[o]ffering what is believed to be their final forensic evidence, . . . failed again yesterday to link scientifically three defendants to the rape and attempted murder of the Central Park jogger”).

<sup>151</sup> See Ronald Sullivan, “Videotapes Are Core of Central Park Jogger Case,” *New York Times*, June 11, 1990, at p. B3.

<sup>152</sup> See Ronald Sullivan, “Genetic Tests ‘Inconclusive’ in Jogger Case,” *New York Times*, October 10, 1989, at p. B1.

<sup>153</sup> See William Glaberson, “In Jogger Case, Once Viewed Starkly, Some Skeptics Side with Defendants,” *New York Times*, August 8, 1990, at p. B3 (reporting that “as the trial drew to a close, a visible group of skeptics openly questioned whether the criminal-justice

the youths had already completed their prison sentences, they were exonerated, based on the confession of the actual perpetrator and DNA evidence proving his guilt.<sup>155</sup> Reflecting on how such a grave injustice could have occurred, *New York Times* columnist Bob Herbert observed:

There is no doubt that much of the press coverage of the Central Park jogger case was racist and way, way over the top. But I thought the defendants were guilty. And as I look back at the environment we were in and the “facts” as they were presented at the time, I’m convinced there was virtually no chance that the five youths accused of attacking the jogger could have been acquitted. . . .

New York in 1989 was a city soaked in the blood of crime victims. Rapists, muggers and other violent criminals seemed to roam the city at will. Gunfire and the horrifying screams of the mortally wounded were common. Someone was murdered every four or five hours.

The jogger case fused the worst of the city’s fears with the worst of its stereotypes. The jogger was white, female, attractive and blameless. The accused were black, male, predatory and obligingly sullen. . . .

Most New Yorkers believed the defendants were guilty. But more important, most New Yorkers in that period – for reasons that spanned a continuum from out and out racism to a deeply felt desire to see criminals brought to justice for a terrible crime – wanted them to be guilty.

And when a desire is strong enough it can overwhelm such flimsy stuff as facts and truth. Reality is a funny thing. It is what we say it is.<sup>156</sup>

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system had been too willing to fix blame on a group of mostly black youths,” but that “[f]or more than a year, the six black and Hispanic teen-agers charged with the rape and attempted murder . . . appeared to find few supporters as New Yorkers recoiled from what the prosecutors said the youths did during a brutal rampage on an April night”).

<sup>154</sup> See “The Case of the Central Park Jogger,” *New York Times*, August 19, 1990, at p. 33 (reporting the convictions of three defendants tried in the first trial); Ronald Sullivan, “2 Teen-Agers Are Convicted in Park Jogger Trial,” *New York Times*, December 12, 1990, at p. A1 (reporting the convictions of two other defendants at a separate trial).

<sup>155</sup> See Susan Saulny, “Convictions and Charges Voided in ’89 Central Park Jogger Attack,” *New York Times*, December 20, 2002, at p. A1; Jim Dwyer, “Man Cleared in Jogger Case Goes Free at the Age of 28,” *New York Times*, December 24, 2002, at p. B3.

<sup>156</sup> Bob Herbert, “That Terrible Time,” *New York Times*, December 9, 2002, at p. A27. Herbert is doubtless right in linking the rush to judgment and the absence of doubt to the Zeitgeist of 1989. But the actions of the New York City Police Department in the wake of the 2002 exoneration suggest that another phenomenon at work throughout the Central Park Jogger case was the human tendency to hold fast to a conclusion once reached, and to reject or harmonize any contrary evidence. Even after the Manhattan District Attorney’s Office confessed error and the court vacated the convictions, an investigatory panel appointed by the Police Department declared that the youths had “most likely” participated

Less than three months after the convictions of the last of the Central Park Jogger defendants, Rodney King was beaten and kicked by officers of the LAPD in the early-morning hours of March 3, 1991. Slightly less than a year after that, the trial of the four officers began.

### III. THE DEVIL IS IN THE DETAILS

The following three studies examine various aspects of the trial in detail. Together they flesh out and reinforce an overview of the trial that earlier thoughtful commentators have proposed: The *Rodney King* trial was essentially a contest about epistemology – about the way in which the human mind should go about getting at the Real Truth of Things.<sup>157</sup> The prosecution staked its case on the propositions that seeing is believing, that videocams do not lie, that the images on the videotape of the defendants beating Rodney King showed What Happened, what counted as Reality.<sup>158</sup> The defendants replied that appearances are deceiving, that images need to be interpreted in order to discern the story they tell, and that it was only by stopping the tape, scrutinizing it frame by frame, and making sense of each frame in relation to a broader notion of How Things Happen, that the Real Story could be known.<sup>159</sup>

We concluded early in our study of the trial that this overview was a fruitful way of understanding the basic positions that the prosecution and defense, respectively, were advocating to the jury.<sup>160</sup> It opened a connected set of interesting questions. *How* – by what specific trial techniques and tactics – did the lawyers wage an epistemological struggle of this sort? What alternative techniques and tactics

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in the beating and rape,” resting this assertion on a completely unsupported theory – easily dismissed by even the District Attorney’s office – that the youths must have acted together with the actual perpetrator. See Robert D. McFadden, “Boys’ Guilt Likely in Rape of Jogger, Police Panel Says,” *New York Times*, January 28, 2003, at p. A1; Marc Santora, “Prosecutor Rejects Theory of Boys’ Attack on Jogger,” *New York Times*, January 31, 2003, at p. B6; Jim Dwyer, “One Trail, Two Conclusions; Police and Prosecutors May Never Agree on Who Began Jogger Attack,” *New York Times*, February 2, 2003, at p. 35.

<sup>157</sup> Goodwin summarizes the trial perfectly in two words: “Contested Vision.” Goodwin at 615. His analysis of the contest, *id.* at 615 - 628, is brilliant.

<sup>158</sup> Goodwin at 615, 621; Levin at 1626 - 1628.

<sup>159</sup> Crenshaw & Peller at 285 - 291; Goodwin at 617 - 621, 622 - 626; Fiske at 918 - 919; Troutt at 110; Butler at 20; Cook at 309.

<sup>160</sup> We have continued to consider whether the overview bears up under close inspection and whether a different or more refined formulation of the parties’ basic positions would be more useful than this one as a framework for analysis or exposition. So far, we remain satisfied with the overview for these purposes. We are, of course aware that our own endeavor to make sense of the trial is akin to the efforts of the lawyers to make sense of the encounter between Rodney King and the LAPD: both are intractably hermeneutic. See text at note 45 *supra*. So, much of what we find in our study of the details of the trial that “confirms” the overview flows in part from a way of looking at details that is framed by the overview itself. The readers’ alternatives will be gratefully welcomed.

might they have chosen to use, or what alternative battles might they have chosen to fight? What available information and what considerations might have led them to conclude that some alternative to the course they took would have been a better strategic choice?

We found it particularly intriguing to explore alternatives that might have been pursued by the prosecution, the losing party. It was not so much the joy of Monday-morning quarterbacking that turned us on to this as the challenge of developing strategies which might have changed the outcome. And as we came increasingly to think that the defense case derived much of its force from a resourceful exploitation of stock stories,<sup>161</sup> we were led increasingly to look for counter-stories that the prosecution might have told.<sup>162</sup>

In the first of the following studies, our colleagues Rachel Shapiro Janger and Jennifer McAllister-Nevins begin their analysis where the trial itself began – with the selection of the jury. They consider what sorts of epistemological orientations the lawyers might have expected to find or hoped to be able to cultivate among members of the venire after the change of venue to Simi Valley; what the *voir dire* revealed about the orientations of venire members; and how the very processes of *voir dire* contributed to shaping the jurors' orientations. Rachel and Jenny then examine the epistemological premises of the stories told by the prosecution and by the defense at trial and the extent to which these stories, respectively, were tailored to fit the likely orientation of the jurors. Concluding that the defense did a substantially better job of tailoring, they detail the specific techniques by which it accomplished this, and then they imagine possible counter-stories and counter-techniques that the prosecution might have used.

In the second study, our colleague Todd Edelman focuses on the cross examination of a single prosecution witness by one of the defendants' lawyers – a performance generally accounted to have made a major contribution to the ultimate success of the defense. Todd finds that this contribution is best explained in terms of story-telling. After sketching the principal plot lines of the prosecution and of the defense and elaborating on a key subplot in the defense story, he conducts a detailed microanalysis of the crucial cross examination and illustrates the remarkable variety of methods used by the defendant's lawyer to turn cross examination into an affirmative story-telling tool.

In the third study, our colleagues Ty Alper and Sonya Rudenstine explore the tactical and narrative problems and possibilities presented to the prosecution by the lone defendant who took a defensive tack different from the other defendants'. Through a close reading of the

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<sup>161</sup> See text at notes 61 - 62, 91 - 93 *supra*; text at notes 257 - 309, 423 - 476 *infra*.

<sup>162</sup> See text at notes 63 - 67 *supra*; and see Delgado; Troutt.

successive steps in the trial that bore directly on this defendant – the opening statements of the prosecution and of the defendant’s lawyer, the direct examination of the defendant and his cross examinations by the prosecution and by counsel for another defendant, and the closing arguments of the defendant’s lawyer and the prosecution – Ty and Sonya identify the points at which opportunities arose for the prosecution to take advantage of the defendant’s separate stance, and describe how an alert prosecutor could have perceived and seized those opportunities. They then analyze a narrative dilemma that complicated the opportunities; they develop three exemplary narrative strategies that might have enabled the prosecution to resolve the dilemma; and they implement the strategies in draft lines of cross examination and closing argument.

## OF TRUTH AND THE JURY

RACHEL SHAPIRO JANGER AND JENNIFER McALLISTER-NEVINS

*The purpose for the trial is to get at the truth and this is the best place and the only place where that is going to be accomplished, in the courtroom.*

Superior Court Judge Stanley M. Weisberg, addressing potential jurors.<sup>163</sup>

The Los Angeles riots following the state-court trial of the four policemen accused of assaulting and using excessive force against Rodney King reflected anger that the jury had reached a verdict contradicting public expectations. Months of viewing the videotaped beating on the news had convinced viewers that the only rational verdict would be one in which all of the defendants were found guilty of all charges.<sup>164</sup> President George H.W. Bush echoed the public's bewilderment that a decision so wrong could emanate from the jury room: "It was hard to understand how the verdict could square with the video[tape]" of the beating.<sup>165</sup>

Not only did the public decry this particular verdict, but to many people the *Rodney King* trial quickly became a symbol of the failure of the jury system as a whole. Critics ranged from those who flatly declared that racist juries guarantee unjust results<sup>166</sup> to academics and commentators who asserted that mass media infiltration of the court-

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<sup>163</sup> Tr. vol. 38, 4027/16 - 19 (February 24, 1992).

<sup>164</sup> The jurors found all four defendants – Officers Stacey Koon, Laurence Powell, Timothy Wind and Theodore Briseno – not guilty of assault. Three were acquitted of using excessive force. The jury deadlocked as to the excessive force charge against Officer Powell. Officers Powell and Koon were also acquitted of making false police reports. "King Verdict Sparks Violence," *Los Angeles Daily News*, April 30, 1992, p. N1. One week after the beating incident, a Los Angeles Times poll had reported that, among those Los Angeles residents surveyed who stated an opinion, 52 percent believed King's version of the story, while only 15 percent believed the police officers' version. The great majority of individuals surveyed had already seen the videotape. Ted Rohrlich, "The Times Poll: Majority Says Police Brutality is Common," *Los Angeles Times*, March 10, 1991, p. A1. Just over a month later, another survey reported that 81 percent of those polled thought the officers "were more likely guilty" than not. See Lois Timnick, "Lawyers Ask Judge to Move Trial of Officers," *Los Angeles Times*, April 23, 1991, p. B1.

<sup>165</sup> Karl Vick, "Another Acquittal Would Be No Surprise," *St. Petersburg Times*, August 6, 1992, p. 1A [hereafter, "Vick"]. Even the Mayor of Los Angeles, Tom Bradley, publicly disagreed with the verdicts: "No, our eyes did not deceive us. . . . No, we will not tolerate the savage beatings of our citizens by a few renegade cops." "Nightline: The Rodney King Verdict," ABC television broadcast, April 29, 1992.

<sup>166</sup> On Nightline's broadcast immediately following the verdict (see note 165 *supra*), Representative Maxine Waters stated: "What we see is a classic case of a majority of white jurors who did not see this man as a human being. . . . [T]he talk about him being something other than a human being helped drive them to the conclusion that he deserved what he got."

room had inevitably distracted jurors from their role as fact finders.<sup>167</sup> The implication of these criticisms is that jurors' opinions are cemented into place before they hear the evidence and that a litigator is powerless to extricate jurors from the preconceptions and external forces that bind them.

Yet, while the jury system may well have been transformed in our "new media" era, and while the new media may have played a large part in this transformation, their impact on juror decisionmaking does not require that we "impugn the system."<sup>168</sup> It challenges us to reconceptualize the jury's role and the trial attorney's task in relation to the jury.<sup>169</sup> In today's media-saturated postmodern era, a juror does not merely "find" facts, but rather constructs a story based on the narrative s/he hears and the world view s/he holds. John Fiske, in examining how the postmodern tabloid culture affects a juror's perceptions, introduced the idea that a lawyer can develop a strategy which works with postmodern jurors, rather than deploring them.<sup>170</sup> In Fiske's view, lawyers need not demand that the postmodern jury rise above the cacophony of popular culture, particularly in an era when jurors cannot escape the pop culture that has inevitably influenced them and forms a significant part of the context in which they are already situated. Rather, the effective postmodern litigator must be aware of the media's effect and must devise narrative strategies that adjust to the postmodern world and take account of the new media.

To prepare for postmodern jurors, an attorney must focus on the interaction between trial lawyer and jury. This chapter of our article will explore three hypotheses about that interaction. The first is that a jury's decision is a product of the interface between each juror's independently developed receptors and filters, on the one hand, and what is presented to the jury as a whole in the courtroom on the other. The second hypothesis is that trial lawyers can influence the interface. The third is that, to do this effectively, a lawyer must work at diagnosing the world views that the jurors will probably bring to the trial; s/he must design stories that will appeal to, engage, and educate people with such world views; and s/he must develop techniques for getting

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<sup>167</sup> See, e.g., Arthur Austin, *The Jury System at Risk from Complexity, The New Media and Deviancy*, 73 DENVER U.L. REV. 51 (1995) (hereafter, "Austin, *The New Media*").

<sup>168</sup> *Id.* at 64.

<sup>169</sup> For a more philosophic interpretation of the effects of the "videosphere" on law, see Peter Goodrich, *Europe in America: Grammatology, Legal Studies, and the Politics of Transmission*, 101 COLUM. L. REV. 2033, 2075 - 2082 (2001) (arguing that the media spectacle which law has become should not be viewed negatively as a threat but does require lawyers and society to account for the technological changes in the transmission of law).

<sup>170</sup> See John Fiske, *Admissible Postmodernity: Some Remarks on Rodney King, O.J. Simpson, and Contemporary Culture*, 30 U.S.F. L. REV. 917 (1996) [hereafter, "Fiske"].

the stories across to the jurors. The *Rodney King* trial provides a good setting for examining these hypotheses because it became a contest between litigators (on the prosecution side) who viewed the jury as a fact-finder and litigators (on the defense side) who had adapted to the idea of the jury as a constructor of meaning. While much of the discussion that follows is specific to the *King* trial, it is intended to illustrate general ideas about litigating to a jury in the postmodern era.

Our discussion of the interaction between the lawyer and the jury begins by considering who the juror is and what s/he brings to the courtroom. In Part I.A, below, we will review Fiske's concept of the "tabloid juror" and use it to examine the postmodern world view held by some jurors, which any specific juror or box of jurors may share. Then, in Part I.B, we will go on to discuss the likelihood that people from a given demographic area, such as California or, more specifically, Simi Valley, would hold this world view. Finally, in Part I.C, we will consider whether the jurors in the *Rodney King* trial appear to have actually held this postmodern world view. To do this, we will focus on the *voir dire* stage of the trial, where the interaction between the juror and the litigator is most apparent. This is the stage at which litigators attempt to pick jurors they hope will be most receptive to the narrative they intend to present. At the same time, it is a crucial stage at which litigators must rethink and reshape that narrative to tailor it to what they have learned about the jurors through the *voir dire* process.<sup>171</sup>

The second part of this chapter will move from considering who composed the King jury to considering the kinds of narrative strategies that were and were not likely to appeal to jurors with the world view they held. We will discuss the prosecution's unimaginative strategy and contrast it with the more resourceful narrative techniques employed by the defense, particularly the defense's manipulation of the now-infamous video. Finally, we will suggest one narrative that the prosecution might have used successfully to counter the defense's treatment of the video.

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<sup>171</sup> We refer to *voir dire* as "a" stage crucial for the lawyer's shaping of his or her trial narrative rather than as "the" stage, because the dynamics of a trial require the lawyer to retain flexibility to mold the narrative to fit what may be changing circumstances. One example of this need for flexibility is the problem posed for the prosecution in the *Rodney King* trial by the strategy of defendant Briseno, who differentiated himself from the other defendants at some points and in some ways but not others. See the discussion of the Briseno dilemma in the text at notes 508 - 699 *infra*.

I. POSTMODERNISM, JURORS AND *VOIR DIRE*A. *The Postmodern Backdrop*1. *The Development of Postmodernism*

World War I and urban development brought with them societal challenges to eighteenth and nineteenth century world views. The horror of the modern technological war undermined enlightenment notions of progress. With the war came the understanding that humankind was not on a road toward infinite improvement, but rather that technology allowed for destruction on an unprecedented scale. In the war's aftermath, western society sought answers to this enlightenment disillusionment in new world views<sup>172</sup> such as liberalism, Marxism, and fascism, which claimed to provide alternative truths and a course to betterment.<sup>173</sup> The coupling of enlightenment disillusionment with an alternative perspectival truth formed the basis of what is often called the modernist era. But while these modernist philosophies had seemingly laudable goals, the institutions that were created to support them produced results like concentration camps, colonialism and violent suppression of worker uprisings in Eastern Europe. As individuals observed such "modern" events, a new world view again emerged – this time marked by skepticism not just of an ameliorative enlightenment world view, but of any claim to a single "God's eye view" of reality.<sup>174</sup> Critics and commentators named the new world view Postmodernism.<sup>175</sup>

To the extent that those who accept the prevalence of postmodernist thinking in today's society believe in the notion of truth, it is a very different notion of truth. It is not an objective truth that exists independently from the historical system of thought and values out of which it emerges.<sup>176</sup> As one philosopher has suggested, we cannot rely on traditional notions of truth "in a world where 'false' appearances go all the way down, and the only available measure of 'truth' is the capacity to put one's ideas across to maximum suasive

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<sup>172</sup> Postmodernists refer to such world views as "metanarratives." See JEAN-FRANCOIS LYOTARD, *THE DIFFEREND: PHRASES IN DISPUTE* 164 (Georges van den Abbeele trans. 1988).

<sup>173</sup> *Id.*

<sup>174</sup> Linda J. Nicholson, *Introduction* in LINDA J. NICHOLSON (ed.), *FEMINISM/POSTMODERNISM* 2 (1990).

<sup>175</sup> See, e.g., Terry Eagleton, *Capitalism, Modernism and Postmodernism*, in PATRICIA WAUGH (ed.), *POSTMODERNISM: A READER* (1992); LINDA HUTCHEON, *A POETICS OF POSTMODERNISM: HISTORY, THEORY, FICTION* (1988); FREDRIC JAMESON, *POSTMODERNISM, OR THE CULTURAL LOGIC OF LATE CAPITALISM* (1991).

<sup>176</sup> Stanley Fish, "Postmodern Warfare: The Ignorance of Our Warrior Intellectuals," *Harpers Magazine* (July, 2002), p. 33.

effect.”<sup>177</sup> The “suasive effect” of a statement will be measured not by a person’s claim that s/he has some transcendent knowledge of truth, but rather by the degree to which it accurately reflects an individual hearer’s own cultural and social experiences.<sup>178</sup>

## 2. *The Postmodernist Culture’s Effect on Juries*

Unsurprisingly, in an environment where the idea of a single unitary truth is questioned, a multitude of news sources have developed to present alternative accounts of what happens in the world. In this era, Walter Cronkite’s once well-known nightly intonation of “. . . and that’s the way it is,” has lost its currency. Networks and the mainstream press must now compete for viewers with tabloid journalism, exemplified by newspapers such as the *National Enquirer* and the *Globe*,<sup>179</sup> television tabloid shows, radio shock jocks, and daytime talk shows<sup>180</sup> – as well as internet chatrooms and blogs – each of which challenges the authority of the mainstream press’s version of events.

John Fiske suggests that the *Rodney King* verdict can be explained by thinking of the jurors’ decisionmaking process as reflective of the postmodernist tabloid culture. Although the jurors were hyper-aware of the nightly news’s version of the beating (as depicted in the video), they were willing to accept the tabloid notion that this dominant media view was open to question. Fiske attributes the jurors’ acceptance of this postmodern skepticism to the social position of some tabloid readers:

The socially powerful readers of *Time* are well served by a . . . belief in a transcendent reality, for this enables them to make their reality universal and to dismiss other realities as false. On the other hand, the less privileged readers of the [*National*] *Enquirer* know that

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<sup>177</sup> CHRISTOPHER NORRIS, WHAT’S WRONG WITH POSTMODERNISM: CRITICAL THEORY AND THE ENDS OF PHILOSOPHY 24 (1990) (quoting Jean Baudrillard). The television show, “The Reality Behind Reality” is a recognition of this concept. While reality television promotes “real” people in “real” situations, “The Reality Behind Reality” attempts to debunk that notion by presenting scenes supposedly demonstrating the rigging of such shows.

<sup>178</sup> See Fiske at 917 - 918 (noting there is no contradiction between asserting that a fact is true and that this may not necessarily be demonstrable to another person by recourse to some test that treats reality as an “objective absolute”).

<sup>179</sup> These newspapers feature sensationalized current events on their covers to increase sales at supermarket checkout stands and are regularly criticized for often paying for stories they print.

<sup>180</sup> Just a few examples of such shows are: Oprah, Dr. Phil, Maury, and Jerry Springer. As the names of the talk shows indicate, the hosts and their opinions are central to the content of the shows. The typical format of these shows involves a panel of guests discussing some topic, ranging from the arrest of Michael Jackson for child molestation to people married to their child’s ex-spouse. The hosts present their own spin on events and are both bolstered and challenged by anyone and everyone surrounding the event, including the parties’ families, jury consultants, and outraged community leaders. These presentations are then open game to comments from the audience and viewers across the country.

their knowledge of the truth is typically contradicted by that of the powerful; they are always aware of the socially-located nature of knowledge. . . .”<sup>181</sup>

The nightly news is removed from these tabloid jurors’ experience of the world. Fiske argues that, as opposed to *Time* consumers, *Enquirer* consumers have no financial investment in either the production or reception of the nightly news. Since they neither control nor benefit from the mainstream press, tabloid readers have little to gain from its version of events. This does not mean that the tabloid reader necessarily subscribes to the view of reality as presented by the tabloids. The potency of the tabloids for any individual is not what they say, but what they represent – a general skepticism of the establishment and a political statement of empowerment that anyone’s truth-claim is as valid (or invalid) as anyone else’s.<sup>182</sup> And, indeed, the power of tabloid skepticism has been growing in recent years as Fox news, MSNBC, and others have imported aspects of tabloid journalism into the venue of network viewing. Fox, for instance, openly states its conservative partisanship, asserting such a view is a necessary counter to the mainstream so-called “liberal media.”

If people’s experiences lead them to be skeptical of what they read in the paper, then they may instead construct their own vision of what is true or look to an alternative source for a story that they can believe. Thus, Fiske suggests that there exist two competing notions of reality in postmodernity: truth constructed by the dominant discourse (powerful institutions such as the government and the mainstream media), and truth constructed as a product of an individual’s experience in the world (dependent on one’s class, geographic location, race, gender, personal experiences, etc.). The tabloid media reinforce the latter truth by empowering their readers and watchers to question the dominant discourse when that discourse does not reflect what they have experienced themselves.

While Fiske’s “two realities” usefully illustrate the effect of postmodernism on the concept of truth, his dichotomous view provides little guidance for litigating before jurors who may embody the

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<sup>181</sup> Fiske at 921.

<sup>182</sup> That tabloid producers and readers recognize the tabloids’ position as challengers as much as alternative truth providers is nicely demonstrated by an example that Fiske cites. He notes that the *National Enquirer*’s photo of O.J. Simpson speaking on a cell phone with a gun to his head during the famous Ford Bronco chase was accompanied by a label that forthrightly informed its readers that the picture was a “computer recreation.” *Id.* at 921. Yet when *Time* magazine surreptitiously darkened its cover photo mug of O.J., the editors did not indicate that the photo had been doctored, and *Time* readers did not think to question whether it might have been. “Tabloid readers . . . have become adept at controlling their own movement between belief and disbelief in a way that *Time*’s readers have not, for that journal would never provoke its readers to disbelieve what it printed.” *Id.*

postmodern skepticism to some degree. Despite Fiske's depiction of these two alternative realities as competing, a litigator operating in a postmodern society can take advantage of the likelihood that any given juror will be influenced by both the dominant media and his or her individual experiences of empowerment by the tabloid media. Tabloid reality simply signifies this broader challenge to the concept of a singular truth. To the extent that Fiske views these two categories as rigid, he misses an important implication of his own argument: that the categories themselves are shifting and fuzzy and that a person needs not be of one type or another, or even consistently a mixture between a tabloid consumer and a nightly news consumer.<sup>183</sup> The subtleties of Fiske's realities suggest that with knowledge of the multiplicity of truths, a person can choose to accept different versions of the truth depending upon their apparent appropriateness in a given situation.<sup>184</sup>

Empirical studies of how jurors find facts support the notion that a litigator must adapt his or her narrative to account for the world view the juror brings into the courtroom. In analyzing jury decision-making practices, Reid Hastie and his colleagues have found that jurors follow a story model when they assess a case.<sup>185</sup> Within this model, each juror performs three interpretive operations before reaching a verdict. First, the juror constructs a story of what happened by locating the central events of that story (looking to the information the attorneys have provided). Then, s/he evaluates that story's implications through "inferences about the relationships among elements in the story" (looking to how the elements of the story best fit together). Finally, the juror evaluates this story for completeness and consistency with his or her social frames (looking to how the evaluation in step two fits in with who s/he is and where s/he came from

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<sup>183</sup> The mainstream media themselves are increasingly unsettling the categorical, binary definitions underlying Fiske's either/or formulation. The addition of color to the *New York Times* and *Wall Street Journal* have led them to appear more similar to the papers produced by the tabloid press. *USA Today* went one step further to provide a daily newspaper that shortens news stories into soundbites and presents dramatic pictures of current events. Perhaps most memorably, on January 29, 1986, the day after the space shuttle Challenger exploded, the paper ran a large headline of Nancy Reagan's exclamation "Oh my God!"

<sup>184</sup> For an example of the strategic implications of this point in trying cases to jurors who are predisposed to a postmodernist world view, see the discussion in text at notes 617 - 692 *infra* suggesting that it would have been in the prosecution's interest in the *Rodney King* trial to develop a "gray" narrative – rather than a black-and-white narrative – for dealing with the defendant Briseno, whose defense strategy was sometimes in synch and sometimes at odds with that of his codefendants. (In the present chapter of our mosaic article, when we speak of the strategies and stories of "the defense" or "defense counsel," we refer to defendants Koon, Powell and Wind, who made common cause, not Briseno.)

<sup>185</sup> REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* 22 (1983).

before confronting this case).<sup>186</sup> The last step is crucial to the final verdict. The juror's world knowledge concerning the domain of events that are relevant to a case is the most important individual ingredient in the juror's decision.<sup>187</sup> As a jury member works within the attorney's narrative framework to build a story, s/he draws upon that knowledge in finding the "facts."

Similarly, in their classic text, *The American Jury*, Harry Kalven and Hans Zeisel concluded that a juror's background significantly affects his or her fact-finding.<sup>188</sup> Kalven and Zeisel discovered that judges and jurors frequently disagree on a verdict although they have been exposed to the same evidence in the courtroom. In looking at these situations, Kalven and Zeisel observed, consistently with Fiske's and Hastie's theories, that forty-five percent of the time the disagreement was caused by some combination of questions of fact and values or sentiments.<sup>189</sup> These two causes of disagreement were not separable, but rather the values and sentiments were expressed "under the guise of answering questions of fact."<sup>190</sup> This suggests that the judge and the jury bring to the courtroom dissimilar world views which affect the way they digest the evidence presented in the courtroom.

Moreover, Kalven and Zeisel found that jurors tend to disagree with each other as to the proper verdict when the first ballot is taken in deliberations.<sup>191</sup> This juror-juror disagreement emphasizes that no two jurors bring to the courtroom the same social or cultural perspectives. Thus, where a juror comes from as well as his or her proclivity to be skeptical about the information presented in court are essential elements for a litigator to consider when refining a narrative strategy to appeal to the entire jury selected.

The perspective of the postmodern jury means that a litigator cannot assume that a juror will see what the litigator sees. As discussed in detail below, the prosecutors' assumption in the *Rodney King* trial that the videotape of the beating would speak in the same way to all jurors and, furthermore, that the prosecution's interpreta-

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<sup>186</sup> See *id.* at 22 - 23.

<sup>187</sup> *Id.* at 130. In the King trial, questionnaires were issued to the potential jurors prior to *voir dire*. The questionnaires focused on "whether the trial outcome might be shaped by jurors' family histories and lifestyles," Richard A. Serrano, "Potential Jurors in King Beating Get Questionnaires," *Los Angeles Times*, February 6, 1992, p. B1, the very issue which the Hastie researchers view as central to jurors' decisionmaking process.

<sup>188</sup> See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 116 (1966).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 488. Nevertheless, Kalven and Zeisel note that the first ballot tends to decide the outcome of the deliberations. Because the majority's opinion at the outset of voting tends to become the final verdict, "the real decision is often made before deliberation begins." *Id.* (italics omitted).

tion of it was the only viable one, was particularly risky when confronting jurors imbued with postmodern skepticism. By contrast, the defense team's strategy of finding a new and different narrative, one which began by telling the jurors "you see what you want to see on this tape,"<sup>192</sup> empowered the jurors to construct a meaning from the video that comported with their own world view.

### B. *The Lay of the Land: The Demographic Picture*

If postmodernism suggests that each juror's view of truth is perspectivized, then the litigator must consider the likely perspective of the specific pool of jurors that will be called to hear his or her case. In the *Rodney King* trial, that was a largely white jury from Simi Valley, California – a demographic datum that may have made the jurors more likely to adopt a skeptical postmodernist viewpoint. The mass media was born in Southern California and continues to play a central role in influencing the region's economic and political landscape. But Californians are also familiar with the media sensationalization of real-life events.<sup>193</sup> Prior to the King trial, Californians had already experienced the controversial trials of Charles Manson, "night stalker" Richard Ramirez, Patty Hearst, Angela Davis, and the McMartin Pre-School case.<sup>194</sup> These cases all garnered significant media attention in California, and more than one was referred to as the "trial of the century."<sup>195</sup>

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<sup>192</sup> Remarks to the Press by Defense Attorney Michael Stone as recorded in the Courtroom Television Network's live broadcast of *California v. Powell*. A set of tapes of this broadcast is on file at the New York University School of Law and will be referred to hereafter as "Court TV."

<sup>193</sup> One lawyer has suggested that the reverse may also be true: trials which involve elements of scandal become big news *because* they take place in California. See Mike Littwin, "With Each Juror Removed from the OJ Panel, America's Faith in the System Takes a Hit; A Jury of Our Fears," *Baltimore Sun*, June 16, 1995, p. 1D (quoting a Washington lawyer and former federal prosecutor as saying: "The word is out. If you want to commit a big crime, go to California. [The OJ trial] . . . would have been conducted differently in all the other 49 states.").

<sup>194</sup> The media attention given these trials probably had more impact in California than in the rest of the country because they took place prior to the growth of Court TV and CNN, which have since created a national audience for such trials. The number of Court TV subscribers grew from less than four million in 1991 to more than 60 million in 2001. Angelique M. Paul, *Note, Turning the Camera on Court TV: Does Televising Trials Teach Us Anything About the Real Law?*, 58 OHIO ST. L.J. 655, 658 (1997); Court TV Press Release, July 30, 2001.

<sup>195</sup> See, e.g., MARY TIMOTHY, *JURY WOMAN* 18 (1974) (referring to the Angela Davis trial). It is interesting to note that at least thirty-two trials since 1900 have been given the title of "trial of the century." GERALD F. UELMEN, *LESSONS FROM THE TRIAL: THE PEOPLE V. O.J. SIMPSON* 204 (1996). See also Laurie L. Levenson, *Cases of the Century*, in *Symposium, Trials of the Century*, 33 LOYOLA L. A. L. REV. 585 (2000), at pp. 585 - 599 (reviewing trials of the century, including seven in the preceding decade).

The demographics of California were particularly significant in the *King* trial. Originally, the case was slated for trial in Los Angeles County, where the beating incident occurred. Los Angeles has been considered the nation's most ethnically diverse city and home to a police department that was once the prototype of the modern urban law enforcement agency.<sup>196</sup> By the time of the trial, however, the Los Angeles Police Department ("LAPD") had come under attack for brutality. In a poll by the *Los Angeles Times* shortly after the beating of Mr. King, one-fourth of the people surveyed believed they had seen or had been involved in an incident in the last five years in which the LAPD had used excessive force.<sup>197</sup> In addition, the media had reported several recent incidents of harassment of minorities by the various police agencies in the area.<sup>198</sup> While some observers pointed directly to problems within the LAPD,<sup>199</sup> others attributed the King beating to a lack of police oversight by the community at large – including the legal community, local prosecutors and local political organizations.<sup>200</sup> Thus, the beating was seen by many not only as the product of a brutal police force, but as a reflection of the weakened structure of the Los Angeles community.

Concerned that these factors would draw a venire inclined to convict the officers, the defendants sought and obtained a ruling ordering a change of venue for the trial.<sup>201</sup> The demographics of the new venue

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<sup>196</sup> See Scott Armstrong, "Public Attention Returns to Police Brutality as Rodney King Trial Begins in California," *Christian Science Monitor*, February 6, 1992 [hereafter, "Armstrong"], p. 1.

<sup>197</sup> See Ted Rohrlich, "The Times Poll: Majority Says Police Brutality Is Common," *Los Angeles Times*, March 10, 1991, p. 1A.

<sup>198</sup> See John L. Mitchell, "Beating Rekindles Anxiety," *Los Angeles Times*, March 11, 1991, p. B1 (noting a recent case involving baseball legend Joe Morgan who was roughed up in the Los Angeles International Airport by an officer who believed Morgan was a drug courier); Editorial, "A Foul on Silk," *Los Angeles Times*, March 2, 1991, p. 5 (decrying an incident in which former Laker star Jamaal Wilkes was pulled over and handcuffed by LAPD officers because, they said, his license tags were about to expire); Armstrong at 1; and see note 124 *supra*.

<sup>199</sup> Following the attention given to Mr. King's beating, the Christopher Commission reviewed the LAPD. It found evidence of a police department in which there was racism, use of excess force, and police-community relations problems. Structural changes were called for, including the "stepping down" of police chief Darryl Gates. See Armstrong at 1. The Commission's recommendations recognized that control and oversight were as much at issue as the behavior of individual officers.

<sup>200</sup> See Jack Katz, "The Only Way Los Angeles Can Clear its Name of Police Brutality," *Los Angeles Times*, March 10, 1991, p. M1.

<sup>201</sup> See note 100 *supra*. Prior to the *Rodney King* trial, Los Angeles County judges had rarely granted a change of venue motion. A change of venue was denied even in the widely-publicized trials of Charles Manson, Richard Ramirez, and the McMartin Pre-School defendants. See Dawn Webber, "Venue Change Possible in King Case; Judge Changes Mind after Court Orders a Review," *Orange County Register*, June 9, 1991, p. A3. In the Robert Alton Harris case, the judge found insufficient prejudice to justify a change

– the small exurb of Simi Valley in Ventura County, which is 33 miles from the metropolitan center of Los Angeles – drew heavy press coverage.<sup>202</sup> The members of this relatively sheltered community were perceived as less likely to have had prior experience with the criminal justice system and as more likely to be sympathetic to the police officers than Los Angeles residents, especially since Simi Valley was the second safest city of its size in the United States<sup>203</sup> and had been formed by so-called “white flight” from Los Angeles.<sup>204</sup> Of its 100,928 residents, 86 percent were Anglo or white, 5 percent Latino, 3 percent Asian, 2 percent African-American, and 4 percent “other.”<sup>205</sup> Additionally, Simi Valley was home to approximately 2000 current and retired law enforcement personnel who had fled the metropolis of Los Angeles to form a safe island on the outskirts of their former home.<sup>206</sup> The trial was an invasion into their enclave of the very thing from which they had sought to escape: the madness and crime of Los Angeles. These demographics depict a community born out of a feeling of disempowerment among its citizens and a population ripe to exercise the empowerment provided by a postmodernist perspective.

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of venue despite 136 exhibits showing intense pretrial media coverage luridly portraying the defendant and the crime, and a venire and petit jury in which more than 75 percent of the venirepersons and jurors had seen the pretrial publicity. See *Harris v. Pulley*, 852 F.2d 1546, 1533 - 1555 (9th Cir. 1988) (denying federal habeas relief).

<sup>202</sup> See, e.g., Andrea Ford and Daryl Kelley, “King Case to be Tried in Ventura County,” *Los Angeles Times*, November 27, 1991, p. A3 (quoting an attorney as saying, “It is naive to think demographics will not be a factor in this case.”); Adrienne Goodman, “NAACP Official Criticizes Venue Change in King Case; Courts: Head of Local Chapter Says Residents of Mainly White, Conservative County Will Never Convict Officers Accused of Beating Black Motorist,” *Los Angeles Times*, December 15, 1991, p. B3 [hereafter “Goodman”] (quoting letter by John R. Hatcher III, president of the NAACP’s Ventura County chapter, distributed to local newspapers).

<sup>203</sup> See Catherine Chriss, “The King Verdict,” *Houston Chronicle*, May 2, 1992, p. A16; Gene Grabiner & Virginia E. Grabiner, *The First “Rodney King Trial,”* 19 HUMANITY & SOCIETY, No. 2, p. 89 (May 1995), at p. 92 [hereafter “Grabiner”]. The suburb is separated from Los Angeles proper by a mountain range which “doubles as a fence” between the two communities. Vick at 1A.

<sup>204</sup> The defense made use of the demographics throughout its case. For example, in closing argument, Michael Stone, arguing for Officer Powell, stated, “And we leave it to them [the police] to take care of the mean streets so that we can safely enjoy our lives, so that we can raise our families in neighborhoods, so that we can enjoy a Saturday afternoon with our daughters watching a new movie . . . .” Tr. vol. 76, 13617/15 - 20 (April 21, 1992). This statement, which includes references to class and gender, is calculated to play to the demographics and fears of the residents of Simi Valley.

<sup>205</sup> Grabiner at 91. The overwhelmingly white population of Simi Valley contrasts sharply with the mix of racial and ethnic groups in Los Angeles. According to the 1990 census, 37 percent of Los Angeles’s 3.5-million-person population were White Non-Hispanic, 13 percent Black Non-Hispanic, 9.2 percent Asian or Pacific Islanders Non-Hispanic, and 40 percent Hispanic. See [www.lacity.org/pln](http://www.lacity.org/pln) (reporting City of Los Angeles Census 1990, Los Angeles Citywide by Race/Ethnicity).

<sup>206</sup> Grabiner at 92.

The public and the media's criticism of Simi Valley as the venue for the *Rodney King* trial reverberated in post-verdict media commentary that largely pointed to the change of venue as the deciding factor in the case.<sup>207</sup> From a litigation standpoint, the move likely affected the kinds of narratives that would most appeal to the jury. The abuse of an African-American man by white police officers had the makings of a tale of oppression and excess readily believable by jurors in the "nation's most ethnically diverse city"<sup>208</sup> but far less credible to jurors in Simi Valley – which some were describing, even before the trial, as "the home breeding ground for the David Dukes, Tom Metzgers and skinheads of America."<sup>209</sup>

C. *Voir Dire, The Closest Look: How It Shapes the Jury and Aids the Litigator in Shaping the Trial*

The *voir dire* examination of prospective jurors for the *Rodney King* trial provides us – and could have provided an attentive litigator – with an opportunity to test the hypothesis that Simi Valley jurors would be likely to come into court with perspectives reflective of a postmodernist society. Close attention to the *voir dire* shows that it not only revealed those perspectives but reinforced them, encouraging the jurors to entertain a heightened level of skepticism regarding the dominant media's view of the video that would be the mainstay of the prosecution's case.

While an individual juror's world view is important in preparing him or her to accept alternative narratives to the dominant discourse, the juror's comfort level with embracing those alternatives can be affected by the education s/he receives about his or her role as juror. *Voir dire* is a crucial locus of that education; and in the *King* trial the *voir dire* played a key part in instructing prospective jurors to accept skepticism as a proper starting point for performance of their fact-finding responsibility. During *voir dire*, venire members learned that a juror's task required not only challenging the dominant power structure's view of "truth" (as the tabloid media taught their readers); it also required an obligation to make an independent judgment about the very definition of "truth." They learned that jurors were wanted to try the *King* case who would boldly embrace their own skepticism and challenge the litigators to tell a story of the King beating and video

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<sup>207</sup> See, e.g., Nightline, *supra* note 165 (including a statement by Representative Maxine Waters on the evening after the verdict: "I knew we were in trouble when we had a change of venue on this case. . . . I and others, I guess, were worried that that case was allowed to be moved there, and while I am, you know, not happy, I suppose I'm not really shocked by what took place there."); see also the commentaries cited in note 7 *supra*.

<sup>208</sup> Armstrong at 1.

<sup>209</sup> Goodman at B3.

that comported with each juror's view of the way the world works.

The *voir dire* process, by its very nature, plays into the postmodernist world view and encourages this bold skepticism in three different ways:

First, *voir dire* reveals which prospective jurors are indisposed to skepticism and weeds them out. In the *King* trial, the intense publicity surrounding the case led the judge to perform individual *voir dire* on the issue of a juror's prior exposure to the video and media commentary concerning it. Because the dominant media had shown the tape and talked about it in a manner that favored the prosecution, and because the judge insisted on accepting from the venire only those jurors who were able fully to "put out of your mind"<sup>210</sup> what the media had shown them, the weeding process operated to produce a jury composed of people susceptible to crediting a defense version of the story.

Second, the *voir dire* process is pitched to affect each potential juror's level of receptivity to postmodern skepticism. In the process of inquiring about the jurors' perceptions of the media, the judge in the *King* trial invoked legal rules about the necessary impartiality of jurors to draw out whatever postmodern skepticism was latent in the prospective jurors. Specifically, through *voir dire* the judge taught potential jurors that to be "fair" they would have to be open (*i.e.*, make use of postmodern skepticism) to consider alternative versions of what happened on the night of the King beating – versions that went beyond the video.

Third, *voir dire* ignites a process of metacognition in which potential jurors are called upon to state and then question the limits of what they have believed. Unlike the "armchair jurors" who were passive receivers of the King videotape via TV in their own homes, the venirepersons were forced to reexamine their original assumptions. Thus, even if members of the jury had viewed the tape on television and believed the officers' force excessive on the basis of that viewing, they were prodded to reexamine their own rush to judgment when they were called upon to articulate and explain their reaction to the tape, first in *voir dire* questioning and later in the jury deliberation room.

These three points can best be elaborated through a detailed examination of the *voir dire* record in the *King* trial.

### 1. *Voir Dire Indications of the Potential Jurors' Predispositions*

Several major themes in the venire members' responses to *voir*

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<sup>210</sup> Tr. vol. 39, 4307/8 - 9 (February 25, 1992). This question, in the same or slightly varying form, was asked of every juror who had seen the video.

*dire* questioning<sup>211</sup> suggested a predisposition toward a postmodernist world view. First, many potential jurors were quick to express the idea that the media had exercised choice in determining what to air or present to the public about the King incident. They opined that what was selected for presentation by “[t]he news media was pretty much the [video] tape,”<sup>212</sup> and not even the entire videotape.<sup>213</sup> The media’s decision to judge the case by the video alone, according to these potential jurors, may have been a mistake:

*Potential Juror #40:* Well, it was when it – like the news that they – I forget what – *Hard Copy* or one of the things that said that there was more to it than, you know, just the chase, you know. . . .

*The Court:* Did you believe it when you heard that on *Hard Copy*?”

*Potential Juror #40:* “No, sir. ¶ . . . I don’t know the full extent or the full reasons of – but I believe that there is more to it than just the – just the video.”<sup>214</sup>

Thus, although PJ #40 agreed with the tabloid show *Hard Copy* in its questioning of the dominant media’s video-as-truth theory, his distrust of the media was so great that he could not adhere even to *Hard Copy*’s explanation of the incident. In general the potential jurors

<sup>211</sup> The *voir dire* testimony of these potential jurors showed that the jurors gained most of their pretrial information about the King beating from television coverage, whether it was the nightly news or *Hard Copy*. Only three prospective jurors said they had never seen the video. Richard A. Serrano, “Jury Picked,” *Los Angeles Times*, March 3, 1992, p. A1. The court, recognizing this, focused its *voir dire* questioning of the potential jurors primarily on any opinions they might have formed about the case based on knowledge of the incident as it was presented by the media.

<sup>212</sup> Tr. vol. 38, 4051/7 - 8 (February 24, 1992) (Potential Juror #2).

<sup>213</sup> See, e.g., Tr. vol. 39, 4405/22 – 23 (February 25, 1992) (Potential Juror #28: “[Y]ou are just seeing a minute – you know, one part of the whole tape”); Tr. vol. 40, 4616/13 - 18 (February 26, 1992) (Potential Juror #27: “Well, you know, seeing the video, I saw, you know, the attack. I don’t know – I didn’t see the beginning, I didn’t see the end. There is more information involved than just what I saw that is needed.”); Tr. vol. 39, 4398/26 - 4399/1 (February 25, 1992) (Potential Juror #25, noting that she had not yet formed an opinion because she seen “just a portion” of the video: “If I had seen what happened before or after, maybe, but not just on that basis, no.”); Tr. vol. 38, 4041/16 - 23 (February 24, 1992) (Potential Juror #1: “I don’t really think I had an opinion or have an opinion, sir.”; “You know, you see just a part of something, you don’t get the whole picture, in my opinion.”); *id.* at 4108/9 - 11 (Potential Juror #19: “What I feel is from the video, that looked inappropriate, but what I didn’t have was what led up to it and why it occurred. . . .”); *id.* at 4146/17 – 20 (Potential Juror #25: “. . . I don’t think that I can make a decision or an opinion on it from what I’ve seen from that videotape. I have no idea what was said or done before that or anything.”).

<sup>214</sup> Tr. vol. 40, 4676/2 - 25 (February 26, 1992).

were unwilling to venture during *voir dire* what a possible alternative interpretation of the event might be. They were sure of only one thing, that, “[i]n any situation I’m sure there is more than they show on t.v.”<sup>215</sup>

Second, the potential jurors had been saturated with media images of the video, most potential jurors having seen it anywhere between three and twenty times before the trial began.<sup>216</sup> Many potential jurors became numbed to the incident, and “got tired of watching it and after awhile it has no meaning after awhile [sic].”<sup>217</sup> Because the video was old news to these prospective jurors, it had lost its narrative force, rather than inspiring belief and a sense of outrage, as the prosecution may have expected and wished.

Third, after these repeated viewings, the jurors sought explanations for the incident beyond the physical event they had seen on the video: “But I think later on, as I seen [sic] it two or three times, like I said, it has been more of – more or less shock and then thinking through, you know, well, why were they doing it and all that. ¶ . . . [A]pparently they had been chasing him, and I’m not – I’m not sure exactly why they were – they pulled him over for some reason. I don’t know why they pulled him over, but apparently he [King] had done something wrong.”<sup>218</sup> Such testimony demonstrated that the potential jurors were primed to accept any new evidence that presented an alternative to the dominant media’s spin on the event.

Finally, the potential jurors expressed other reasons for distrusting the media portrayal of the incident. For example, their experiences with the dominant media in the past had led them to doubt the information they received from it. As one juror stated, “I don’t believe that you can form an opinion by what you read in the newspapers because I have read too many things that are reported and then you find out they weren’t right at all . . . .”<sup>219</sup> The potential jurors also

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<sup>215</sup> *Id.* at 4602/20 - 21 (Potential Juror #22); see also Tr. vol. 39, 4303/8 - 19 (February 25, 1992). (Potential Juror #6) (“[W]hat you see — you see that on the tape, but in my opinion there must be more to it than what is there.” ¶ “. . . I see what is happening on the tape the first couple of times that I saw it, and I just figured that – I mean, that is one portion of the tape, so I really haven’t an opinion – I haven’t, you know, come up with any opinion of the tape.”).

<sup>216</sup> This figure is based on an analysis of potential jurors’ responses over the course of the entire *voir dire*.

<sup>217</sup> Tr. vol. 38, 4111/13 - 15 (February 24, 1992) (Potential Juror #19).

<sup>218</sup> Tr. vol. 40, 4547/18 - 4848/1 (February 26, 1992) (Potential Juror #9).

<sup>219</sup> *Id.* at 4621/26 - 4622/2 (Potential Juror #28); see also, *e.g.*, Tr. vol. 38, 4044/4 - 6 (February 24, 1992) (Potential Juror #2) (“From my background [in law enforcement], I didn’t – didn’t think – there is other things that wasn’t presented on t.v.”); Tr. vol. 39, 4407/1 - 3, 4411/9 - 12 (February 25, 1992) (Potential Juror #28: “I’m not a person that believes the – that I believe the press absolutely and I know that those tapes are a very small portion of what might or could or should have happened”; “[s]o that I do realize that, you

expressed their opinions that the media are not dispassionate reporters, but have a point of view that affects how the story is told.<sup>220</sup> Thus, even if every news show had the same interpretation of the incident, the potential jurors acknowledged that there was probably another point of view out there:<sup>221</sup>

I didn't really examine the tapes and I think that impression that I got [of excessive force used on Mr. King] was – was as much from the media, what they had said in connection with that tape, more than the tape itself. ¶ So . . . I'm not decided, because I've only heard the media's point of view and I – I don't think they always give a fair representation of what has happened.<sup>222</sup>

In the end, these prospective jurors were not willing to adhere to a view of the beating incident that had been crammed down their

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know, facts can be altered by the press and I still form opinions by them, but they could be altered until I find out differently.”).

<sup>220</sup> See note 219 *supra*; text accompanying note 222 *infra*.

<sup>221</sup> It is possible that these statements reflecting distrust of the media were covers for the prospective jurors' real feelings about the beating incident. Commentators and observers have repeatedly asserted that the jury's verdict was attributable solely to racism. Obviously, few potential jurors would admit that their beliefs about the likely innocence or guilt of the defendants were driven by racist antipathy to Rodney King. Disbelief of the media and of a video that seemed to implicate the white defendants would provide a better reason than racism for coming to a decision contrary to the one apparently implied by the dominant media's persistent sponsorship of the video and adopted by the viewing public.

The recognition that prospective jurors' professions of skepticism toward the media may have been employed – to an unknown and unknowable extent – to conceal an underlying racism does not, however, make those professions unimportant. Had the prosecutors appreciated that what the prospective jurors were expressing was the *concept* of skepticism toward the dominant media's portrayal of reality, they could have addressed that concept in ways that at least worked to cut away this cover story, leaving the jurors to face their own racism. And the same shame that might have made jurors loth to admit racism might also have made them loth to consciously act on it.

It is also possible that prospective jurors' expressions of skepticism toward the media were not so much a reflection of their pre-court attitudes – that is, of a tendency to disbelieve what they saw on TV day by day – as an *explanation* to which they resorted *post hoc* when they discerned during *voir dire* questioning that they were expected to exhibit an open mind and needed to explain how they had maintained one despite extensive exposure to the video on TV. That would make these expressions significant from the standpoint of metacognition (see text at notes 233 - 241 *infra*) but less so as evidence of the Simi Valley venire's incoming dispositions. Again, the question whether a particular juror's ability to articulate the *concept* of skepticism demonstrates that s/he actually harbored skepticism is unanswerable – in our study and probably in life generally. What we can say is that many of the *Rodney King* venirepersons were able to both articulate and justify that concept in plausible, concrete terms immediately and without coaching; and a concept so available to consciousness is not unlikely to play a part in one's everyday perception of the world.

<sup>222</sup> Tr. vol. 40, 4570/10 - 19 (February 26, 1992) (Potential Juror #12). Today, 24-hour news channels are more prevalent than they were at the time of the *King* trial, so today's viewers probably have more choice regarding the interpretive bent they hear in the reporting of news. See text following note 182 *supra*. If the *King* trial were to take place today, the *voir dire* process might be usefully informed by inquiring which, if any, of these “dominant” media resources the prospective jurors choose to watch.

throats by the media. Instead, they sought the kind of empowerment that the tabloids provide in a culture shot through with postmodern skepticism – the ability to judge for themselves which version of the event they could and would believe.

## 2. *The Voir Dire as an Instrument for Educating the Jury*

As we have noted, the judge focused *voir dire* on the extent to which the prospective jurors' exposure to pretrial publicity had caused them to form opinions. Through the judge's examination of the pretrial publicity issue, the prospective jurors were educated about what it meant to be deemed impartial enough to serve as a juror in a highly publicized trial of four police officers accused of beating a citizen. This was made evident when the judge issued a general instruction informing the venire members that the "test" they must pass to become jurors was "whether you can put [your pretrial exposure to the case] out of your mind and decide this case based only on what evidence is presented in this courtroom and my instructions on the law."<sup>223</sup>

Judges give similar instructions in most criminal trials, either because the aim of *voir dire* is to obtain an impartial jury or because they want to decrease the vulnerability of the record to post-trial claims of jury bias. To accomplish either of these ends in a case in which the jurors have already seen the key piece of evidence – some of them repeatedly – a mere exhortation to the jurors to disregard their pretrial knowledge of the case would not be sufficient. In the *Rodney King* trial, the prospective jurors had to be taught not simply to be skeptical of their previous impressions regarding the facts, but to be skeptical specifically of the videotape, the centerpiece of the prosecution's case. Only venire members who claimed to have remained unswayed by pretrial publicity – which meant, for virtually every prospective juror, by exposure to the videotape in particular – could obtain a coveted spot on the jury in such a high-profile case.<sup>224</sup> The dynamics of *voir dire*, as they played out in the *King* case, served to educate venire members already drawn from a postmodern Californian background to be even more skeptical of any enlightenment notion of truth that might have invested the video with credibility as an objective mirror of reality.

This educational effect was probably enhanced by the fact that the judge, rather than the attorneys, conducted the *voir dire* questioning. As in any conversation among people, during *voir dire* "informa-

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<sup>223</sup> Tr. vol. 39, 4267/10 - 13 (February 25, 1992).

<sup>224</sup> The increasing ability of jurors to sell their stories, in the form of books and interviews, after a trial is completed, has complicated jurors' incentives to be on the jury in a highly publicized trial.

tion is being exchanged and a social relationship is being created, maintained, or, in some cases, weakened.”<sup>225</sup> The relative social status of the conversants, as well as the context in which the conversants meet, will have an effect on the development of the information exchange and relationship. When the conversation is between the judge and a potential juror, the judge’s prestigious position in American society and the image of a judge as being above the fracas – as embodying the ideals of both wisdom and impartiality – have a powerful impact. In responding to such an estimable questioner, a prospective juror may well be concerned to give the judge the answers s/he sees the judge wants, even if s/he strives to be honest.<sup>226</sup> And Judge Weisberg’s line of questioning and forms of dialogue with the potential jurors in the *King* trial were particularly likely to educate them as to the desired answers to his questions. For instance, after each potential juror was questioned about the source and extent of his or her exposure to the video, s/he was asked some version of the following question: “have you formed any opinions about this case, based upon looking at the videotape . . . ?”<sup>227</sup> Significantly, the judge did not ask *to what extent* the jurors had formed opinions about the case, or *what kinds of opinions* they might have formed as a result of viewing the video, but *whether* they had formed any opinions at all. Such an alternative-choice question, one which allows only for a yes or no answer, suggests that if a juror wants to express impartiality (which s/he has already been told is essential to the role of the juror), s/he should reply “no.”<sup>228</sup>

At least one study has shown that “a judge’s admonition to disregard pretrial publicity [is] effective.”<sup>229</sup> Because the King-beating video had been seen by almost all of the venire members, Judge Weisberg’s admonition and line of questioning may well have had an even more powerful effect – and a qualitatively different one – than the general warning about pretrial publicity involved in that study. Had potential jurors never seen the video prior to trial, they would have

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<sup>225</sup> Roger W. Shuy, *How a Judge’s Voir Dire Can Teach a Jury What to Say*, 7 DISCOURSE & SOCIETY 208 (1996) [hereafter, “Shuy”].

<sup>226</sup> See NATIONAL JURY PROJECT, JURYWORK: SYSTEMATIC TECHNIQUES § 2.03[3] (2d ed. 1983) (“The greater the status difference or social distance between interviewer and subject, the greater the tendency of the subject to give answers the subject believes the interviewer would like to hear.”).

<sup>227</sup> Tr. vol. 40, 4541/11 - 13 (February 26, 1992).

<sup>228</sup> Such questions “admit no qualifications, influencing the answer to the extent that a simple yes or no answer is required whether or not such an answer can adequately represent what a respondent really wants to say.” Shuy at 208.

<sup>229</sup> Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUMAN BEHAVIOR 31, 45 (1984) (reporting a 1966 study by T.W. Simon).

been free to evaluate it as new evidence presented by the attorneys. Instead, before they had heard even one piece of evidence in court the judge implied that they were not supposed to interpret the video as it had been presented by the dominant media. Via the *voir dire* process, it became clear that if the media were correct that the video as they had shown it was a self-sufficient depiction of what happened, then there would be no need for a jury. The implication was that if any potential juror stated a belief that the video as presented on *Nightline* captured the whole truth, s/he would be disqualified from jury service.

When a potential juror did initially express some partiality based on viewing the video, the judge immediately followed up with questioning about the reasons for that partiality – questions that taught the potential juror that his or her partiality was based on insufficient information and therefore was probably incorrect. Below are two analyses of colloquies between the judge and potential jurors that demonstrate the *voir dire*'s powerful effect on jurors' attitudes toward the tape. The left column contains a sample colloquy in full while the right column contains our commentary on the colloquy and its progression.<sup>230</sup>

<b>Example 1</b>	
<p><i>Court:</i> And did you form any opinions about this case, based upon looking at the video or the news coverage?</p> <p><i>PJ #12:</i> Not really.</p> <p><i>Court:</i> Okay. Did you form any opinions at all? When you say “not really” does that mean –</p>	<p>Here the judge implicitly emphasized that impartiality requires a yes or no answer to his question about opinions based on pre-trial publicity. His question sought clarification that the potential juror indeed had no opinions based on pretrial exposure.</p>

<sup>230</sup> Prospective jurors are referred to by number as “PJ #\_\_”. The jurors were renumbered at the start of each day of *voir dire*. Although the colloquies are broken by lines for purposes of analysis, the left column in each example contains the complete exchange unless marked by ellipses.

<p><i>PJ #12:</i> It was upsetting to see somebody hit like that.</p> <p><i>Court:</i> All right.</p> <p>Did you form any opinions as to whether or not what you saw was legal or illegal activity by the police officers involved?</p> <p><i>PJ #12:</i> I know they had a job to do, so I really can't say.</p> <p><i>Court:</i> What did you mean by that?</p> <p><i>PJ #12:</i> They have to arrest the person. I thought they went to an extreme when they had the man down.</p>	<p>The potential juror at first favored the prosecution's side of the case, using strongly emotional language: "it was upsetting to see somebody hit like that." Yet, in her next response, she stated her belief that the defense may have some valid arguments as well. After a bit of prodding for clarification, she expressed the view that both sides could have arguments for the validity of their positions. She still had not given a definitive yes-or-no answer to the judge's question about whether she had formed an opinion regarding the legality of the officers' action, but she was showing that she could be swayed from her original position. Her last observation (in this block) suggests that she is aware of a tension in her own thinking: she herself is making arguments for both sides, and she recognizes that she is doing so.</p>
<p><i>Court:</i> Did you form an opinion as to whether or not what they did was more than they should have done under the circumstances? . . . Or did you have enough information to make that decision?</p> <p><i>PJ #12:</i> I don't think I had enough information really.<sup>231</sup></p>	<p>The judge's suggestion here gave her a way out of the tension: she could take the position that she lacked sufficient information to make an informed judgment either way. Although her earlier statements had indicated that she did indeed have opinions, the judge has now supplied her with a defensible and comfortable reason for retreating from those opinions – the idea that whatever initial opinions she may have formed were based on less information than may be forthcoming in court and should therefore be put aside. The juror is quick to seize upon and embrace that idea. In the exchange, she has learned that there is more to this case than just the videotape.</p>

<b>Example 2</b>	
<p><i>Potential Juror #25:</i> Just in general I don't think violence is necessary to arrest someone.</p> <p><i>The Court:</i> All right.</p> <p>But do you have any preconceived ideas that a police officer, under certain circumstances, cannot or should not ever use violence or force to effect an arrest or detain somebody? . . .</p>	<p>Here the judge's emphatic and unconditional language, "cannot or should not ever use violence" told the juror that it would be an expression of partiality to claim that violence is always improper. By using the term "preconceived ideas," a phrase implying a premature, unconsidered idea, lacking any basis in fact or reason, the judge made clear that he viewed such ideas negatively.</p>

<sup>231</sup> Tr. vol. 38, 4078/3 - 4079/2 (February 24, 1992).

<p><i>PJ #25:</i> I think that if their life is in jeopardy, yes.</p> <p><i>Court:</i> Or if some circumstances justified it, you could accept that there should be a level of force necessary under certain circumstances?</p> <p><i>PJ #25:</i> Yeah, absolutely.</p> <p><i>Court:</i> Do you have an open mind on that subject as far as how much force might be necessary in a particular circumstance?</p> <p><i>PJ #25:</i> I think so, yes.</p>	<p>In response to the judge’s cue the juror imagined a scenario in which violence would be permissible. Such an answer, though, was limited to a specific situation and fell short of accepting the possibility of permissible uses of violence in general. The judge’s follow-up question, talking about “some circumstances” and “certain circumstances,” emphasized the need for generality as a condition of impartiality. The phrases implied their own answer – that violence is appropriate in more situations than simply those where an officer’s life is in jeopardy. The juror’s response showed she now understood that to be impartial, she must have a completely “open mind” about the use of violence.</p>
<p><i>Court:</i> You don’t have any – coming into this do you have any preconceived ideas that violence should never be used or force should never be used in the arrest of an individual?</p> <p><i>PJ #25:</i> No.</p> <p><i>Court:</i> All right. . . .<sup>232</sup></p>	<p>Finally, the juror gave the conclusive response that she no longer has any “preconceived ideas” about the appropriate use of violence (notwithstanding her initial statement that, in general, violence is not necessary). An “open mind[ed]” juror, she has learned from the judge, must start from a position of general, unqualified agnosticism. [Soon after this answer was given, the judge and the attorneys invited the juror back for further <i>voir dire</i>, a sign that she had passed the test.]</p>

In this manner, the *voir dire* educated the potential jurors that partiality (which equated to a willingness to base any opinions regarding the facts of the King-police encounter on the video aired by the media) was unacceptable juror behavior, and that what was demanded of a juror was impartiality (which equated to an ability to set aside any views the juror may have formed in viewing the video on TV and a willingness to look beyond the video in determining the facts of the encounter). The result, doubtless unintended and unnoticed by the judge, was to encourage jurors’ skepticism of the truth of the very video which the prosecution – all unwitting – was planning to make the foundation of its case.

### 3. *Voir Dire Indications of a Process of Metacognition at Work*

Before being called for jury duty, certainly, not all potential jurors distrusted the media’s coverage of the beating episode or criticized the notion that the video provided conclusive evidence of the officers’ guilt. Nonetheless, even before the judge asked them questions that would nudge them toward such skepticisms, these jurors’ summons to court initiated a process of metacognition. For the first time, perhaps, many of the jurors anticipated that they would be re-

<sup>232</sup> Tr. vol.39, 4399/22 - 4400/24 (February 25, 1992).

quired to articulate and defend their views concerning the King-police encounter they had seen depicted by the video aired on TV. And that anticipation provoked second thoughts.

Unlike the jurors who professed a general skepticism toward the media, others appear to have developed a skeptical attitude toward the video only after they were called for *voir dire*. Potential Juror #15, for example, “was shocked” when she originally saw the video on TV.<sup>233</sup> But when the judge asked her whether this opinion was a strong belief, she responded, “Well, I have a problem with the question because my belief is that I don’t like forming an opinion in front of a bunch of people when I don’t know all the facts.”<sup>234</sup> Thus, while her inclination was to find that “they looked guilty” upon first exposure to the video, she readily admitted that this opinion had been formed “without knowing everything involved in the case.”<sup>235</sup> She could only agree with the judge’s question – itself a leading question and another illustration of the tendency of the court’s *voir dire* questioning to push jurors in the direction of skepticism, whether or not they were inclined in that direction to start with – that she had a “feeling or belief that there was more to it [the case] than what you just saw on the t.v.”<sup>236</sup>

Potential Juror #15 demonstrates that the *voir dire* process was capable of teasing out answers which might not otherwise have entered into the juror’s own conscious thoughts. As the judge noted in a discussion with the attorneys about the acceptability of one potential juror, *voir dire* may “sort of push these people into these statements . . . [by] asking them to form opinions, even if they might not have done so . . . .”<sup>237</sup>

Exhibiting another form of metacognition, one potential juror noted that her role as juror would force her to drop any preconceived notions she may have had prior to trial. “Well, I think when you are called as a juror, the way I feel about it, you become – you need to hear more information about what happened, and the only thing I have to go on right now is what I saw on the tape . . . .”<sup>238</sup> Once called to jury duty the potential juror faced, “a different total situation . . . [B]efore I didn’t think I was going to be a juror; now it is a possibility I will be, so you have to look at things a little bit differently then, or I do.”<sup>239</sup> Another juror noted that his opinion changed over the period

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<sup>233</sup> Tr. vol. 38, 4094/17 (February 24, 1992).

<sup>234</sup> *Id.* at 4096/15 - 18.

<sup>235</sup> *Id.* at 4096/20 - 22.

<sup>236</sup> *Id.* at 4097/1 - 3.

<sup>237</sup> *Id.* at 4102/21 - 25.

<sup>238</sup> Tr. vol. 39, 4358/14 - 18 (February 25, 1992) (Potential Juror #8).

<sup>239</sup> *Id.* at 4353/7 - 11 (Potential Juror #8).

of time extending from his viewing of the video on TV, through his filling out of a pre-*voir-dire* juror questionnaire, until his appearance in court. Based on his original viewing of the video, the juror stated that it looked like “excessive force.”<sup>240</sup> But the process of filling out the questionnaire shifted his views on this point:

*PJ #35:* . . . The media presents it . . . [to look like excessive force] and that is what you think at first, you know, but after being called as a prospective juror for this case, I’ve done a lot of thinking on it.

I don’t know about anybody else, but it took me have [sic] about five hours to fill out that questionnaire, because I had to do a lot of thinking, you know, to put down what I believed was my true feelings.

*Court:* And as you come into this courtroom now, anticipating that you might be a juror in this case, can you honestly say that you can put out of your mind any impressions or feelings or opinions you might have and make your decision based only [sic] the evidence presented in this courtroom and my instructions on the law?

*PJ #35:* Yes, I believe I can.

*Court:* Do you have any doubt in your mind about that?

*PJ #35:* No.<sup>241</sup>

This dialogue shows the interplay between the educative effects of *voir dire* and its capacity to stimulate metacognition. Building on the potential juror’s pre-court transformation, the court used *voir dire*

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<sup>240</sup> *Id.* at 4449/9 (Judge Weisberg, quoting from the completed juror questionnaire of Potential Juror #35).

<sup>241</sup> *Id.* at 4450/1 - 21 Potential Juror #35). Another prospective juror responded in almost the same manner as Potential Juror #35. When she originally viewed the tape, she believed that “[t]he officers beat an unarmed man,” and she recorded this opinion in her juror questionnaire. *Id.* at 4405/2 - 3 (Judge Weisberg, quoting from the completed juror questionnaire of Potential Juror #28). On *voir dire*, Judge Weisberg asked whether the juror currently maintained this view. She responded that she had recorded her belief because, “You asked if you – if we had formed an opinion. Yeah, I had formed an opinion in the past.” *Id.* at 4405/28 - 4406/1. However, by the time of the trial, she had thought further on the subject and she concluded that this was “probably not” her belief now “[b]ecause that [belief] – that was when I viewed the tape – You know, when you look at what they showed on you [sic] T.V., I realize you are just seeing a small portion of that tape. . . . ¶ So I do realize that *now*.” *Id.* at 4405/12 - 19 (emphasis added). This prospective juror may have reconsidered her position simply as a result of being called for jury duty or because the judge had announced that the upcoming round of *voir dire* would be devoted to determining the video’s effect on potential jurors – or she may have reconsidered only upon being asked if she still maintained the same view. [Both sides subsequently agreed to excuse this prospective juror for cause, apparently for reasons unrelated to her opinions regarding the videotape. She spoke of the LAPD “beating” people on another occasion (*id.* at 4407/12 – 15), probably making her undesirable from the defense’s perspective, and she stated that she did not believe that race was a factor in the case (*id.* at 4407/5 - 4410/10), probably making her undesirable from the prosecution’s perspective.]

questions embodying the standard legal formulas for jury impartiality to move him one step further. Just to have rethought or questioned his original assumptions through a self-taught form of metacognition would not have been sufficient to prepare him to be empanelled as a juror. In addition, the judge taught him that he needed to ignore his original assumptions entirely in order to be deemed impartial enough to serve on the jury.

## II. FORMULATING NARRATIVES FOR THE POSTMODERN JURY: A CONTRAST BETWEEN PROSECUTION AND DEFENSE

Some observations about the role of the jury in criminal trials generally and the expectations flowing from this role in the specific context of the *Rodney King* trial will set the scene for our analyses of the prosecution and defense litigation strategies and of available alternatives. Part of the function of criminal trials – and a major part of the attraction they offer to a fascinated public – is that they serve as a “central moral arena for society,” in which observers can scrutinize the norms and evils of the society’s people.<sup>242</sup> In this way, the trial offers the public a chance to regain a sense of control and order in response to its anger about crime and violence and its frustration at society’s seeming inability to curb these disorders. Unlike the complexities of modern urban life, a trial must end and a defendant must be fitted into one of two simple categories: guilty or not guilty. Even those skeptical of the notion that trials serve to find the truth can appreciate the closure that a trial ritual brings. Indeed, the public that rejected the verdict in the state-court trial of the *Rodney King* case ultimately gained satisfaction through a subsequent federal trial at which two of the officers were convicted for the beating.<sup>243</sup>

In the *King* trial specifically, Simi Valley and the jury were faced with two forms of social disorder. The first disorder was that the defendants had allegedly savagely beaten a citizen. The jury’s role here was clear: reimpose order by purging the community of those who have violated its rules of conduct. The second form of disorder, how-

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<sup>242</sup> Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 Nw. U. L. REV. 863, 885 (1996) (“[B]y providing the public with a close-up view of individuals on trial, by embedding the deviant act in circumstances that are often not themselves deviant, by allowing full consideration of all the excuses offered up by defendants, the public also comes to experience the ways it is like, not simply different from, the criminal”).

<sup>243</sup> The federal civil rights trial resulted in the convictions of Sergeant Koon and Officer Powell and the acquittal of Officers Wind and Briseno. See notes 4 and 6 *supra*; and see “Two Police Convicted in Beating of Black Motorist,” *Inter Press Global Information Network*, April 19, 1993, available at 1993 WL 2541726 (quoting Attorney General Janet Reno as commenting that White House officials expressed “complete satisfaction that justice had been done”).

ever, complicated the jury's first role immensely. The particular players – an African-American victim and four white police-officer defendants – evoked the threatening image of rampaging inner-city criminals of color barely restrained by the “thin blue line.”<sup>244</sup> This was likely to appear to the all-white Simi Valley jury a far greater social disorder than the acts of a few individuals who had violated society's rules. For this jury to convict its protectors because of violations affecting an apparently inebriated, drug-using, law-breaking, African-American man, the jurors had to dis-order their view of the world, and their own community. The good guys had to be made the bad guys and the bad guy had to be made the victim. This was not a re-ordering task to be taken lightly, for its implications were far greater than those of letting one group of guilty defendants go free.

Thus, before trial had even begun, the litigators should have understood that they would need to shape their narrative strategies to play on this hazardous stage. The demographics of the accused, the victim and the jurors placed the trial in a complex, volatile social sphere. The litigators' trial planning had to take account of the backgrounds, experiences, and perceptions of everybody involved. In addition, the litigators should have learned through *voir dire* that the jurors would demand more information about the King beating than what they had thus far learned from the media. And the jurors would expect and demand that this new information explain the beating episode in ways that comported with their individual world views. In the following subsections we suggest that the prosecution was much less successful than the defense in devising narrative strategies suited to the complexities of the situation.

#### A. *The Prosecution's Strategy: Reliance on the Videotape as Objective Evidence*

In his opening statement, prosecutor Terry White described how Rodney King led the police on an extended car chase, how his car was eventually stopped, how he got out of the car, and how he eventually lay down flat on the ground after repeated police orders to do so.<sup>245</sup> White related these events, which set the scene for the beating, largely through the perspectives of Melanie and Tim Singer, the California Highway Patrol officers who originally pursued Mr. King. From that point on, White's approach to the facts was to present the videotape as unquestionable demonstrative evidence of what then happened.<sup>246</sup> White played the video in his opening statement – not an enhanced

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<sup>244</sup> See text and notes at notes 61 - 62 and 119 - 156 *supra*.

<sup>245</sup> Tr. vol. 44, 5258/19 - 5265/5 (March 5, 1992).

<sup>246</sup> *Id.* at 5266/20 - 5269/8.

version of it such as the defense lawyers would later use, but the same version that the jurors had seen over and over again on TV and discussed on *voir dire*.<sup>247</sup> He briefly summarized what the video would show before he screened it, and he summed it up again in a single sentence after screening it,<sup>248</sup> but essentially he allowed the tape to perform his own function as prosecutor – to describe what the prosecution would prove – and he repeatedly told the jury that the videotape would provide the whole relevant truth of the event.<sup>249</sup>

Even after it became plain that the defense team was working to create an alternative truth by reconstructing the video (as we will describe below), White continued to adhere to his “the tape tells the truth” theory throughout the trial. Indeed, White emphasized that there could be no alternative truth, because anything that was not the video as he showed it was simply a lie. In closing argument, White argued that Officer Powell had told twenty-six lies either in his report to the police department or in courtroom testimony.<sup>250</sup> To demonstrate that Powell lied, White frequently compared Powell’s testimony to the video evidence. For instance, with regard to Powell’s statement that King had made a “[h]ostile charge in our direction,” White asserted: “That was a lie, too. You could see that from the video.”<sup>251</sup> The

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<sup>247</sup> Michael Stone, attorney for Officer Laurence Powell, also showed a version of the videotape during his opening statement. *Id.* at 5306/24 - 5309/28, 5317/5 - 5323/23. This was an enhanced version made by the FBI. The enhanced tape included a visible timing mechanism showing the amount of time elapsed during playback of the tape, to the tenth of a second. It included three versions of the original video: one in real time, one at 25 percent of actual speed, and one at 6 percent of actual speed. *Id.* at 5382/8 - 5383/2 (stipulation). During his opening, Stone played the real-time segment but did not play it through. Instead he stopped and started the tape while commenting on the events depicted as they occurred, using the timing mechanism for reference. See *id.* at 5318/8 - 5324/2. During this presentation, he also introduced other enhancement techniques which would be used by the defense team throughout the trial. See text and notes at notes 277- 281 *infra*.

<sup>248</sup> *Id.* at 5266/20 - 5269/8. His post-screening commentary was simply: “Ladies and gentlemen, you will be seeing that video a number of times during this trial and we believe the evidence will show that you will see – you have a man who is down, a man who was not aggressive, a man who was not resisting, yet those blows from Officer Powell and Officer Wind’s batons continued and continued and continued for no just reason.” *Id.* at 5269/1 - 8.

<sup>249</sup> See note 252 and text accompanying notes 251 - 253 *infra*. Speaking to the press after the trial, White said, “We thought the videotape was very, very powerful,” John Riley, “What the Jury Heard That the Public Didn’t,” *Newsday* (Nassau and Suffolk edition), May 13, 1992, p. 5, Lexis printout at \*2 [hereafter, “Riley”], and “We thought it spoke for itself,” *id.* at \*5.

<sup>250</sup> Tr. vol. 75A, 13531/7 - 9 (April 20, 1992) ; and see, e.g., *id.* at 13535/7 - 15 (“He can’t admit to anything because he knows an admission by him . . . on any one of those points clearly proves what everyone can see when you look at that video, that there was a man, Mr. King, that was being punished out there that night. ¶ There was not a reasonable use of force. That is why he has to have all these lies. That is why he can’t tell the truth.”).

<sup>251</sup> *Id.* at 13533/16 - 17. See also, e.g., *id.* at 13533/18 - 25 (“Check swing versus video image. . . . ¶ When you look at the start of the video, there is no check swing there.”); *id.* at 13534/2 - 5 “He [Powell] said Mr. King ran into him. Well, you don’t see that on the video-

prosecution's argument depended on the proposition that while humans can lie, videotapes cannot. White relied on this line of argument throughout the trial, and confirmed it in his closing:

And what more could you ask for? You have a videotape in this particular case which shows objectively, without bias, impartially, what happened that night.

¶. . . This videotape is the central piece of evidence in this case. We don't need to rely on Stacey Koon's words. We don't need to rely on Lawrence [sic] Powell's word. We don't need to rely on what they said happened that night. We don't need to rely on what Mr. King says happened that night.

We have the videotape and the videotape shows conclusively what occurred that night and it is something that can't be rebutted. It is there for everyone to see. It is the most objective piece of evidence you can have."<sup>252</sup>

The prosecution's narrative strategy, then, demanded that the jury be a passive observer of the videotape and that, when the time came for deliberations, the jurors simply accept that the facts as presented in the videotape were the objective facts of the case.<sup>253</sup>

The danger of White's tape-as-truth theory – the same theory that underlay the TV media's repeated presentation of the video as the authoritative version of the beating – was that although it enabled the jury to remedy a wrongful beating by punishing the beaters, it did not resolve the problem of how to turn the police into bad guys. To redress the disorder depicted as police-officers-wrongly-beating-a-citizen, the jury was forced to accept a second, more disturbing disorder: the punishment of the traditional good guys for the sake of protecting

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tape."); *id.* at 13534/13-15 ("Look at the start of the videotape. Neither one of those things happened."); *id.* at 13534/25 - 13535/2 ("Laughter on the tape. Officer Powell wants you to believe that [laughter] was just heavy breathing. You can listen to that tape one time, two times, a hundred times, you are never going to be able to identify that as heavy breathing. That is laughter . . .").

<sup>252</sup> *Id.* at 13479/3 - 28. And see the concluding passage of White's closing argument (*id.* at 13603/28 - 13604/13):

*Mr. White:* . . . Who are you going to trust, them [the defendants] or your own eyes?

And at this time I'm going to play this videotape again and at the end I have a question and then I'm going to leave with the defendants – for the defendants to answer in their arguments.

(At 4:51 P.M., People's Exhibit 2, a videotape, was played.)

*Mr White:* Now, who are you going to believe, the defendants or your own eyes?

Thank you.

<sup>253</sup> Richard Sherwin notes that defense attorneys are often called upon to counter a "logico-scientific" narrative of the prosecution. See Sherwin, *Narrative Construction* at 689. We will detail later the techniques used by defense counsel to do this in the *King* trial.

a prototypically bad guy.<sup>254</sup> Unlike the defense, which provided a story that did not require the good-guy/bad-guy role reversal, White gave the jury no way to vote for his version of reality without inverting their fundamental view of the world. By referring to the defense version of reality as “lies,” White failed to account for the possibility of alternative world views and ignored that the defense spin on the video had equipped the jurors to view White’s so-called “lies” as “alternative truths.”

White’s cross-examination of defense expert Sergeant Charles Duke illustrates most clearly the limits of White’s tape-as-truth theory. Duke, who trained police officers in the use of force, was the pivotal defense witness. As an expert, he detailed the use-of-force training given to Los Angeles police officers. Then he performed an exegesis of the video, moment by moment and sometimes frame by frame, justifying every baton stroke as proper police conduct.

After Duke presented his analysis of the video on direct examination by defense counsel, White opened his cross-examination by questioning whether Duke really believed what he had just said: “Sergeant Duke, when you first saw this videotape you were shocked by what you saw, weren’t you?” Duke denied being shocked. In response, White posed the question again, more insistently: “When you first saw this videotape did you believe that it possibly contained excessive force by these officers?” Duke replied: “I never form an opinion until I get all the facts.” White pressed on: “Sergeant Duke, when you first looked at this video did you possibly believe that it contained excessive force? . . . Yes or no?” When Duke responded in the negative, White tried one more time: “So you didn’t – you looked at this video-

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<sup>254</sup> White’s rebuttal argument in closing did address the inversion of the jurors’ world views that a conviction would require, but he offered only abstract platitudes as a palliative to this problem:

. . . I knew at one point I would hear about the thin blue line, and it is a real tragedy that . . . [the defense attorneys are] bringing that up here in this case. And the tragedy is that we give these men and women our trust. We ask them to do their job, we ask them to do their duty, we ask them to uphold the law.

¶ . . . To have them hide behind the very badges that they wear by talking about this thin blue line, by talking about these hordes of criminals out here that they are protecting us against, that is embarrassing.

Men and women across this country do their job every day as law enforcement officers without resorting to the violence and the brutality that you see on this – that you have seen on this screen over the last six weeks.

¶ . . . What kind of world would you have without cops? That is what Mr. DePasquale asked. I ask what kind of world are you going to have where these cops violate the law, they fail to uphold the law and they failed in their duty, and their duty is to follow the law.”

Tr. vol. 77, 14002/23 - 14004/10 (April 22, 1992). White never gave the jurors any kind of narrative that would enable them to answer his penultimate rhetorical question. For a narrative theory of the case that White might have employed, see text at notes 314 - 336 *infra*.

tape and you weren't shocked by what you saw? You thought everything on it was ok?"<sup>255</sup>

As an expert witness for the defense, Duke was unlikely to admit that he had ever seen the excessive force that White was implying the videotape revealed. White doubtless knew this. White could only hope through this line of cross examination to distance the jury's untutored experience of the video from the expert's. Such a strategy raised but did not resolve the issue whether the jurors should accept the expert's tutoring. The only reasons suggested by White's questioning why the jury should not do so were that Duke was either incapable of seeing an obvious truth that the jury saw (perhaps because he was calloused) or unwilling to see it (perhaps because he was a hired gun). Such an attack on Duke's credibility as a witness was in keeping with White's overall approach to truth – whoever could not see the truth must be either a fool or a knave – and ill-adapted to the perspectivalism of a postmodern jury.

For, in attacking Duke in this personal manner, White implicitly attacked the new media. Duke, like the tabloids, advertised an ability to alert his audience to a new way of looking at a familiar scene, fully acknowledging to the audience that this was what he was about.<sup>256</sup> In effect, Duke empowered the jurors by reinforcing their belief that the video could tell more than one story. White's response offered no similar empowerment, no competing story for the jury's choice as an alternative interpretation if interpretation of the video was necessary. White just bashed the defense storyteller.

### *B. The Defense Team's Use of the Video to Play to Juror Skepticism*

Given that the prosecution's tape-as-truth version of the facts was liable to undermine the world view of Simi Valley jurors, White's strategy of simply pointing to the video again and again without interpreting it seems singularly ill-conceived. In contrast, the defense created a narrative which explained the video in a way that did not require a reevaluation of the jurors' life experiences.<sup>257</sup>

The message embedded in the defense narrative was that jurors were right to trust the police; the cops put their lives on the line every day to protect the jurors from the Rodney Kings of this world; the

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<sup>255</sup> Tr. vol. 57, 8720/4 - 21 (March 24, 1992).

<sup>256</sup> See note 182 *supra* and accompanying text.

<sup>257</sup> See Sherwin, *Narrative Construction* at 689 - 690 ("[T]he inherited cultural knowledge at the jurors' fingertips will be, at least the defense hopes, shaped and informed by the images, scripts, and familiar scenarios that defense counsel evokes during the course of the trial.").

police were the victims here, not Rodney King; they should not be punished for doing their job. To reconcile this message with the scene depicted by the videotape, defense counsel embraced the jurors' skepticism<sup>258</sup> and willingness to see the video as open to interpretation. They labored to construct an alternative knowledge structure through which to view the video. Their narrative strategy treated the video as a "text," a body to be read and deciphered.<sup>259</sup> This enabled the jurors to re-read the video and give it a new, alternative interpretation. By slowing down the action, breaking it apart, and arranging the pieces in a selective mosaic, the defense first provided a new conception of what the text was. It then rewrote what the text said.<sup>260</sup> Through Duke's expert testimony, the defense transformed an appearance of mindless, brutal, excessive force into a demonstration of thoughtful, refined, carefully measured performance of an impeccably correct police procedure.

### 1. *Creating a New Text Out of an Old Video*

The defense team translated the video into an interpretable text by deconstructing the video in form and content. On the formal level, they showed the jury alternative versions of the tape (starting with the FBI's "enhanced" version), played the tape in alternative ways (different stop-and-start patterns), froze individual frames into stills, magnified the stills, and marked them in various ways. These techniques highlighted specific action sequences and discrete fragments of the visible scene on which the defense wanted the jury to focus. By extracting temporal and visual pieces from the whole, the defense broke down the linear series of events constituting the prosecution's case and challenged the prosecution's "objective truth" as a "nonsensical, incredible tale too full of inconsistencies and loose ends to withstand the onslaught of reasonable doubt."<sup>261</sup> But more than simply creating doubt about the prosecution's version of events, the defense supplied its own explanation of the things seen (or seeable) on the video. The defense provided, in short, a modernist response to the prosecution's

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<sup>258</sup> See, e.g., Tr. vol. 76, 13808/6 -8 (April 21, 1992) (telling the jury in closing arguments that "it is up to you to be skeptical and to see through weaknesses in the final argument by the D.A. . . .") (closing argument of Paul De Pasquale on behalf of Timothy E. Wind).

<sup>259</sup> Defense attorney Michael Stone explained the deconstructive aim of this strategy by saying: "many people, probably, coming into this case – lawyers included – thought, 'Boy, what a dynamite piece of evidence, I mean, this is really something,' never realizing how deceptive that wonderful piece of evidence really is." CNN, *Early Prime, Rodney King Trial Update* (broadcast April 21, 1992).

<sup>260</sup> See STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* 322 - 337 (1980) (providing examples of the variability of texts and interpretation).

<sup>261</sup> Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39, 68 (1994) (citing *Closing Arguments*).

enlightenment version of events.<sup>262</sup>

The defense attorneys foreshadowed their modernist story by telling the jury during opening statements that they were going to freeze the video's frames and then take the image on a frame, blow it up, and, through the use of overlays, direct the jurors' attention to outlined individuals at select moments in time.<sup>263</sup> In effect, the defense promised the jury new evidence: the video in an entirely new form. To reconstruct the video into something new for the jury, the defense employed five primary techniques.

First, the defense emphasized what had happened before the video filming began.<sup>264</sup> This technique was responsive to the jurors' complaints on *voir dire* that the media had failed to contextualize the video.<sup>265</sup> Specifically, defense counsel emphasized the high speed chase leading to King's arrest,<sup>266</sup> King's violence,<sup>267</sup> numerous communications, commands and warnings by the officers that the audio failed to pick up,<sup>268</sup> and King's appearance of being under the influ-

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<sup>262</sup> See text and notes at notes 172 - 175 *supra*.

<sup>263</sup> Tr. vol. 44, 5318/24 - 5322/18 (March 5, 1992) (opening argument of Michael Stone on behalf of Laurence Powell).

<sup>264</sup> For instance, Koon's testimony on direct spanned 91 pages. Thirty-seven (41 percent) of those pages discussed events that occurred prior to the beginning of the videotape. See Tr. vol. 54, 7769/4 - 7866/3 (March 19, 1992).

<sup>265</sup> See, e.g. Tr. vol. 38, 4118/19 - 22 (February 24, 1992). ("But like I said, I don't know what happened before or after. I don't know all the details . . ."); *id.* at 4048/12 - 27 ("[W]hat I'm looking at on the television was an incident where the motorist was stopped, there was a physical confrontation, and what I saw for some reason the motorist tried to get back up and there was resistance and I don't know why that happened. . . . Just by the videotape, I don't think that is sufficient evidence."). In noting that the defense strategy of emphasizing pre-video events was calculated to play well to jurors who voiced such reservations about the media presentations of the King beating, we do not mean to suggest that defense counsel devised the strategy only after hearing the *voir dire*. To the contrary, the Los Angeles Times reported before *voir dire* began that the defendants intended to "build their case around the crucial moments between when King stepped from his car on a darkened San Fernando Valley street and when an amateur cameraman began recording." Richard A. Serrano, "Attempt to Blunt Effects of Video Seen as Key to Trial," *Los Angeles Times*, January 16, 1992, p. A1.

<sup>266</sup> See, e.g., Tr. vol. 76, 13623/10 -17 (April 21, 1992) (closing Argument of Michael Stone on behalf of Laurence Powell) ("He chose, ladies and gentlemen, to drink. He chose to get in the car. He chose to drive a hundred to 115 miles an hour on the freeway. He chose to run from the CHP on the freeway. He chose to ignore the red light and siren. He chose to run red lights. He chose to drive 80 miles an hour on city streets in an effort to get away.").

<sup>267</sup> See, e.g., CNN, *The World Today: Defense Attorneys in King Trial Analyze the Video Tape* (broadcast April 30, 1992) (hereafter, "*World Today*") (featuring defense attorney Darryl Mounger stating "You have to understand what had happened before this had occurred. He had thrown four policemen off; he had led them on a high speed chase.").

<sup>268</sup> For example, defense attorney Michael Stone told the jurors in his closing argument, ". . . [L]et's not forget things you can't hear in the video but you've heard a lot of testimony about, there is constant commands, 'Get down, stay down, your hands behind your back, get down, get down.' You can hear some of it on the video. Even though it is from 175 feet

ence of PCP.<sup>269</sup> By starting the action earlier and locating the videotaped part of it toward the end of a purportedly connected sequence, defense counsel turned Mr. King – who may have looked like a victim during the video – into an aggressor getting only what he deserved.<sup>270</sup> Armed with information about preceding events that the popular media had ignored, the jury could, defense counsel suggested, finally see the appropriateness of the officers' actions.

Second, defense counsel manipulated the speed at which they showed the video.<sup>271</sup> For example, they slowed down the video when they wanted to emphasize that the officers devoted thought to developing a reasoned response to Rodney King's movements during a period that was a split second in real time.<sup>272</sup> It was essential to the officers' case that the jury believe that the officers actually could have had time to think through their actions as the events progressed, since their defense was not that they were so overwhelmed by King that they did not know what they were doing, but that their responses were reasonable and correct. Conversely, defense counsel speeded up the video when it served their argument to do so. This technique allowed the defense to skip over many unflattering moments.<sup>273</sup> But, the de-

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away, you can hear it." Tr. vol. 76, 13669/25 - 13670/3 (April 21, 1992).

<sup>269</sup> Sergeant Koon testified that, "[King] had exhibited this hulk-like strength which I've come to associate with PCP." Tr. vol. 54, 7806/6 - 8 (March 19, 1992). The effects of the drug, according to Koon, are "like a policeman's nightmare, that the individual that is under this is super strong, they have more or less a one-track mind. They exhibit super strength and they equate it with a monster . . ." *Id.* at 7810/26 - 7811/1. See also note 112 *supra*.

<sup>270</sup> See text at note 91 *supra*.

<sup>271</sup> Tr. vol. 44, 5323/23 - 5324/2 (March 5, 1992) (opening argument of Michael Stone, explaining that three versions of the video would be shown: real time, slow motion, and very slow motion).

<sup>272</sup> Slowing down the video helped to support testimony such as that of Sergeant Koon in describing the incident: "It has gone on it seems like an eternity, but it has gone on several seconds, yes." Tr. vol. 54, 7853/26 - 27 (March 19, 1992).

<sup>273</sup> During Duke's testimony, for instance, defense attorney Darryl Mounger stopped the video at 3:28:22. Tr. vol. 56, 8501/24 - 25 (March 23, 1992). At this precise moment, Mr. King was lying flat on the ground. Mounger asked Duke whether the police were hitting King while he was lying flat; Duke said, no. *Id.* at 8501/27 - 8502/7. Mounger then fast-forwarded to 3:32:15, so that the beatings occurring during the intervening time were not discussed. He played the portion of the video from 3:32:15 to 3:32:24 in slow motion and elicited Duke's testimony that King was "in a rising position" at 3:32:24. *Id.* at 8502/9 - 23. Avoiding words like *beating* or *hitting*, Mounger used the police code lingo for striking-with-a-side-handled-metal-baton by asking Duke whether "it would be appropriate use to use a PR-24" in this situation. Duke answered, yes and explained why. *Id.* at 8502/25 - 8503/11. After discussing with Duke that Rodney King was 6'3" tall and weighed from 250 to 300 pounds, the attorney then briefly fast-forwarded the tape again, blurring additional beating of Mr. King, before playing another portion at normal speed. Without discussing the beating that took place during the blurred interval, Mounger asked Duke to comment solely on King's body motions. *Id.* at 8503/22 - 23. Duke's response that "He [King] goes down" (*id.* at 8503/24) shows the effectiveness of moving quickly over the portions that are

fense also employed real-time speed when that served the defense argument. For example, the defense used real time to show how quickly King was able to move, although he had just been hit with high voltage electricity from the taser.<sup>274</sup>

A third defense technique, related to the second, was stopping the video for analytic commentary on segments of it. Running the tape in slow motion, defense counsel repeatedly interrupted the projection and asked their expert witness, Sergeant Duke, to explain and evaluate fractional pieces of the visible action and minute portions of the various scenes.<sup>275</sup> Duke proceeded to pair every strike of a police baton with some prior movement by Mr. King which he characterized as threatening. What appeared on the full-speed video as Mr. King simply cocking his leg, kneeling, resting on his elbows, or sitting on his haunches, became an “escalation of force” that required, in Duke’s expert opinion, a response from the officers.<sup>276</sup>

The fourth defense technique was to alternate between showing the most complete version of the video in its entirety and individual segments of the video or stilled frames. Prosecutor White had shown the complete video during his opening statement, not just the horrific snippets of the beating most repeatedly aired on television. In making extensive use of small extracts from the video during the defense case, defense counsel risked incurring the suspicion of the jury that they,

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less flattering to the police. Through Duke’s testimony, King was transmuted from object (occupying a victim’s position) to subject, (controlling the action). Without the intervening acts, it appeared as if King chose to go down of his own volition, rather than that he was forced down by the officers’ successive beatings.

<sup>274</sup> Defense attorney Stone discussed this strategy on *World Today*.

<sup>275</sup> The prosecution recognized this defense strategy but apparently saw no way to counter it. After the verdict, prosecutor White stated “[W]e didn’t want a frame-by-frame analysis, and we – but we couldn’t stop the defense from trying to put that on. . . . [The jury] had to look at the totality of the videotape, and that there was a point in that videotape where enough was enough . . . .” Nightline, *supra* note 165.

<sup>276</sup> See, e.g., Mounger’s examination of Duke at Tr. vol. 56, 8504/2 - 21 (March 23, 1992):

Q: All right.

When he is in this position here at 36:16:19, would it be appropriate to hit Mr. King with a baton?

A: He is in a rising position. He has this leg cocked, he is up on his knees or up on his elbows in a rising position.

Q: All right.

So you are saying based upon all that has happened up to date with regard to this scenarios [sic] you think it would be appropriate to hit him?

A: Yes, I do, because once an officer is attacked, to allow the suspect to rise up to his feet, you allow the potential for escalating the situation into a deadly force mode with the consideration of weapon retention, with the consideration of this suspect, grabbing hold of the officer and removing – removing a weapon, so the position that the officers want to keep him in is down.

See also the passage of Duke’s testimony described in note 273 *supra*; and see note 93 *supra* and accompanying text.

like the media, were distorting events by manicuring the tape. To overcome this problem and appear even more comprehensive in presenting relevant information than the prosecution, defense counsel showed the FBI “enhanced” tape during opening statements and repeated the showing during the defense case after having had its expert isolate and analyze small segments and individual frames in such a way as to justify each blow by the officers. They thus appeared to be offering the jury an opportunity to double-check the correctness of the defense analysis of extracts from the video by putting those extracts back into the context of the full tape – although, of course, the jurors’ perception of the full tape had now been conditioned by the defense analysis of the extracts.

The fifth defense technique was converting the video from its original form into individual stills. This created an entirely new body of texts, transforming the visual scene from chaos into order, from frenetic motion into an array of static photographs and figures outlined like the constellations in a child’s map of the night sky.

Defense counsel justified the transformation by pointing out blurs and ambiguous images in the video so as to cast doubt on the tape’s quality and value as a representation of reality.<sup>277</sup> Having thus opened the interpretive terrain, they remade the video by presenting the jury with various frame-changing devices. They created the equivalent of a flip book of individual still photographs: a series of discrete, single-page images which, when flipped in sequence, gave the

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<sup>277</sup> See, e.g., Tr. vol. 44, 5306/19 - 23 (March 5, 1992) (opening argument of Michael Stone: “One of the things about this tape that you will realize as the case goes forward is that there is a lot of things that you didn’t see at first when you look at the tape and there is a lot of things that you see only after examination.”); *id.* at 5318/24 - 26 (same: “Now, right here is a portion of the tape where the images go out of focus for a few seconds and you can’t really see what is happening.”); *id.* at 5319/7 - 15 (same: “Now, the evidence will show that certain things happened during that blurry period where the tape is blurry, and the only way you can see those things is by – May I show this to the jury, Your Honor? ¶ . . . – by freezing the frames and then taking a picture of the frame and then blowing it up.”); Tr. vol. 76, 13664/20 - 24 (April 21, 1992) (closing argument of Michael Stone: “One of the things that we talked about in the very beginning of the opening statement in this case about this video is that there are portions of the video that are not clear and that are blurry . . . .”); *id.* at 13682/20 - 28 (same: “And you remember that in the opening statement I described the video as something of an illusion. I told you that it was, in spite of its stark apparent reality, it was deceptive, and I pointed out that it was taken from 175 [feet] away, not right up close, and that like any non-professional film it is not three-dimensional, but rather two-dimensional, that it does not show or define spatial relationships.”); *id.* at 13683/24 - 26 (same: after arguing that the video only allows the incident to be seen from one angle, as compared to an instant replay of a football game, where the viewer can compare angles and views of the play, Stone concludes: “That is part of the problem with, as Mr. White says, just relying on that great piece of evidence.”). On Nightline, *supra* note 165, Ted Koppel noted that the defense’s success was at least partly due to its ability to undermine the video, a video which was “unsteady, out of focus, zooming in and out, and . . . shot from 10 [sic] feet away, from a secondary [sic] story.” Nightline, *supra* note 165.

impression of movement. At any point, though, the defense could stop the flipping and analyze each page on its own. The stop-motion pictures became discrete texts, distinctly different from the appearance of those same pictures when viewed in quick sequence. Through the flip-book procedure, the jurors were made to focus on *each* movement by *each* party involved in the incident. That alone made Mr. King appear more active throughout the episode than he appears in the video. In addition, the procedure turned motion into a succession of stillnesses, allowing the defense to support its claim that Mr. King was struck only “when” he moved, not “when” he was lying prone on the ground. Of course, these separate *whens* were created by dwelling at length on a single snapshot and then, again at length, on another snapshot, while ignoring that only tenths of a second before the snapshot and tenths of a second after the snapshot, the police were beating Mr. King.

Defense counsel distilled the individual photographs further by placing overlays marked with outlines on top of them. They and defense expert Duke used crayoned outlines and a pointer to focus the jury’s attention on King and not the officers.<sup>278</sup> Like the lines connecting selected stars<sup>279</sup> into a constellation, the outlines changed what had been nothing but a mass of blurred pixels into a definite form for the jurors. Thus, the defense filled the blurs with interpretation – blurs which defense attorney Michael Stone argued in closing “you tend to pass over . . . and say, oh, I can’t see what is happening there so you just kind of ignore it.”<sup>280</sup> The defense’s outlining undertook to “show” King’s position relative to the police officers clearly; and the jurors were more likely to find facts based on such fixed, clear pictures than on a fast-moving blurry video of shadows in the night.<sup>281</sup> In addition,

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<sup>278</sup> Overlays were also used in the examination of Koon, who himself drew white-crayon outlines purporting to mark the position of King on blurry photographs. See, *e.g.*, Tr. vol. 54, 7815/7 - 11 (March 19, 1992). According to Koon, each photograph represented one-thirtieth of a second of action. *Id.* at 7813/25 - 26.

<sup>279</sup> In this and other matters, Duke focused the jurors’ attention by purporting to cull masses of details and separate the “relevant” from the “irrelevant” for the uninformed juror.

<sup>280</sup> Tr. vol. 76, 13664/25 - 27 (April 21, 1992).

<sup>281</sup> During Koon’s direct examination, he was asked to compare still photographs framed by his white-crayon overlay outlines (note 278 *supra*) with the enhanced videotape. Tr. vol. 54, 7815/7 - 7816/20 (March 19, 1992). After repeatedly rewinding and fast-forwarding the tape, Koon identified a portion in which he claimed that King fell onto his face and then “start[ed] on the rise.” *Id.* at 7825/20 - 7829/27 [the quoted passage is at 7829/23]. The overlays’ main purpose was to bolster Koon’s interpretation of the videotape. Defense counsel had Koon give a running commentary on the video, stopping it from time to time to describe what was purportedly happening and to document his commentary by pointing to the overlay-framed photos. See, *e.g.*, *id.* at 7835/25 - 7853/22. Interweaving different forms of evidence throughout his testimony (video, commentary, photo display, straight-

the white crayoning foregrounded one object – King’s body – placing it in marked contrast to the bodies and weapons of the officers surrounding him.

Richard Sherwin notes that our culture has entered a period in which the media have made it increasingly difficult to distinguish between “fiction and reality, . . . [to] draw[ ] the line between historic events and their visual representation.”<sup>282</sup> The defense team in the *King* trial translated Mr. King’s beating from reality into fiction by creating visual representations of the incident that constituted new texts in the forms of photos, overlays and diagrams. It recognized that to postmodern jurors, fiction is not the polar opposite of truth, but rather a variation on a theme. It understood the challenge of postmodern storytelling: to effect a convergence of fiction and reality so that jurors can come to a verdict which comports both with the evidence and with their own views of “law, truth, and social justice in our time.”<sup>283</sup>

The defense knew that it had to get the jurors to reject the “old text” – the video. By reconstituting the text, it enabled the jurors to perform their postmodern role of making meaning through a tabloid-like construction of the truth. *Take the scenes we are giving you, the defense said, connect them to your reality, and tell us what you think those scenes mean.* The defense admitted that the prosecution’s reality – the videotape – existed, and that it did show violence. Yet by insisting that a different reality was also there to be extracted by breaking the video down into timeless images capable of alternative interpretations, the defense created space between the frames for a story to be told which justified that violence:

Mr. Mounger: How do you view looking at this videotape, sir?

.....

Sgt. Koon: It is violent and it is brutal.

Mr. Mounger: Was this anything that you enjoyed?

Sgt. Koon: No.

Mr. Mounger: Why was it done?

forward Q & A testimony) served to give credibility to Koon’s claims by conveying: *not only was I there that night to see what I am telling you, but I can back up what I tell you with clear demonstrative evidence on each point.* Of course, the outlines framing the still photos were Koon’s own creations, and the video segments to which he pointed were the very ones that defense counsel were claiming needed to be interpreted; but the composite effect of the mixed-medium presentation was impressive in precisely the way that tabloid constructions of reality can be.

<sup>282</sup> Richard K. Sherwin, *Introduction to Symposium, Picturing Justice: Images of Law and Lawyers in the Visual Media*, 30 U.S.F.L. REV. 891, 896 - 897 (1996) [hereafter, “*Picturing Justice*”].

<sup>283</sup> *Id.* at 897.

Sgt. Koon: It is done to control an aggressive combative suspect and sometimes police work is brutal. That is just a fact of life.<sup>284</sup>

In the world view of a Simi Valley juror – a world seen through the eyes of white exurbanites fearful of black crime and dependent on the police for protection – this story resonated. The breakdown of the tape ended their exposure to chaos, violence and a need to choose between disorders. In place of the brutal, senseless beating of an African-American citizen by out-of-control cops, they were able to see in the defense text only reason, discipline, control, and professionalism on the part of police officers defending their community against a violent individual.

## 2. *The Professional's Story: Just Doing Our Job*

Having deconstructed the video's form, defense counsel proceeded to reconstruct its narrative substance. The defense narrative combined video technology (as the medium) and the technology of police weaponry (as the message) to "professionalize" the defendants' behavior.<sup>285</sup> It starred an expert witness who interpreted the defendants' actions as they appeared on the video after first teaching the jury a technical vocabulary that embedded a technocratic perspective. This technique for communicating a story to the jury simultaneously embraced the notion that meaning is always perspectival – the product of a social and historical context constituted by and transmitted through discourse – and provided a coherent retort to the prosecution's argument that the truth of the video needed no interpretation but was obvious and transparent to the viewer.

As a legal matter, Sergeant Charles Duke's job as an expert witness for the defense was to draw conclusions that were outside the average juror's sphere of knowledge, not to tell the jurors what it was they saw on the videotape.<sup>286</sup> Yet Duke often slipped without comment or objection beyond the legal bounds, literally describing the physical postures and positions of King and the officers, even though his expertise did not qualify him to substitute his vision for the jury. Duke's testimony communicated to the jury through language, demonstrations, and handling of the technological tools of the trade, his "professional vision" of the video.<sup>287</sup> More specifically, Duke's testimony created an interpretive framework for the jury to "re-see" the

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<sup>284</sup> Tr. vol. 54, 7861/10 - 22 (March 19, 1992).

<sup>285</sup> Goodwin at 618.

<sup>286</sup> See, e.g., RICHARD LEMPERT & STEVEN SALTZBURG, *A MODERN APPROACH TO EVIDENCE* 167 (2d ed. 1983).

<sup>287</sup> Goodwin at 618 - 621.

video as depicting not a torrent of unbridled savagery but a series of reasoned, professional responses to a dangerous situation – indeed, ten separate choreographic events, with discrete phases of “escalation and de-escalation of force” controlled by King.<sup>288</sup> As Charles Goodwin explains, Duke, the expert, “[taught] the jury how to look at the tape and how to see relevant events within it. . . He provide[d] them with an ethnography of seeing that situate[d] the events visible on the tape within the worklife and phenomenal world of a particular community.”<sup>289</sup>

Part of what defines a profession is the use of jargon. Jargon allows those within the profession to communicate effectively with each other. Equally important, it demarcates a space between those who are insiders and those who are outsiders. A juror who had already understood from the *voir dire* process that s/he must be open to alternative interpretations of the video would be especially susceptible to an authoritative interpretation coming from one who has the resumé to “really know” what happened that night in Los Angeles. By speaking in professional jargon, Duke implicitly provided the jurors with an explanation as to why they may have seen something different prior to his interpretation of the tape: they had had no vocabulary for properly interpreting what they had seen. The expert’s job was to “code” the actions of Rodney King and the police for the jurors, giving them the professional discourse they had previously lacked.<sup>290</sup> To this end, Duke walked them through an elaborate chart of police “tools in escalation,” beginning with “verbalization and presence” and elevating to the use of a choke hold and deadly force.<sup>291</sup> He then labeled – and thereby redescribed – the officers’ actions in beating Mr. King by reference to these “tools.” He began by pointing to frozen images on the video and performing a choreographic demonstration in the courtroom to reconstruct Officer Powell’s first baton blow, the one that knocked Mr. King to the ground,<sup>292</sup> as “an appropriate weapon to use to stop” what Duke said appeared to him to be Mr. King’s “charge at an officer.”<sup>293</sup> He then continued through the beating episode, characterizing the officers’ blows at each point as similarly appropriate responses to movements by Mr. King which Duke characterized as preludes to danger.<sup>294</sup>

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<sup>288</sup> *Id.* at 617 – 620.

<sup>289</sup> *Id.* at 622.

<sup>290</sup> *Id.* at 606.

<sup>291</sup> Tr. vol. 56, 8465/23 - 8472/9 (March 23, 1992).

<sup>292</sup> *Id.* at 8494/22 – 8500/22.

<sup>293</sup> *Id.* at 8494/13 – 20. [The first quoted phrase is from a leading question by defense counsel that Duke endorsed with a “yes.”]

<sup>294</sup> See, e.g., *id.* at 8522/23 – 8523/2:

Duke's testimony contextualized the testimony of defendants Koon and Powell. As the most experienced officers, they were the experts on the scene. Their knowledge and use of the professional jargon both shored up Duke's testimony and, at the same time, put them safely in Duke's professional club. Sergeant Stacey Koon's introduction to the jury by defense counsel appeared to be that of an expert witness. Like Duke, he opened his testimony by listing his extensive resumé of experience.<sup>295</sup> Like Duke, he distinguished his perspective from the jury's by employing technical jargon. His power to name what the jury could not name authenticated his version of the events as the expert's view. For instance, in analyzing the video stills, Koon offered explanations such as "Mr. King went down on what I would call a one-point landing on his face"<sup>296</sup> and "Officer Powell had what I would call kind of a pulsated back to evaluate."<sup>297</sup> Koon also frequently defined words for the jury,<sup>298</sup> even when the words may not have been beyond the average juror's common knowledge.<sup>299</sup>

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Q: Did you see Officer Powell deliver a blow at 3:45:12?

A: I can see him swinging the baton, but I don't see contact.

Q: All right.

Assuming that there was contact at 3:45:12, would that have been an appropriate blow?

A: Roger. Yes, he was on the rise.

Similar exchanges are repeated, literally blow by blow, from *id.* at 8525/22 through *id.* at 85231/21.

<sup>295</sup> Tr. vol. 54, 7770/23 - 7775/2 (March 19, 1992). Koon had served as a police officer since 1976. *Id.* at 7773/14.

<sup>296</sup> *Id.* at 7825/21 - 22.

<sup>297</sup> *Id.* at 7835/15 - 16. [This appears to refer to Mr. King's back.]

<sup>298</sup> For example, Koon defined the words "swarm" (*id.* at 7801/1 - 10) and "gibberish" (*id.* at 7801/21 - 27).

<sup>299</sup> Koon, for instance, defined the word "pursuit" for the jury as follows: "A pursuit means that an officer is uniformed, he is in a marked black and white and he has on the overhead lights, the red light, the blue lights and amber lights, that he has his siren on and the individual is failing to pull to the side to stop." *Id.* at 7780/2 - 10.

At other times, the officers provided alternative definitions for words that the jurors may have known. These alternative definitions allowed the officers to create their professionalized Potemkin Village, in which their actions could be justified by dressing up words whose underlying meaning was both obvious and unsupportive of their version of events. Koon, for instance, defined what he had meant in describing his assessment of the situation as influenced by the fact that King appeared "buffed out": "Buffed out is jargon that I have come to associate with very muscular. In other words, an individual that is very pumped up as far as muscles." *Id.* at 7788/21 - 27. Because King was buffed out, Koon stated he believed that King was an ex-con. *Id.* at 7789/7 - 11. To support the validity of this view, defense attorney Mounger immediately had Koon re-rehearse his history and experience as a policeman (*id.* at 7789/21 - 7790/8), even though Koon had offered the same information only minutes before (see note 295 *supra*). Mounger's immediate recourse to a second pedigree in order to impress the jury with Koon's professional knowledge that ex-cons tend to be buffed out is hardly surprising. If this esoteric wisdom had not been made convincing to the jurors, they might well have found Rodney King's muscularity unremarkable and nonthreatening in a venue famous for its muscle beaches.

Powell's testimony did not begin with a resumé, but rather with a narrative about the day of the incident. Since he was not the command officer onsite, his professional pedigree was somewhat less important than Koon's. But his training remained a centerpiece of his testimony. His introduction to the jury took the form of recounting a training session he had received the night of the King incident on "a specific baton movement called the power chops [sic], which is a chop to the – [a] specific baton maneuver that is used specifically on the clavicle, elbow and wrist area."<sup>300</sup> While he did not profess – as Koon did – to make an independent, expert assessment of the appropriate use of force, he came across as proficient in doing exactly what he was trained to do – to follow the proper police procedures. To bolster this image, Powell testified that following the training lecture on the power chop the officers went downstairs to practice that procedure.<sup>301</sup> There, an officer "criticized" Powell for not using sufficient force, and Powell repeated the technique pursuant to the officer's instructions to use "all the force that I could muster."<sup>302</sup>

Duke and subsequently the defendant officers not only drew the jury's attention to Mr. King's subtle, minute movements, but also semantically invested these movements with enormous significance.<sup>303</sup> Because King was barely moving, the use of the expressions "cocked" or "rising"<sup>304</sup> when referring to King's leg, hand, elbows, buttocks, or haunches, filled a mere twitch or quiver from King with ominousness to which the officers were justified in reacting.<sup>305</sup> The baton strokes,

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During closing arguments, the defense lawyers themselves also took on the role of teachers (or perhaps of T.A.'s), defining terms that may have been obvious to the jury. During Michael Stone's closing argument, for example, he asked and then answered: "What have we learned about the baton in this case? Well, we've learned it is an impact weapon, that it is used to defend the officer or to control a resistant suspect, both legitimate uses of the baton." Tr. vol. 76, 13704/16 - 20 (April 21, 1992).

<sup>300</sup> Tr. vol. 62, 9965/7 - 10 (March 31, 1992).

<sup>301</sup> *Id.* at 9966/27 - 9967/13.

<sup>302</sup> *Id.* at 9967/21 - 22.

<sup>303</sup> Goodwin at 620.

<sup>304</sup> Duke used the term "cocked" or some variation of the term throughout his testimony. See, e.g., Tr. vol. 56, 8504/6, 8531/14 (March 23, 1992); Tr. vol. 57, 8611/11, 8799/9 - 12 (March 24, 1992). He used the word "rising" or "a rise" or "raised" to describe Mr. King's actions even more frequently. Tr. vol. 56, 8502/23, 8504/7, 8526/2 (March 23, 1992); Tr. vol. 57, 8611/9 - 10, 8742/25 - 26, 8782/3 - 10, 8785/27 - 8786/1 (March 24, 1992); cf. Tr. vol. 56, 8511/11 - 15, 8520/ 1 - 5, 8531, 1 - 5 (March 23, 1992).

<sup>305</sup> Koon's testimony, like Duke's, translated for the jury King's slightest movements into aggressive actions. See, e.g., Tr. vol. 54, 7839/22 - 7840/1 (March 19, 1992) (finding evidence that King was not complying because "his left arm is cocked here. You can see that his legs are cocked here. He is in the same position he was in this – the beginning of the first series [of blows] here . . ."); *id.* at 7841/11 - 15 ("It appears that he has his legs cocked again and his torso is raised here and at this point in time I believe he's either trying to get up or he's trying to roll into Officer Wind."); *id.* at 7843/22 - 27 (responding to the question whether Mr. King is laying on his face: "I wouldn't say he is on his face. His

Duke suggested, were all that the officers had to keep them safe. Even when King had his hand behind his back with his palm up, as if submitting to handcuffs, Duke justified the officers' defensive reactions:

[Prosecutor] White That would be the position you would  
[on cross examination]: want him in; is that correct?  
Duke: Not – not with the way he is – . . . his  
leg is bent in this area having moved  
[sic], this hand here being straight up  
and down. That causes me concern.<sup>306</sup>

Indeed, when White asked Duke whether King's putting his hands behind his back in response to an officer's order to do so could be considered an aggressive movement, Duke said "Yes, it could be."<sup>307</sup> The aggressive language that defense testimony associated with King's movements contrasted starkly with the passive language used to describe the officers' actions. Koon only "activate[d]," rather than shot the taser repeatedly,<sup>308</sup> whereas King's slightest head movement, even after being knocked to the ground by Powell, was characterized as the beginning of renewed aggression.<sup>309</sup>

The primary step in coding is always open to challenge, whether one is an archeologist classifying dirt samples or a police trainer

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torso is still raised at this position. ¶ . . . His head is up, I believe."); *id.* at 7844/5 - 10 (responding to the question whether he sees anything to justify a certain blow: "Yes, his legs are cocked and his torso is on the rise again."); *id.* at 7848/25 - 7849/2 ("[I]t looked as if to me, from my perception, that his waist area, torso, which was slightly lifting off the ground and his legs were beginning to cock, and it was at that time that I feared that Mr. King was possibly reaching for a weapon."). Even Mr. King's inaction was dangerous. Describing a moment when Mr. King is flat on his back with his head slightly raised, his arms up, and his legs "cocked," Koon testified that "from an officer's safety standpoint this is a terribly vulnerable position" for the officer because "Mr. King has access to his hands, he has access to his legs, he can grab with his hands, he can kick with his legs and what's more important, he has a visual sight of where the officer are." *Id.* at 7844/21 - 7845/16.

<sup>306</sup> Tr. vol. 57, 8834/12 - 17 (March 24, 1992).

<sup>307</sup> *Id.* at 8814/15 - 22.

<sup>308</sup> See, e.g., Tr. vol. 54, 7812/14 - 15 (March 19, 1992) ("I continued to activate the taser. The taser was wearing down, but I continued to activate that. . .").

<sup>309</sup> Koon testified that he knew that Mr. King's head hit the ground because he "saw the head do a reaction or a bounce back up." Tr. vol. 54, 7827/5 - 8 (March 19, 1992). Koon demonstrated this by describing the movement as the video was played in the courtroom: "Up. Head up, down and up." *Id.* at 7827/21. In Koon's version of events, this head bounce was the beginning of re-escalation by King:

Q: And what happened then?

A: What happened then is after his face made contact with the ground he then began to rise up with his torso.

Q: He started coming up again?

A: Yes. After the face made contact, his arms came into his side and he began to push himself up.

*Id.* at 7828/15 - 22.

describing what constitutes a threat.<sup>310</sup> The variations that distinguish different categories are often slight, and professionals may disagree as to the appropriate categorization of a particular instance, even under the best of circumstances. Yet talk in terms of categories allows for certainty, albeit a false sense of certainty, once the categorization has been made. Given an expert and a jury of novices, the conclusionary categorizations made by an “expert” will have that much greater weight.

Duke’s testimony therefore put the prosecution in a difficult position. The prosecutors could and did counter with an expert of their own. But to do no more than this would risk appearing to concede both that the video was susceptible to interpretation and that a police technocracy possessed the expertise needed to interpret it.<sup>311</sup> At these costs, the prosecution’s rebuttal expert could do little more than generate the typical battle of experts, with the prosecution at an atypical disadvantage. (When experts disagree in an ordinary criminal case, the burden-of proof-rule which should work in favor of the defense by leading the jurors to think “‘How could we as lay people know beyond a reasonable doubt, when the experts can’t decide?’”<sup>312</sup> is offset by the tendency of jurors to ascribe greater authority, competence and rectitude to the prosecution than to the defense.<sup>313</sup> But in the *Rodney King* trial, with police-officer defendants, the prosecution could not count on having this offset.) On the other hand, to insist in the face of Duke’s narrative that the video was *not* open to alternative interpretations – that it self-evidently proved the prosecution’s case – was to appear to concede that *if* the video required interpretation, the prosecution was at a loss to offer either an interpretation of its own or any

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<sup>310</sup> Goodwin at 608 - 611.

<sup>311</sup> Apparently, the prosecution had trouble recruiting an expert. “White would explain later that they had contacted many police use-of-force experts who were sympathetic, but made their living by being retained by police as defense witnesses in brutality suits. In the end, the only prosecution expert was police department Commander Jeff Bostic, a high-ranking officer who did provide testimony to counter Duke” but who “was attacked by the defense as a white-collar cop who hadn’t been on the street for more than a decade.” Riley at \*5. As Charles Goodwin has pointed out, the defense strategy of asserting that the videotape – and, more generally, the entire series of events involving Mr. King and the police on March 3, 1991 – could be understood only through the “professional vision” of a qualified expert gave the defendants a virtual monopoly of “the power to authoritatively see and . . . be heard . . . [as] qualified to speak the truth.” Goodwin at 626. “[N]o equivalent social group exists for the suspect [abused by the police]. Victims do not constitute a profession.” *Id.* at 625. Thus, the prosecution’s very calling of a rebuttal expert tended to accredit the defense position that police use of force is the subject of an arcane science known only to the privileged members of a technocratic cadre.

<sup>312</sup> *Id.* at 616. See also Riley at \*5 - \*6.

<sup>313</sup> See, e.g., Scott Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1123 - 1125 (1997).

reason to reject the defense interpretation (other than that Duke was a liar). Given what the prosecutors might have learned by attending to the *voir dire* and its probable effects in reinforcing the postmodernist predispositions of the *Rodney King* jurors, the latter course was perilous.

### III. WHAT THE PROSECUTION NEEDED: A COUNTER-NARRATIVE

Rather than taking the rigidly objectivist course that the prosecution ended up choosing – *the tape, the whole tape, and nothing but the tape* – the prosecution may have been better off trying to beat the defense at its own game by granting that the video did require interpretation but impressing the jury with the frightening consequences of the defense interpretation and, indeed, of the very means by which the defense had arrived at it. This approach would have accepted the jurors' role not simply as passive fact-finders but as active meaning-makers and would have asked them to consider what kind of meaning they wanted to give to a series of events in which the police defendants beat Rodney King and sought to justify the beating as impeccably proper according to the "professional vision" of a police technocracy.

The prosecution could have told a story that exposed Duke's technological professionalism as entirely out of kilter with common morality. The use of force that Duke attempted to justify – and Duke's own defense of it – could have been depicted as an outrageous over-response to Rodney King's minor infractions of the law by a run-away police machine so obsessively programmed to overwhelm the slightest resistance that it was likely to destroy the very social order it existed to protect. The point of such a story would not be to deny the power of Duke's professional vision, but rather to help the jurors see that they could buy into that vision only at a price society should not be willing to pay.

Popular narratives abound which warn against the dangers of professionalism-run-amok, particularly the professionalism of science. The *Frankenstein* myth, reiterated in variants ranging from E.M. Forster's *The Machine Stops*<sup>314</sup> to the *Island of Dr. Moreau*<sup>315</sup> to *Dr. Strangelove*<sup>316</sup> to *War Games*,<sup>317</sup> to *The Lawnmower Man*,<sup>318</sup> tells us

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<sup>314</sup> E.M. FORSTER, *The Machine Stops*, in *THE ETERNAL MOMENT AND OTHER STORIES* (1928), frequently reprinted in sci-fi anthologies.

<sup>315</sup> There was a 1977 MGM/UA version of the H.G. Wells classic, starring Burt Lancaster and Michael York.

<sup>316</sup> *Dr. Strangelove, or, How I Learned to Stop Worrying and Love the Bomb* (Hawk Films 1963).

<sup>317</sup> (MGM 1983).

<sup>318</sup> (New Line Cinema 1992).

that it is folly to trust the safety of humankind to science and its technocrats. Society, like Dr. Frankenstein, can never control its superhuman Creatures: once give Them enough strength and self-governance, and They will turn and rend the human beings whose pain and weakness They can only despise. The *King* defendants, their professional-vision defense, and Sergeant Duke himself were all ideally suited to play the classic Creature's part, if Prosecutor White and his colleagues had only thought to cast them in it.

The prosecutors could also or alternatively have turned the professional-vision defense into the ages-old story about how too-much power corrupts.<sup>319</sup> This story has variants emphasizing two potential troubles. First, there is the trouble that well-intentioned people in a powerful chain of command will behave intolerably by "just following orders" or "just following the rules" in situations calling for discerning judgment that they lack or are forbidden to exercise. Emblematic of this first trouble are rank-and-file cops executing their superior's commands or going by the book.<sup>320</sup> Second, there is the trouble that at least some individuals in the power structure will deliberately abuse the rules because they are so consumed with their own power that they feel entitled to become a rule unto themselves. Government conspiracy stories, like those told in the television series *The X-Files*, the Oliver Stone film *JFK*,<sup>321</sup> or (again) Stanley Kubrick's *Dr. Strangelove*, portray the dangers of a world in which we entrust our safety to too-powerful individuals who can so easily abuse the powers we have granted them. Government higher-ups, those who control the conspiracy and coolly calculate the evils that it perpetrates, are emblematic of this second trouble. Whether they be mad scientists or corrupt officials, characters of this type have their own peculiar vision of the best interests of the citizenry, and it leads them to extend their power beyond all rightful limits.

Any narrative the prosecution developed, however, would have had to account for the jurors' reluctance to significantly reorder their world view. A prosecution story depicting *all* police use of violent force as dangerous would have been unacceptable to Simi Valley jurors; and even a story less extreme in its implications than that would have required a form of story-telling that opened new "imaginative possibilities"<sup>322</sup> for the jury. Philip Meyer, from whom we have bor-

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<sup>319</sup> For a surprising legal application of the story, see MINDING THE LAW at 143 – 164.

<sup>320</sup> See the discussion of the *Ordinary Men* narrative at notes 617 - 692 *infra*.

<sup>321</sup> (Warner 1991).

<sup>322</sup> Philip N. Meyer, "Desperate for Love II": Further Reflections on the Interpenetration of Legal and Popular Storytelling in Closing Arguments to a Jury in a Complex Criminal Case, 30 U.S.F. L. REV. 931, 959 (1996).

rowed this concept, demonstrates in an insightful article how an attorney can transform even an apparently open-and-shut case by generating new possibilities “within the collective dreamspace of the popular imagination.”<sup>323</sup> In the case Meyer explores, a defense attorney does this by spinning familiar cinematic redemption narratives out of a series of damning government tapes in a RICO murder trial. This defense attorney does not “refuse to incorporate” the prosecution’s tapes, but rather “take[s] up where . . . [the prosecution] leaves off”<sup>324</sup> and draws upon classic Hollywood mafia, pub, and buddy stories in “revisit[ing] the details of . . . [the defendant’s] illegal activities lovingly, artistically, and ironically.”<sup>325</sup> At the end of the defense closing argument, the jury recognizes and sympathizes with the portrait of the defendant, who survives crises and ultimately reaches transformation.<sup>326</sup> In this way, the narrative moves the jury “towards the shared and familiar and hopeful”<sup>327</sup> and provides them with a happy ending they welcome.

Richard Sherwin would agree with Meyer’s analysis. Lawyers, he believes, can appeal to jurors effectively by framing the case on trial in the context of stories the jurors know. He argues that “[t]o effectively persuade another requires gaining control over reality. The reality that counts most in this context is the one that people carry around in their heads: the popular images, stock stories and character types, the familiar plot lines and recurring scenarios.”<sup>328</sup>

In the *King* case, the prosecutors may not have been able to write a story with a happy ending, but they could at least have presented an ending that allowed the jurors to sleep safe in the knowledge that their view of the world would not be undermined by a verdict convicting the police for abusing Rodney King. Models for stories with such an ending can be found in popular culture narratives.

*A Few Good Men*<sup>329</sup> portrays a military world similar to the professional vision of police activity described by Duke. The film is about the trial of two marines accused of the murder of a fellow marine. As much as anything, the film offers a picture of military life on the edge of danger. The opening credits feature a marine parade drill, focusing variously on soldiers’ shined shoes, buttons, and hats. Both in appear-

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<sup>323</sup> *Id.*

<sup>324</sup> *Id.* at 937.

<sup>325</sup> *Id.* See *id.* at 937 - 941.

<sup>326</sup> *Id.* at 957 - 958.

<sup>327</sup> *Id.* at 960.

<sup>328</sup> *Picturing Justice* at 893 (noting that in using this method, the lawyer utilizes the “convergence of mass communication and the multi-perspectival, constructive epistemology of postmodernism”).

<sup>329</sup> (Columbia 1992).

ance and in motion, the picture is one of precision and synchronicity. However, the viewer soon learns that the discipline of the military belies its disorder. As the trial progresses, the viewer discovers that the murder occurred when the accused marines were following an order to discipline an enlisted man. Such an order was referred to in military jargon as a “code red.” Two marines (Dawson and Downey) were ordered by their superiors to discipline Santiago, a weaker marine, ostensibly for informing outsiders of an illegal shooting but actually for simply not fitting in. Santiago’s actions in reporting outside of the chain of command breached the unwritten but sanctified Code of his platoon: “Unit, Corps, God, Country.” His transgression was punished from the very top, with the base’s highest officer, Colonel Jessup, issuing the code red order. In Santiago’s case, the code red went awry, and what was intended as discipline turned into homicide. As one lieutenant explained, Santiago died “because he had no Code, he . . . [died] because he had no honor.” Common sense and the finding of a military jury at the conclusion of the film, however, remind the audience that the real reason Santiago died was that obedience to the Code became more important in this military world than life itself.

Like the viewer, the marines’ defense attorney, Navy Lieutenant Daniel Kaffee, is an outsider to the marines’ world. (Kaffee’s outsider status is clear from the moment he arrives at the marine base at Guantanamo Bay. He appears at Guantanamo dressed in navy whites, suitable for a warm climate. A marine immediately admonishes him to cover himself in fatigues to avoid making the entire group an easily spotted target for Cuban snipers.) Along with Kaffee, the viewer experiences a crash course in understanding marine jargon, such as “code red” and “fence-line shooting.” Kaffee, too, struggles to understand his clients, who justify their blind obedience to an unethical order by reciting the Code. They explain to Kaffee that, to a marine, following a superior’s orders can never be unethical, because soldiers are duty-bound to obey their superiors.

By the time of his opening statement, Kaffee has become well educated in the Code and the language of the marines and is able to explain to the jury the defendants’ seemingly inexplicable obedience to the code red order:

It’s because it was what they were ordered to do. Now, out in the real world that means nothing, and here at the Washington Navy Yard, it doesn’t mean a whole lot more. But, if you’re a marine, assigned to Rifle Security Company Windward, Guantanamo Bay, Cuba, and you’re given an order, you follow it or you pack your bags. Make no mistake about it, . . . [the defendants] are sitting

before you today because they did their job.

Kaffee understands that social and occupational survival in the marines' world depends on following orders. He understands that physical survival, too, is ultimately at stake if the ethos of strict obedience to the military command structure is undermined. (As Colonel Jessup testifies, "We follow orders or people die.") And viewers of *A Few Good Men* are not permitted to forget these things or take them lightly.

The problem, though, is that the people in the marines' world and in the command structure are human beings – human in their vulnerability to pain and death, human in their susceptibility to arrogance and error. They cannot safely be exempted from the principles of morality that define what it means to be human. Brutality and murder at the orders of a Colonel are still brutality and murder. In the end, the military jury itself rejects the notion that the vital role of the military in protecting society justifies a marine's unquestioning obedience to every order, regardless how offensive to society's basic precepts. While not finding the officers guilty of murder, the jury does convict them of Conduct Unbecoming an Officer. As Dawson, the more senior of the two defendants, explains to the other, they were not found guilty for simply "doing [their] job." Their real job was not to follow orders blindly but, rather "to help the weak ones."

The frightening mentality of the marines' world that produced Santiago's murder is epitomized in the character of Colonel Nathaniel R. Jessup, a rising star in the military, who ordered the code red. At the end of a grueling cross examination in which Kaffee pushes Jessup to admit that he ordered the code red, Jessup (played by Jack Nicholson) finally admits it. The cross examination exposes Jessup's warped view of military privilege, which allows him to justify his abuse of power. Jessup maintains that the murder, which might appear "tragic . . .[,] grotesque and incomprehensible" to the outsider, is understandable and necessary in the world of the marines:

Son, we live in a world that has walls, and those walls have to be guarded by men with guns. Who's going to do it? . . . I have a greater responsibility than you can possibly fathom. . . . [Y]ou curse the marines. You have that luxury. You have the luxury of not knowing what I know: that Santiago's death, while tragic, probably saved lives . . . . [Y]ou want me on that wall. You need me on that wall.

We use words like honor, code, loyalty. We use these words as the backbone of a life spent defending something. You use them as a punch line. I have neither the time nor the inclination to explain myself to a man who rises and sleeps under the blanket of the very

freedom that I provide and then questions the manner in which I provide it. I would rather you just said thank you and went on your way.

The tension between cross examiner and witness reaches its height when Jessup, fed up with Kaffee's questioning, demands, "What is it that you want?" Kaffee responds, "I want the *truth!*" Jessup growls, to Kaffee and to the entire courtroom, "You can't handle the truth!" Still convinced that his actions were fully justified by his circumstances, Jessup finally does deliver the truth – that he ordered the code red. To his amazement and outrage, Jessup is immediately placed under arrest for violating military rules. He is dragged from the courtroom screaming, "you friggin' people, you have no idea how to defend a country. You weakened this Nation today."

*A Few Good Men* helps us to imagine narrative possibilities that the *King* prosecutors could have used to counter Duke's professional vision.<sup>330</sup> Duke introduced the *King* jury to the technocratic language and perspective of the LAPD in the same way that the film introduces Kaffee, the military tribunal, and the viewer to the militaristic jargon and mentality of the marines. Duke, like Jessup, was the ultimate insider, and his point was the same as Jessup's: the PR-24 baton,<sup>331</sup> the "escalation of force," the conversion of a "cocked" leg into a menace, all these may seem "tragic" to outsiders, but they are necessary to protect the public order. The film stimulates rejection of this viewpoint by a number of related moves. It emphasizes the divergence of the marines' perspective from common sense by dwelling on the very fact that marines need to have *code words* which change the meaning of things.<sup>332</sup> It emphasizes that divergence further by dwelling on the *rigidity* and *absolutism* of the military viewpoint ("Unit, Corps, God, Country"), which leave no room for the individual situation-specific judgments that are the essence of common sense (and, one would suppose, particularly appealing to jurors with a postmodern outlook). It zeroes in on the mental characteristics of the people who demand and practice obedience to the technocratic viewpoint: the *arrogance* and *pretentiousness* of a Jessup; the brain-washed subservience of a Dawson or a Downey. By these narrative techniques, Jessup is believably cast as a mad inventor, while Dawson and Downey are cast as cogs in the dangerous military machine that Jessup has invented. If the *King*

<sup>330</sup> The plot was well precedented, with a wide range of variants. See, e.g., *Judgment at Nuremberg* (MGM 1961); *Z* (Reggane Films 1969); *QB VII* (Screen Gems 1974); *The Official Story* (Almi 1985); *La Femme Nikita* (Vidmark 1991). Post-Watergate versions were numerous, of course, but would doubtless not have offered the best models for a story pitched to a Simi Valley jury.

<sup>331</sup> See note 273 *supra*.

<sup>332</sup> Compare notes 296 - 299 and accompanying text *supra*.

prosecution had cast Duke and the defendants in similar roles, it might have gotten across to the jurors that the jury needed to play the classic complementary role – guards over the guardians.<sup>333</sup> It might have brought home to the jurors that if they failed to call a beating a beating, rather than a “stroke” or a “tool” or an “escalation of force,” their verdict would condone an erosion of the individual morality and responsibility that distinguish a free society from a police state.<sup>334</sup>

A related prosecutorial narrative suggested by *A Few Good Men* and stock stories of its kind involves the pair of abuse-of-power themes that we have mentioned in connection with tales of official corruption.<sup>335</sup> The *King* prosecutors might have used such a narrative to suggest that acceptance of the defendants’ professional-vision defense implies acceptance of a kind and degree of power that the police are bound to abuse.

In the first place, Duke was asking the jury to take a dangerous leap of faith by believing, implausibly, that each and every police officer trained by Duke and his fellow use-of-force instructors would correctly understand where and when to engage in physical violence. Duke’s testimony was aimed at persuading the jurors that great amounts of force could safely be entrusted to the police under rules that made officers’ decisions to use it unreviewable by ordinary citizens sitting on juries, and that the jurors could sleep in comfort with the assurance that this kind of unreviewable power would never be abused. But its abuse is inevitable because, even with the best of intentions, a professional cadre trained to believe that they are “just doing their job” will make mistakes when they violently assault people on the basis of judgments that a “cocked leg” on the part of someone they have knocked to the ground is an “escalation of force” warranting a similar escalation in response. The disproportion between the

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<sup>333</sup> The fact that Koon and Powell were charged with making a false report to cover up the abuse of Mr. King could be emphasized as increasing the need for the jury to act as guards over the guardians. The defendants’ police supervisors, who should have been acting as guards, were prevented from performing this role by the defendants’ failure to describe the events truthfully. But for the accident of an amateur videotaping, no one would have known the facts about the beating of Rodney King – or believed them – since the supervisors would not have challenged the officers’ reports. The prosecution might have suggested, indeed, that the cover-up of the episode through false reporting presents the likelihood that similar atrocities must go undiscovered. Thus, while the defense team (and Duke in particular) was essentially telling the jurors that they could not judge LAPD officers because they were outsiders, the short answer to this arrogant point was that it was precisely because the jurors were outside the LAPD world that they were in a position to judge the defendants.

<sup>334</sup> See also the discussion of the *Brave New World* narrative at notes 612 - 616 (describing how autocratic regimes can appear to provide Utopia, but at the cost of denying all human freedoms).

<sup>335</sup> See text at note 320 *supra*.

rigor of the response and the tenuous nature of the circumstances that these professionals are trained to see as calling for a response guarantees that serious errors will occur. And when the authorities rush to deny any claim of error and to insist that they alone have the ability to say whether an error happened – as Duke and Jessup do – the result is unacceptable.

Second, there is always the danger of willful abuse of power under rules made and interpreted by authorities convinced of their own righteousness, rightness, and immunity from review by lesser mortals. Such people will claim that their responsibilities for the protection of the citizenry require that they be given vast powers; and the possession of vast powers will in turn make them scorn as weaklings the very people they claim to be protecting. (*You can't handle the truth*, says Jessup.) They will claim that they alone can understand what it takes to do their job (*I have a greater responsibility than you can possibly fathom*), and that therefore they alone have the right to say exactly how much power they should be given, as well as when it should be exercised. (*I have neither the time nor the inclination to explain myself to a man who rises and sleeps under the blanket of the very freedom that I provide and then questions the manner in which I provide it. I would rather you just said thank you and went on your way.*) Even to a Simi Valley jury feeling a strong need for police protection, this kind of swaggering assertion of unchallengeable power might very well be made to appear to go too far.

We sketch below some lines of possible cross examination that could have been used on Duke in order to develop the narrative possibilities we have just suggested. Their objective is give Duke a stage on which he has room enough and cause to come off looking like a Jack Nicholson playing a Colonel Jessup. To accomplish this, we use open-ended questions for the most part, and forgo leading.

LINE I - *Duke as expert and instructor*

1. Are there any individuals whom you believe to be better qualified than yourself to assess the propriety of uses of force by LAPD officers in encounters such as the one between the defendants and Mr. King?
2. Are there any individuals whom you believe to be equally qualified?
3. Who are they?
4. Please tell us the basis for your judgment that they are as well qualified as you are in that regard.

5. When Mr. Mounger questioned you about your qualifications on direct examination, you recounted a number of occasions on which people in the LAPD have sought your advice regarding issues of the use of force. Since you have been assigned to your present position in the department, have you ever sought the advice of other persons regarding issues of the use of force?
6. Who?
7. Why?
8. Have you found their advice useful?
9. Why?
10. Have you ever disagreed with their opinions?
11. Why?
12. Do you think that citizens who are not members of the LAPD and who have not had the sort of training that you give LAPD officers in the use of force are able to make an accurate assessment of the propriety of uses of force by LAPD officers in encounters such as the one between the defendants and Mr. King?
13. In your present assignment with the LAPD, who do you report to?
14. Do any officers report to you?
15. How many?
16. As part of your duties, do you ever help to set LAPD rules on the use of force?
17. With whom, if anybody, do you confer in that regard?
18. Do they have the final say about the rules, or do you?
19. Why?
20. Have you found that they usually agree with your judgment regarding the rules to be made?
21. Have there been occasions on which the contents of rules that were made were not in line with your proposals regarding the contents of the rules that should be made?
22. In the process of making new rules, is there usually debate about what the contents of the rules should be?
23. Do these debates ever reflect disagreements about the circumstances under which it is proper for a LAPD officer to employ a given level of force?
24. In answering Mr. Mounger's questions on direct examination, you said that you were in charge of the physical fitness and self-defense unit at the Academy for a time, is that right?
25. In that position, did you yourself train new police officers, those who had just been sworn in?
26. Did you observe other instructors train new police officers?
27. Was there a training guide that told instructors what training to give new police officers?

28. Did instructors just read instructions from the guide to the officers they were training?
29. No trainers read to the trainees directly from the manual, did they?
30. Each trainer put different spins on the rules, based on their own experience in the field, is that how it was?
31. In your opinion, were these trainers all competent to train officers?
32. Were they all equally competent?
33. How many individual officers of the LAPD have you personally trained regarding the use of force in your years with the department, would you estimate?
34. During that same period of time, how many LAPD officers would you estimate received training in the use of force from instructors or from more experienced officers other than yourself and were never personally trained by you?

LINE II - *Application of the use-of-force rules (professionalism run amok)*

1. Referring to the image in the frame at 3:36:19 on the video-tape, you said on direct examination that this image shows Mr. King with his leg cocked, is that correct?
2. If you were training a group of new LAPD officers at the Academy, would you choose this image as an illustration of what it looks like for a person to have his leg cocked?
3. Would you choose this image as an illustration of what it looks like for a person to be escalating the level of force?
4. Let us assume that you were using this image to train a class of 20 students at the Academy on how to interpret a suspect's behavior in terms of escalation-of-force principles. Would you expect that 20 out of 20 would agree that Mr. King's leg is cocked?
5. Would you expect that 20 out of 20 would agree that the position of Mr. King's leg in this image is an escalation of force?
6. If some of the students did not interpret the position of Mr. King's leg as an escalation of force, would you instruct them that they were wrong?
7. Would you teach them that the only proper way for a police officer to interpret the position of Mr. King's leg was as an escalation of force?
8. And that the only proper police response was to beat Mr. King?

9. When a motorist who has been stopped by the police is knocked to the ground by a blow from a PR-24 baton and lands on his face and then tries to get to his hands and knees, should the officer at that scene conclude that this behavior is an escalation of force that should be met with an escalation of force?
10. When a motorist is face down on the ground and cocks his leg, should the officer who sees that behavior conclude that this is an escalation of force that should be met with an escalation of force?
11. When a motorist is face down on the ground and bends his knee, should the officer who sees that behavior conclude that this is an escalation of force that should be met with an escalation of force?
12. So you would you say that the beatings that Mr. King received in the early morning hours of March 3, 1991 were a model of police procedure, correct?
13. As long as these officers followed the rules as you teach them, their action is ok, correct?
14. And you believe the defendants followed the rules in this case?
15. So there can be no correct judgment of the propriety of their actions outside of the rules you teach, correct?
16. Despite any injuries that may result to a citizen through following those rules, right?

LINE III - *How does an officer know when to use force under the rules?*

1. Would you say that there is a right way and a wrong way to determine when the use of force is appropriate under the set of rules that you have explained relating to the “escalation of force”?
2. To apply the rules properly, an officer in the field has to make decisions about what level of force the rules authorize him to use in response to a particular escalation of force, right?
3. And the officer also has to interpret the behavior of the suspect in order to make a decision as to whether it does or does not constitute an escalation of force, right?
4. In a given instance, the decisions have to be made pretty quickly, don’t they?
5. Who is it that decides in any given interaction whether to apply these rules of force?
6. An officer has to think very fast, doesn’t he?
7. And is it possible that an officer could make a mistake in such a fast judgment call?
8. Some mistakes could be made that were reasonable mistakes, isn’t that correct?

9. And some mistakes could be made that were not reasonable, couldn't they?
10. Can you know for certain during training sessions which officers will apply the proper amount of force in a given situation?
11. Is it possible that an officer could ever make an honest mistake and use more force than is appropriate under the rules?
12. Is it possible that an officer may be mistaken in thinking that a situation authorizes him to use force when in fact it does not?
13. Is it possible that some officers whom you think in training have properly understood the rules governing the escalation of force in fact do not have a correct understanding of those rules?
14. When a number of officers are engaged in making an arrest and one of the officers is the supervisor in charge of the others at the arrest scene, are the other officers required to follow that supervising officer's orders?
15. And to use whatever amount of force that supervisor orders?
16. So if the supervisor concludes that a suspect's cocked leg is an escalation of force requiring the use of force in response, and if he orders the other officers to use force on the suspect, they are supposed to follow his order and use force, right?
17. They are not supposed to make an independent judgment whether the supervisor's conclusion about the suspect's escalation of force was right or wrong, are they?
18. If the supervisor makes a mistake then, in his split-second decision regarding the propriety of an escalation of force, his mistake will affect the action of the entire team of officers, right?
19. So an entire team could end up using too much force in a given situation because one officer made a mistake about the application of the escalation-of-force rules?
20. Would every supervising officer always arrive at the same judgment regarding the application of the escalation-of-force rules in a given situation?
21. Is it possible that one supervising officer would regard the position of a suspect's leg as "cocked" and conclude that the cocking of the leg is an escalation of force, whereas another supervising officer in the same situation would disagree and conclude that the position of the leg is not an escalation of force?

#### IV. CONCLUSION

The trial of the four police officers accused of beating Rodney King had all the makings of the perfect twentieth-century trial: a case made easy through the benefits of technology. The existence of a

videotape of the beating would bring new meaning to the notion of reconstructing a crime in the courtroom, so that the jury could “know” for certain what had happened the night Rodney King was taken into custody by the LAPD. The public, too, could be well-informed “armchair jurists,” exposed to multiple viewings of the video as well as commentary from legal, news, and tabloid sources.<sup>336</sup> Although some of the media sources were presenting an obviously pro-King version of the story (based on the perspectives of Mr. King, the onlookers, and reporters’ descriptions of the video),<sup>337</sup> the video itself seemed to bear them out and to give the TV-viewing public as much of an ability to know what happened on the early morning of March 3, 1991 as the jurors who spent weeks in the jury box.

But those weeks in the jury box brought the jurors to a different conclusion than the viewing public. The video, instead of assuring a uniform, agreed-upon, objective version of the event, caused the public to reject the jury’s verdict and led many to condemn the jury system itself.

Our chapter has been aimed at understanding some of the reasons why the jury saw the beating of Rodney King differently than those who watched the video on TV. It has not been aimed at conducting still another exercise in Monday-morning-quarterbacking of the verdict. Our interest, rather has been in the broader point that, no matter how strong or clear a case the “objective evidence” may appear to make out,<sup>338</sup> fact-finders in our time are acculturated to expect

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<sup>336</sup> An editorial on the first day the *Los Angeles Times* reported on the beating began with this paragraph:

The cops thought nobody was looking – but some folks made good use of a video camera, and now the whole world has seen a deeply disturbing and shocking vision; at least 10 officers, clearly out of control, wielding their batons like baseball bats, ferociously beating and kicking a black man who lay helplessly on the ground.

Editorial, “The Investigation of a Videotaped Beating,” *Los Angeles Times*, March 7, 1991, p. B6. On the same day, just four days after the incident, the *Times* also published a story reconstructing the “brief but furious incident” through a comparison of the perspectives of onlookers, the videotape, and contradictory police reports. See Hector Tobar & Richard Lee Colvin, “Witnesses Depict Relentless Beating,” *Los Angeles Times*, Mar. 7, 1991, p. B1.

<sup>337</sup> See *id.*: “The tape begins with King on his knees as he receives 10 quick blows from an officer’s baton. It shows about a dozen officers gathered around King, watching. King begins to stand up and lifts an arm, somewhat meekly it appears, in an attempt to ward off the blows. King then tumbles to the ground, falling on his stomach, as the officers continue to deliver the blows against the back of his legs. King rolls over onto his back, and one officer strikes him across the midsection with a baton.”

<sup>338</sup> While the existence of video evidence in the *King* case may have been unusual, the proliferation of both security cameras and home video cameras suggests that in the future such evidence may become more commonplace. Interestingly, immediately following the verdict in the *Rodney King* trial, video played a key role in the trial for the beating of truck driver Reginald Denny.

to be told a story. And they evaluate competing stories by fitting them into the fact-finder's preexisting mindset – by considering how the possible narratives that can be woven from the evidence do or do not cohere with what the fact-finders have experienced.

Our analysis of the *King* trial also offers some initial ideas about what kinds of stories are likely to work with what kinds of jurors under what circumstances. Probably at no previous time in history have so many different forms of stories been so easily and constantly accessible to and consumed by the public. The pop culture of daytime talk shows, sitcoms, tabloids, internet chat rooms, and John Grisham novels – regardless of whether one categorizes it as beneficial or poisonous – provides litigators with a ready library of story models and stories with which jurors are already familiar. Litigators can choose among those pop-culture narratives according to the best diagnosis they are able to make of the backgrounds and likely predispositions of their specific group of jurors.

## CROSS EXAMINATION AS STORY-TELLING

TODD E. EDELMAN

### I. THE PARADOX OF MELANIE SINGER'S TESTIMONY

In March and April of 1992, four white officers of the Los Angeles Police Department (LAPD) stood trial on charges that they used excessive force in apprehending Rodney King, an African-American motorist who had led the police on a high-speed chase during the early morning hours of March 3, 1991. Sergeant Stacey Koon and Officers Lawrence Powell, Timothy Wind and Theodore Briseno all faced charges of assault with a deadly weapon and of excessive force under color of police authority; in addition, Koon and Powell were charged with filing false reports in order to cover up the incident, and Koon was charged with assisting Powell in evading justice.<sup>339</sup> Well before the trial of these officers in Simi Valley, California began, a solid majority of the American public had developed strong opinions regarding their guilt. A Los Angeles resident had surreptitiously made an eighty-one-second videotape of the officers' arrest of Mr. King, and a large portion of the millions of Americans who had repeatedly viewed segments of that tape on television news programs in the year preceding the trial viewed the jury's task as the mere transformation of the brutal "reality" displayed on their television screens into a formal guilty verdict.<sup>340</sup>

The prosecution and defense attorneys in the *Rodney King* trial essentially agreed on a number of central factual issues. Through their opening statements, closing arguments, and witness examinations, both sides told the jury that Mr. King led California Highway Patrol (CHP) Officers Tim and Melanie Singer on a high-speed chase over various freeways and surface streets; that King ignored repeated signals to pull over; that police units from the LAPD and the Los Angeles Unified School District joined in the pursuit; that the police eventually stopped King's car but that he exited the vehicle slowly and refused to follow the Singers' orders to lie flat on the ground; that Sergeant Koon ordered Melanie Singer to back off; that Koon then took control of the police operation; that King resisted an initial at-

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<sup>339</sup> Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 U.C.L.A. L. REV. 509, 524 n.77 (1994) [hereafter, "Levenson"]; Lou Cannon, "Focus Rests on 1 Officer in L.A. Trial," *Washington Post*, March 15, 1992, p. A3.

<sup>340</sup> Elizabeth F. Loftus & Laura A. Rosenwald, *The Rodney King Videotape: Why the Case Was Not Black and White*, 66 SO. CAL. L. REV. 1637, 1644 (1993) [hereafter, "Loftus & Rosenwald"]; Levin at 1619 - 1620; Goodwin at 615.

tempt by Officer Powell and others to apprehend him physically; that Koon was unable to force King into submission with two darts from a taser gun; and that King then endured forty-five baton blows from Powell, dozens of baton blows and kicks from Wind, and one kick to the upper body by Briseno before the police finally handcuffed and arrested him.<sup>341</sup> The prosecution and defense attorneys differed, however, in their characterization of the blows delivered by Powell, Wind, and Briseno. While the prosecution argued that they constituted an unjustified assault on a helpless motorist, the defense characterized each individual action taken by the officers as a reasonable, calibrated response to the aggressive or non-cooperative movements of a hulking, dangerous man who appeared to be under the influence of PCP.<sup>342</sup>

The jury listened to fifty-five witnesses provide a total of one hundred and fifty hours of testimony over an eight-week period before beginning its deliberations, with each side presenting dozens of witnesses and exhibits to support its portrayal of the officers' conduct.<sup>343</sup> The prosecution built its case primarily on the videotape itself, the testimony of the Singers that King's actions did not justify the LAPD response, recordings and recollections of racist or callous remarks made by Powell both before and after the incident, medical evidence relating to the injuries suffered by King,<sup>344</sup> and the rebuttal testimony of an LAPD "use-of-force" expert who described the officers' actions as "unreasonable."<sup>345</sup> The defense presented much of its evidence through the testimony of the officers on the scene. Koon, Powell, and Briseno described the fear aroused in them by King's resistance, while Koon, Powell, and nine other officers (including one African-American officer) described the officers' actions as controlled, justified, and the minimum necessary to apprehend King.<sup>346</sup> The defense also called two of its own "use-of-force" expert witnesses, both of whom maintained that the videotape depicted actions that were authorized by LAPD policy and were in direct response to evasive or aggressive movements by King.<sup>347</sup> After a full week of deliber-

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<sup>341</sup> *The "Rodney King" Case: What the Jury Saw in California v. Powell*, Part One (Courtroom Television Network [Court TV], 1992, Fred Graham, host; Jamie Alter, Senior Producer), available in the Golding Media Center, New York University School of Law Library [hereafter "*What the Jury Saw*"]; Levenson at 517 - 521.

<sup>342</sup> *What the Jury Saw*, Part One; JEWELLE TAYLOR GIBBS, RACE AND JUSTICE: RODNEY KING AND O.J. SIMPSON IN A HOUSE DIVIDED 40 - 45 (1996) [hereafter, "GIBBS"].

<sup>343</sup> *What the Jury Saw*, Part Eight; Loftus & Rosenwald at 1644.

<sup>344</sup> *What the Jury Saw*, Parts Two and Three; Levenson at 526 - 527; GIBBS at 41 - 42.

<sup>345</sup> *What the Jury Saw*, Part Seven.

<sup>346</sup> *What the Jury Saw*, Parts Four, Five, Six; Levenson at 526 - 527.

<sup>347</sup> *What the Jury Saw*, Parts Four, Five. See also Richard A. Serrano, "All 56 Blows to King Justified, Expert on Use of Force Testifies," *Los Angeles Times*, March 24, 1992, p.

ations, the jury rendered a split verdict with regard to Powell – acquitting him of the assault and false reporting charges while deadlocking on the excessive force count – and fully acquitted Koon, Briseno, and Wind, setting off riots in Los Angeles and other American cities.<sup>348</sup>

Both during and after this trial, legal commentators and media observers attached considerable importance to the testimony of CHP Officer Melanie Singer – and particularly to her cross examination by Michael Stone, defense counsel for Officer Powell – as a factor in the final verdict. During direct examination, Singer testified, *inter alia*, that King had ignored orders to pull his car over and had refused to follow her requests after he finally exited his vehicle, but that the LAPD officers had brutally assaulted King for “no reason.”<sup>349</sup> Trial observers labeled Singer as a “major,”<sup>350</sup> “main,”<sup>351</sup> “key,”<sup>352</sup> or “star”<sup>353</sup> prosecution witness, and described her testimony as “dramatic”<sup>354</sup> and as “critical” to the state’s case.<sup>355</sup> Yet, by the end of her two days of testimony, these same analysts almost unanimously concluded that, because of Stone’s cross examination, Singer’s testimony had, on balance, aided the defense case.<sup>356</sup> Stone himself became so convinced of Singer’s contribution to his client’s defense that he called Singer as his own witness in the subsequent federal civil rights prosecution of the four officers.<sup>357</sup>

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B3; Levenson at 526; John Riley, “What the Jury Heard That the Public Didn’t,” *Newsday* (Nassau and Suffolk edition), May 13, 1992, p. 5, Lexis printout at \*5 [hereafter, “Riley”].

<sup>348</sup> Richard A. Serrano & Tracy Wilkinson, “All 4 in King Beating Acquitted; Violence Follows Verdicts,” *Los Angeles Times*, April 30, 1992, p. A1 [hereafter, “Serrano & Wilkinson”]. In a subsequent federal trial, Officers Koon and Powell were convicted on charges that they violated Mr. King’s civil rights. See Lou Cannon, “Jury Convicts 2 Los Angeles Officers in King Beating,” *Washington Post*, April 18, 1993, p. A1.

<sup>349</sup> *What the Jury Saw*, Part Two.

<sup>350</sup> [Special to the New York Times] “Witness Says Tape May Support Officer’s Claim,” *New York Times*, March 10, 1992, p. A18.

<sup>351</sup> [Special to the New York Times] “Highway Officer Gives Tearful Testimony in Beating Case,” *New York Times*, March 27, 1993, p. A2.

<sup>352</sup> Lou Cannon, “L.A. Police Dept.: ‘Dragnet’ It Isn’t,” *Washington Post*, March 29, 1992, p. A3; Richard A. Serrano, “Conflicts Persist in King Trial,” *Los Angeles Times*, March 22, 1992, p. B1.

<sup>353</sup> *What the Jury Saw*, Part Two.

<sup>354</sup> Roger Parloff, “Maybe the Jury Was Right,” *The American Lawyer*, June 1992, p. 7, Lexis printout at \*4 [hereafter, “Parloff”].

<sup>355</sup> Richard A. Serrano, “CHP Officer’s Testimony, Memo on Beating Differ,” *Los Angeles Times*, March 10, 1992, p. B1.

<sup>356</sup> See, e.g., [New York Times], “Officer: ‘No Reason’ for Motorist’s Beating in L.A.,” *Chicago Tribune*, March 7, 1992, p. 13C; [Special to the New York Times] “Officer’s Blows Unprovoked, Jury Told,” *New York Times*, March 7, 1992, p. A12.

<sup>357</sup> See Henry Weinstein, “Jury Relied Heavily on Tape of King Beating,” *Los Angeles Times*, April 18, 1993, p. A1 [hereafter, “Weinstein”]; [Special to the New York Times] “Highway Officer Gives Tearful Testimony in Beating Case,” *New York Times*, March 27,

In describing Stone's cross examination of Singer, however, the trial observers who viewed it as so helpful to the defendants' case do not specify how this questioning actually assisted in the development of the defense theory of the case. At most, their accounts of this portion of the trial provide a description of the manner in which Stone's "destructive" cross examination<sup>358</sup> neutralized the evidentiary value of Singer's testimony on direct, depriving the prosecution of whatever the prosecutors may have thought to gain by calling her to the stand. According to these accounts, Stone used the cross examination as a "defensive" rather than an "offensive" maneuver. They generally depict him as attempting to reveal the inconsistencies in Singer's story<sup>359</sup> or trying to discredit<sup>360</sup> or contradict<sup>361</sup> her, not as building his own case or advancing the defense theory through her testimony. These reports describe Stone's actual questions in similarly negative terms, referring to them as "pounding"<sup>362</sup> or "grueling,"<sup>363</sup> while taking note of their tendency to cast doubt upon the witness's motivations<sup>364</sup> and ability to recall events.<sup>365</sup> Indeed, even evaluations of the final impression left by Singer's testimony fail to assign any value to Stone's cross examination other than as an antidote to the potentially damaging evidence elicited on direct examination. Commentators lauded Stone for posing questions which "severely discredited"<sup>366</sup> Singer and exposed

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1993, p. A2.

<sup>358</sup> A leading text on trial advocacy describes as "destructive" those cross examinations that include "the kinds of questions that will discredit the witness or his testimony so that the jury will minimize or even disregard them." THOMAS A. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* 214 (3d ed. 1992) [hereafter, "MAUET"].

<sup>359</sup> See "CHP Officer's Account of King Beating Attacked," *Los Angeles Times*, March 10, 1992, p. B1; [Special to the New York Times] "Witness Says Tape May Support Officer's Claim," *New York Times*, March 10, 1992, p. A18; [New York Times], "Officer Says Action by King Might be Called Aggressive," *Houston Chronicle*, March 10, 1992, p. A4.

<sup>360</sup> See "CHP Officer's Account of King Beating Attacked," *Los Angeles Times*, March 10, 1992, p. B1; Richard A. Serrano, "CHP Officer Describes Chase, Beating of King," *Los Angeles Times*, March 7, 1992, p. A1.

<sup>361</sup> See Richard A. Serrano, "CHP Officer's Testimony, Memo on Beating Differ," *Los Angeles Times*, March 10, 1992, p. B1.

<sup>362</sup> See "Officer Says Tape Shows Threat," *Atlanta Journal and Constitution*, March 10, 1992, p. A4.

<sup>363</sup> See [Special to the New York Times] "Witness Says Tape May Support Officer's Claim," *New York Times*, March 10, 1992, p. A18; [New York Times], "Officer Says Action by King Might Be Called Aggressive," *Houston Chronicle*, March 10, 1992, p. A4.

<sup>364</sup> See "CHP Officer's Account of King Beating Attacked," *Los Angeles Times*, March 10, 1992, p. B1.

<sup>365</sup> See Richard A. Serrano, "CHP Officer's Testimony, Memo on Beating Differ," *Los Angeles Times*, March 10, 1992, p. B1; "CHP Officer's Account of King Beating Attacked," *Los Angeles Times*, March 10, 1992, p. B1.

<sup>366</sup> See [Special to the New York Times] "Highway Officer Gives Tearful Testimony in Beating Case," *New York Times*, March 27, 1993, p. A2.

the inconsistencies in her direct testimony;<sup>367</sup> post-trial interviews with jurors focused on his demonstration of the contradictions between her claims, the videotape, and the medical evidence.<sup>368</sup> Thus, none of these detailed accounts of Stone's supposed purposes, the questions he asked, or the overall impact of his performance reveals the basis for the generally accepted notion<sup>369</sup> that Stone's cross examination of Singer advanced the defendants' theory of the case.

Similarly, the published post-trial attempts to explain the jury's verdict do not clarify the means by which Stone's cross examination of Singer could actually have advanced the defense's case. Some of the most popular explanations for the verdict center on the jury itself, speculating that the racial composition of the Simi Valley jury panel produced the results<sup>370</sup> or focusing on the general reluctance of juries to convict police officers for over-zealous behavior in arresting a suspect.<sup>371</sup> Other analyses attribute the trial's outcome to various strategic choices made by the prosecutors – their decision to allow defense counsel to present expert evidence on “use of force” despite the judge's announcement that he would sustain an objection to such testimony,<sup>372</sup> their inability to find a convincing expert witness of their own,<sup>373</sup> their decision not to call Rodney King as a witness,<sup>374</sup> or other errors in the presentation of the State's case.<sup>375</sup> None of these expla-

<sup>367</sup> See Parloff at \*4.

<sup>368</sup> See, e.g., D.M. Osborne, “Reaching for Doubt,” *The American Lawyer*, September 1992, p. 62, Lexis printout at \*8 - \*9 [hereafter, “Osborne”].

<sup>369</sup> See notes 356 - 357 *supra* and accompanying text.

<sup>370</sup> See Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 *TULANE L. REV.* 1739 (1993) [hereafter, “Johnson”]; Vogelman; Levin at 1620 - 1624; Karl Vick, “Why the Jury Voted to Acquit Officers,” *St. Petersburg Times*, May 1, 1992, p. 1A [hereafter, “Vick”]; Lou Cannon & Leef Smith, “A Case of Haunting Images and Perplexing Questions,” *Washington Post*, May 1, 1992, p. A29 [hereafter, “Cannon & Smith”]; Serrano & Wilkinson at A1. Because of a change of venue that moved the trial to a location where the population was virtually all white, the jury included no African Americans and only two people of color. Erwin Chemerinsky, “How Could the King Jury Do That?,” *Legal Times*, May 11, 1992, p. 23, Lexis printout at \*1 - \*2 [hereafter, “Chemerinsky”]. See also notes 7, 100, 196 - 209 *supra* and accompanying text.

<sup>371</sup> See David Luban, *Are Criminal Defenders Different?*, 91 *MICH. L. REV.* 1739, 1741 (1993); Osborne at \*2 (“... [the jurors'] reverence for police officers as guardians of the social order colored their view of the entire case”); Riley at \* 4; Chemerinsky at \*3.

<sup>372</sup> See Riley at \*5; Vick at 1A.

<sup>373</sup> See Riley at \*6; *What the Jury Saw*, Part Eight.

<sup>374</sup> See Gary A. Hengstler, *How Judges View Retrial of L.A. Cops*, 79 *A.B.A. J.*, No. 8, p. 70 (August 1993), at p. 70 (reporting that 55% of judges polled believed that the state prosecutors made a “tactical mistake” in not calling King as a witness, while 65% felt that his testimony contributed to the guilty verdicts in the federal trial); Phillip M. Gollner, “Image-Making Strategy in the Rodney King Case,” *New York Times*, December 25, 1992, p. A3; Riley at \*4; Chemerinsky at \*2; Vick at 1A.

<sup>375</sup> See, e.g., Levin at 1628 (“Having observed the entire trial, when the prosecution rested, I was hard pressed to find a common thread, a central theme, or a foundation of guilt. The presentation was so diffuse, it was hard to recall which points were made against

nations provides much insight into how Singer's testimony could have played a crucial role in the outcome of the trial.

Descriptions of the role played by Singer's testimony at the subsequent federal trial of the four officers<sup>376</sup> further complicate any effort to evaluate the importance of Stone's cross examination of her at the state trial. Before the second trial, the federal prosecutors came to so thoroughly accept the conventional wisdom that Singer's testimony had damaged the State's case that they did not even plan to elicit this once-"critical" prosecution testimony in their civil rights prosecution.<sup>377</sup> Stone, however, called Singer as a defense witness; in testimony that was twice delayed by the witness' tearful near-breakdowns, Singer gave essentially the same description of the events of March 3, 1991 – of the high-speed car chase, of Rodney King's refusal to follow police orders, and of the beating he received at the hands of the LAPD officers – as she had during the Simi Valley trial.<sup>378</sup> Once again, curiously, Singer's testimony was viewed by some analysts as central to the trial's outcome – although this time it was said to have assisted the prosecution rather than the defense.<sup>379</sup> Trial commentators suggested that her testimony "drove a dagger through the heart of the defense's case"<sup>380</sup> and "provided the emotional content for the prosecution that it lacked."<sup>381</sup> Stone's decision to call her to the witness stand has been described as "a critical strategic mistake."<sup>382</sup> One of the defense lawyers opined after trial that her testimony had helped to convict Koon and Powell.<sup>383</sup> The general assessment that Singer's testimony significantly aided the federal prosecutors confounds at the least – and perhaps completely undermines – the earlier impression of journalists and legal analysts that at the first trial Stone used his cross examination of Singer effectively to advance the defendants' case.

Michael Stone's cross examination of Melanie Singer during the

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which officers.").

<sup>376</sup> See notes 4, 6, 243, 348 *supra*.

<sup>377</sup> See Lou Cannon, "Lessons Learned and Gambles Taken: How This Trial Was Different," *Washington Post*, April 18, 1993, p. A22; [Special to the New York Times] "Highway Officer Gives Tearful Testimony in Beating Case," *New York Times*, March 27, 1993, p. A2.

<sup>378</sup> See sources cited in note 357 *supra*.

<sup>379</sup> See, e.g., Jim Newton, "Case History: The Strategy, The Fights, The Setbacks – How Four Angry Men Tackled the Most Explosive Criminal Trial in History," *Los Angeles Times Magazine*, June 27, 1993, p. 10. Both the prosecution and the defense invoked her testimony in their closing statements. Weinstein at A1.

<sup>380</sup> *Id.* at A1.

<sup>381</sup> Lou Cannon, "Lessons Learned and Gambles Taken: How This Trial Was Different," *Washington Post*, April 18, 1993, p. A22.

<sup>382</sup> Weinstein at A1.

<sup>383</sup> *Id.* (quoting Harland W. Braun, counsel for Officer Theodore Briseno in the second trial); Lou Cannon, "Lessons Learned and Gambles Taken: How This Trial Was Different," *Washington Post*, April 18, 1993, p. A22 (quoting Braun).

state trial has thus generated a challenging mystery. While most observers of the Simi Valley trial believe that this cross examination *did* help the defendants' case in a manner that went beyond merely casting doubt on the claims the witness had made during direct examination, neither the journalistic accounts of the trial nor the conventional explanations of the verdict nor the descriptions of Singer's testimony in the later federal trial provide any clues as to *how* it did so. Unless another interpretive framework can shed some light on the impact of this aspect of the trial, the conclusion that Stone's cross examination of Singer scored important points for the defense must be seen as the product of either poor legal journalism or lawyer-worshipping legal mythology.

## II. THE STORY-TELLING CONCEPTION OF TRIAL – A RESPONSE TO THE SINGER PARADOX

An interpretive framework that sees trial advocacy as story-telling and lawyers as story-tellers may offer a useful perspective on the trial process, provide a measure for the success of some trial tactics, and even explain some trial outcomes. Application of this perspective to the tactics employed by Michael Stone in the Simi Valley trial yields a fruitful examination of the utility of those tactics and their contribution to the defense case. Analyzing Stone's cross examination as an instance of legal story-telling helps to illuminate the manner in which he furthered his client's case through the testimony of a hostile witness and goes a long way toward vindicating and explaining the conventional wisdom regarding the importance of this cross examination in the first *Rodney King* trial.

### A. *Story-telling in Litigation*

Recent legal scholarship has emphasized the roles that story-telling and narrative structuring play in trial advocacy. In contrast to the traditional view of trials as inquests into the objective truth of some set of historical facts, this scholarship suggests that story-telling – which constructs facts rather than documenting preexisting facts – permeates the trial process at all levels. Lawyers and witnesses use story-telling techniques to present information to the court; jurors and judges use story-interpreting techniques to organize the information and assess competing claims.<sup>384</sup>

A number of factors combine to explain the preeminence of

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<sup>384</sup> W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE 3 - 4 (1981) [hereafter, "BENNETT & FELDMAN"]. See also *Closing Arguments*, *passim*; BENNETT & FELDMAN at ix.

story-telling in the American courtroom. A principal function of our process of public trials, and of jury trials in particular, is to legitimize the justice system by linking its formal mechanisms for dispensing justice with common-sense conceptions of fair and just results.<sup>385</sup> To maintain the linkage, court procedures provide a framework of evidentiary and procedural rules that encourage competing advocates to present their versions of events and explanations for those events – *i.e.*, their “stories” – in ways that appeal to shared notions of fairness.<sup>386</sup>

The very nature of the jury’s fact-finding function also places story-telling at the center of the trial process. Studies of jury decision-making have repeatedly demonstrated that jurors evaluate issues by employing a story-like framework: they transform the evidence they have heard into a standard story form and then analyze the story according to the applicable legal principles.<sup>387</sup> Jurors naturally rely on story-interpreting techniques, because these techniques are uniquely suited to the task of sifting through, organizing, and evaluating the information presented during a trial.<sup>388</sup> The story format enables jurors to organize masses of information – some of it quite complicated, and almost all of it adduced in a confusing, non-chronological manner; to remember the key facts presented during the testimony and the key arguments made by the lawyers; to focus on the central issues in the case by identifying them as central actions in a story-line; to differentiate between relevant and irrelevant facts; and to apply legal standards and other normative judgments to an interpretation of events.<sup>389</sup> The

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<sup>385</sup> BENNETT & FELDMAN at 25.

<sup>386</sup> Steven Lubet, *The Trial as a Persuasive Story*, 14 AM. J. TRIAL ADVOCACY 77, 77 - 78 (1990) [hereafter, “Lubet”]; BENNETT & FELDMAN at 33 - 37.

<sup>387</sup> See, *e.g.*, Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991) [hereafter, “*The Story Model*”] (concluding that jurors resolve questions of fact by analyzing how they can fit evidence into various story patterns); Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 CARDOZO L. REV. 559, 559 - 563 (1991) [hereafter, “Lempert”] (summarizing contemporary research); Pennington & Hastie, *Explanation-Based Decision Making: Effects of Memory Structure on Judgment*, 14 J. EXPERIMENTAL PSYCH. 521 (1988) (describing jurors’ practice of organizing information into story patterns during trials); BENNETT & FELDMAN at 3, 13-14 (detailing conclusions about jurors’ use of story structures, based upon a study of more than sixty criminal trials, forty trial transcripts, several videotaped trials, and experiments with students at the University of Washington). See also Sunwolf, *Talking Story in Trial: The Power of Narrative Persuasion*, 24 CHAMPION, No. 8, p. 26 (October 2000) [hereafter, “Sunwolf”], at p. 26 (noting that in four jury deliberations recorded on videotape, “jurors primarily argue with one another in story format”).

<sup>388</sup> See, *e.g.*, Phillip H. Miller, *Storytelling: A Technique for Juror Persuasion*, 26 AM. J. TRIAL ADVOCACY 489, 490 (2003) [hereafter, “Phillip Miller”]. Indeed, as we have noted, people generally make sense out of the world through story-telling and story interpretation. See notes 11 – 15 *supra* and accompanying text.

<sup>389</sup> *The Story Model* at 520 - 529; BENNETT & FELDMAN at 19; Phillip Miller at 489 - 490.

story framework also provides a means for appraising the consistency, completeness, and meaning of each side's story or "theory of the case,"<sup>390</sup> allowing jurors to compare elements of the advocates' stories to those narratives they have internalized through their experiences in our culture.<sup>391</sup>

The centrality of story-interpreting to the judicial process in general and to fact-finding in particular has dramatic implications for conceptions of trials and of trial advocacy. To begin with, it radically undermines the traditional notion of trial as a neutral procedure for discerning historical truth and of courtroom justice as a product of a "mechanical and objective process."<sup>392</sup> Because the use of stories determines both the presentation and the interpretation of evidence, the outcome of a trial depends less upon the "reality" of the prior event under consideration than upon a wide range of cognitive factors, including the witnesses' conclusions about the situation, the advocates' initial perception of the story, the relative story-telling abilities of each attorney, and the fact-finders' interpretive abilities, assessment of the competing stories, and view of the story-tellers.<sup>393</sup> In a system in which the use of stories both legitimates the process and controls the interpretation of evidence, it becomes difficult to characterize the dispensation of justice as "objective" under any definition of the term that implies freedom from interpretations and value judgments.

In addition, an appreciation of the role of story-telling in trials leads to an understanding of verdicts as a function of evaluations of the relative coherence of the stories that are told. Often the "facts" or evidence presented will not dictate the outcome of the proceeding.<sup>394</sup> The evidence will play a part in the advocates' presentations and will limit the available ways in which a fact-finder can arrive at an outcome, but the manipulation, structuring, and ordering of "facts" and evidence will have an enormous impact on trial outcomes.<sup>395</sup> As Ben-

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<sup>390</sup> BENNETT & FELDMAN at 41, 67.

<sup>391</sup> *Id.* at 46 - 47; Phillip Miller at 494.

<sup>392</sup> BENNETT & FELDMAN at ix.

<sup>393</sup> *Id.* at 65.

<sup>394</sup> *Id.* at 117.

<sup>395</sup> See *id.* at 89:

[T]he way in which a story is told will have considerable bearing on its perceived credibility regardless of the actual truth status of the story. This means that the symbols chosen, the structural elements (scene, *act*, agent, *agency*, and purpose) that are defined and left undefined, and the amount of detail provided to facilitate connections between story symbols, will all have a significant bearing on audience judgments about stories – judgments based on the overall completeness, consistency, and adequacy (in other words, the degree of ambiguity) of story connections.

See also *id.* at 65, 90; Elizabeth Loftus & Edith Greene, *Book Review*, 74 J. CRIM. L. 315, 320 (1983); Phillip Miller at 489 - 490 ("Importantly, juror decisions are affected by when the story begins and the point of view used to tell the story. This 'sequencing' of the story

nett and Feldman have pointed out, this cognitive structuring of evidence contributes to the result of virtually every case:

Although documentary evidence exists to support some symbolizations in a story, both the teller and the interpreter of the story *always* have some margin of control over the definition of certain key symbols.<sup>396</sup>

To the extent the studies can be credited, both theoretical<sup>397</sup> and empirical<sup>398</sup> analyses of trials have concluded that, in a typical trial, the quality of an advocate's story-telling and story-structuring eclipses the evidence s/he presents in its ultimate influence on the adjudicative outcome.<sup>399</sup> The importance of a piece of evidence in the resolution of a case depends not so much upon the "objective" value it may have in documenting a prior event as upon the capacity of the advocates to give it a pivotal place in the story structure they construct.<sup>400</sup> Similarly, other variables that may have an impact on the trial process – for example, the race-based prejudices of jurors, other normative assumptions jurors may make (including assumptions about the types of

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can change the outcome of deliberations.”).

<sup>396</sup> BENNETT & FELDMAN at 65.

<sup>397</sup> Lempert at 562.

<sup>398</sup> See BENNETT & FELDMAN at 67 - 68:

“Although it is doubtful that completely undocumented stories will be believed in many instances, it is quite possible that adequately documented but poorly structured accounts will be rejected because they do not withstand careful scrutiny within a story framework. Similarly, a well-constructed story may sway judgments even when evidence is in short supply.”

See also Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 U.C.L.A. L. REV. 273, 274 & n. 1 (1989) [hereafter, “Moore”] (describing the discussion of evidence by mock juries as heavily reliant on story-interpreting techniques).

<sup>399</sup> Other disciplines have long recognized the importance of narratives in conveying a text's meaning. Literary theorists have noted the interdependence of an author's choice of narrative structure and the themes of his or her work. See, e.g., ERICH AUERBACH, *MIMESIS – THE REPRESENTATION OF REALITY IN WESTERN LITERATURE* (Willard R. Trask trans., Princeton paperback ed. 1968). Similarly, contemporary historians have recognized the dominance of narrative over “facts” in advancing the thesis of a historical text. See, e.g., Louis Mink at 141 - 149; HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES* (1980); and see note 95 *supra*. Legal commentaries appearing in non-legal periodicals also have shown an increasing recognition that narrative structure may predominate over evidence in influencing trial results. See, e.g., William Finnegan, “Doubt,” *The New Yorker*, January 31, 1994, p. 48, at pp. 48 - 67; Stephen Gillers, “Grisham's Law,” *The Nation*, April 18, 1994, p. 509:

“Do you think Leslie Abramson got Erik Menendez a hung jury by appealing to the facts? No way. If she had argued the facts, he'd be on death row. Abramson took control of the narrative – the tone and texture and voice of Erik's story. If a story works, it's probably true. . . . Do you think Lorena Bobbit got off because she was crazy? Forget it. Her lawyer persuaded the jury that it had to write a dramatic, not a legal, ending to the event. The jury understood that the story needed an acquittal to work – not as a trial but as a story, which is what it had become.”

<sup>400</sup> See BENNETT & FELDMAN at 144.

behavior common on the part of police officers or criminal suspects), and the effects of various tactical maneuvers by the advocates – gain significance to the extent that they affect the development of one of both of the competing narratives.<sup>401</sup>

Recognition of the role of story-telling in the judicial process and of the consequences of that role for trial outcomes also has implications for the way that litigators view their own role in a trial. Essentially, trial lawyers are – and should view themselves as – storytellers.<sup>402</sup> Although limited by parameters set by the available evidence, by evidentiary and procedural rules, by the substantive law, and by general conceptions of what constitutes “lawyerly” behavior, lawyers arguing even the simplest case have a wide range of freedom in selecting a story to present to the fact-finder and in selecting the means for communicating that story.<sup>403</sup> Indeed, because of the centrality of story-telling to the trial process, lawyers probably choose and tell stories in court whether they intend to or not.<sup>404</sup>

Advocates thus must remain conscious of their story-telling role at all phases of the litigation process. Because the evidence available before court proceedings begin will often support a number of differing theories or interpretations, an advocate preparing for court must consider what kind of story is most likely to point persuasively to the outcome (or story “ending”) s/he wants.<sup>405</sup> Bennett and Feldman found that they could categorize the narrative structures used by lawyers in most criminal trials into a few basic types. They noted that, in the trials they studied,<sup>406</sup> the prosecutors told essentially the same type of story, connecting the basic story elements in three “structural triads” (actor-scene-act; actor-purpose-act; actor-agency-act), each of which “corresponds to one dimension of legal proof” (the first “*situat[ing]* the actor and action in time and space, the second establish[ing] the actor’s *intent*, and the third cover[ing] the behavioral mechanics or *execution* of the act [defined as a crime]”).<sup>407</sup> In contrast,

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<sup>401</sup> *Id.* at 5 - 6.

<sup>402</sup> See Benjamin Reid, *The Trial Lawyer as Storyteller: Reviving an Ancient Art*, 24 LITIGATION, No. 3, p. 8 (1998) [hereafter, “Reid”], at p. 9 (“Great trial lawyers have always been great storytellers.”).

<sup>403</sup> *Closing Arguments* at 58.

<sup>404</sup> *Id.* at 117.

<sup>405</sup> Lubet at 78; Sharon Creeden, *Telling Your Client’s Story to the Jury*, TENN. BAR J., May/June 1991, p. 10, at pp. 10 - 13; Reid at 9; Phillip Miller at 490.

<sup>406</sup> See note 387 *supra*.

<sup>407</sup> BENNETT & FELDMAN at 94 – 98. The phrases quoted are on p. 96. Bennett and Feldman believe that the way in which common forms of jury instructions embodying the elements of criminal offenses (situation, *mens, actus*) “rehearse the key connections that must be drawn among story elements in support of a consistent interpretation of the defendant’s behavior” (*id.* at 95) tend to require that “the prosecution case must employ the same underlying story strategy in every trial” (*id.* at 96).

defense attorneys seem to have a broader range of options in structuring their trial narratives. According to Bennett and Feldman, they can ask the jury to question the prosecution's arrangement of actions and events into a story-line by constructing (1) a "challenge" narrative, through which they attack elements of the prosecution's story as inconsistent, unproven, or subject to a competing interpretation; (2) a "redefinition" narrative, through which they re-interpret ambiguous elements of the prosecution's story in order to point to different conclusions about that story and its central action; or (3) a "reconstruction" narrative, through which they place the central action of the prosecution's story in an entirely new context to yield a radically different interpretation of that action.<sup>408</sup> An advocate's choice among these narrative structures is crucial to the conduct of litigation, governing his or her general approach to case preparation and his or her presentation of the theory of the case at trial.<sup>409</sup>

As crucial as the selection of a narrative macrostructure is in shaping the story eventually conveyed to the jury, decisions regarding specific trial tactics also contribute to the composition and communication of that story. Advocates must begin to develop their stories well before trial, using discovery and fact investigation to explore and collect the story elements they may want to use.<sup>410</sup> Opportunities for story-telling arise at virtually every stage of a trial.<sup>411</sup> While a number of informal story-telling processes – ranging from the images communicated by a lawyer's interactions with his or her client at counsel table<sup>412</sup> to the messages conveyed whenever an attorney makes an objection<sup>413</sup> – affect an advocate's success in constructing a convincing narrative, the more formal mechanisms for story-telling have received the bulk of scholarly attention. Analyses of story-telling in litigation have frequently focused on opening and closing statements (the two portions of every trial in which the advocates can explicitly delineate their stories)<sup>414</sup> and the presentation of evidence through witnesses and exhibits. As a speech outlining the advocate's approach to the

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<sup>408</sup> *Id.* at 98 - 107. Bennett and Feldman refer to these story types as "strategies" rather than as narrative structures but describe them in ways that attribute a distinctive narrative structure to each strategy.

<sup>409</sup> *Id.* at 107 - 114.

<sup>410</sup> Phillip Miller at 495. See also text at notes 37 - 42 *supra*.

<sup>411</sup> See text at notes 68 - 71 *supra*; *Closing Arguments* at 57 n. 5. In some jurisdictions, *voir dire* procedures allow lawyers to begin telling their stories to the fact-finders even before the opening statements. Reid at 9 - 10; Murray Ogborn, *Bringing the Case to Life*, 38 TRIAL, No. 1, p. 57 (January 2002) [hereafter, "Ogborn"], at pp. 59 - 60.

<sup>412</sup> See, for example, text following note 71 *supra*.

<sup>413</sup> See, e.g., 3 ANTHONY G. AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES, § 413 (D) at p. 209

<sup>414</sup> See Reid at 11: "Opening and closing represent storytelling in its purest form."

major factual and legal issues in controversy, the opening statement usually constructs a framework for the story. An opening statement can, indeed, serve as one of counsel's most important story-telling devices, because the structure it establishes will influence the fact-finder's initial interpretation (through a psychological process known as "coding") and subsequent memory of information.<sup>415</sup> Similarly, the closing argument affords the advocate a unique opportunity to fit every element of the preceding trial into the narrative structure s/he hopes the jury will accept.<sup>416</sup> Scholars of legal story-telling have also begun to explore the means by which the presentation of evidence through direct examinations of witnesses<sup>417</sup> shapes the underlying narrative advanced by an attorney.

Recent legal scholarship on story-telling in litigation thus suggests the extent to which an advocate's decisions about most basic aspects of trial conduct – pretrial maneuvers, opening and closing statements, presentation of evidence, and even behavior in the courtroom – implement strategic judgments about the nature of the story s/he will communicate to the fact-finder. Doubtless, the cross examination of an adverse witness often presents another promising opportunity for story-telling. A leading primer on trial practice identifies the elicitation of testimony favorable to the advocate's case as "[t]he cross-examiner's primary purpose";<sup>418</sup> some scholars have acknowledged that, in general, witness examinations do provide an opportunity for story-telling.<sup>419</sup> The extant literature, however, reflects little attention to the role of cross examination, not simply in attacking the direct examiner's story, but in contributing to the development of an alternative narrative. Lubet suggests that cross examination plays less of a role in the creation of a story structure than do opening and closing statements, direct examination, introduction of exhibits, and "absolutely everything else that an attorney does in the courtroom,"<sup>420</sup> while Lempert connects cross examination to story-telling only by describing the manner in which a "destructive" cross examination can inter-

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<sup>415</sup> See notes 44 - 60 *supra* and accompanying text; and see Lempert at 564 - 565; Sunwolf at 28 - 29; Ogborn at 60. Some of the psychological processes involved are discussed in the sources collected in *Closing Arguments* at 114 - 116 n.146.

<sup>416</sup> See *Closing Arguments, passim*; BENNETT & FELDMAN at 93; Lempert at 569; Sunwolf at 29 - 30; Reid at 11.

<sup>417</sup> See, e.g., H. Mitchell Caldwell et al., *Primacy, Recency, Ethos, and Pathos: Integrating Principles of Communication into the Direct Examination*, 76 NOTRE DAME L. REV. 423 (2001); William T. Hangle, *Direct and the Director: Writing, Staging, and Telling the Story*, 25 LITIGATION, No. 1, p. 20 (1998); Reid at 12; Ogborn at 60.

<sup>418</sup> MAUET at 224.

<sup>419</sup> See Lubet at 89; *Closing Arguments* at 57 n.5; BENNETT & FELDMAN at 116; Moore at 323 - 331.

<sup>420</sup> Lubet at 89 - 90.

fere with the other side's story-construction efforts.<sup>421</sup> To the extent that analyses of litigators as story-tellers have discussed the role of cross examination in advancing a narrative, they have primarily focused on the ability of a cross examiner to control the story-line through use of strongly leading questions (*i.e.*, those requiring a simple "yes" or "no" answer).<sup>422</sup> Analysis of Michael Stone's cross examination of Melanie Singer suggests that such a limited view of the role of cross examination in story-telling may prevent a more thorough understanding of the means by which advocates advance their stories in the courtroom.

### B. *Story-telling in the Rodney King Trial*

At its highest level of abstraction, the story-telling conception of trial provides a descriptive model for the trial process as well as a partial explanation for some of the outcomes of the process. By clarifying an important dimension of lawyers' tactics and the likely interpretive responses of jurors, it can also serve as a framework for understanding specific aspects of particular trials. This framework offers a way to understand the advocates' strategic choices in the *Rodney King* trial and the impact of these choices on the verdict.<sup>423</sup> Before it can be brought to bear upon the single aspect of the trial with which I am specifically concerned – the cross examination of Melanie Singer – the framework requires an explication of the overall narratives advanced by the prosecution and the defendants respectively.

As Bennett and Feldman would have predicted, the prosecution relied on the story line traditionally employed by the government in criminal trials, a straightforward narrative that situated and motivated the defendants' conduct in committing an obviously criminal act.<sup>424</sup> Through their statements and presentations of evidence, the prosecutors told a relatively simple tale about four police officers who abused their publicly-granted authority by subjecting a motorist they had

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<sup>421</sup> Lempert at 566 - 567.

<sup>422</sup> See, *e.g.*, Ogborn at 60; Reid at 12 - 13.

<sup>423</sup> Because the federal prosecutors later retried the case (for all practical purposes) and achieved a dramatically different result, and because Melanie Singer's testimony (or, to be more precise, the cross examination of Melanie Singer) contributed to both verdicts, analysis of the stories told during this trial and during Singer's testimony should prove especially fruitful. As Bennett and Feldman have noted:

The structure of stories becomes crucial to judgment in cases in which a collection of facts or evidence is subject to competing interpretations. In such cases, it may not be the evidence that sways final judgment; judgment hinges on the structure of interpretation that provides the best fit for the evidence.

BENNETT & FELDMAN at 89 - 90. See also *Closing Arguments* at 57.

<sup>424</sup> See note 407 *supra* and accompanying text.

stopped for traffic violations to a brutal, unprovoked, unjustified beating.<sup>425</sup> The videotape of the beating assumed a prominent position in this narrative. Indeed, throughout most of the prosecution's presentation of its case-in-chief, the prosecutors' story merely foregrounded and reinforced the images visible on the tape. The prosecutors relied on the videotape to support each element of their story,<sup>426</sup> characterizing it as the most objective piece of evidence that could possibly be had.<sup>427</sup> In advancing their case in this fashion, the prosecutors presented the basic prosecution story as History, arguing that the videotape represented an accurate, unbiased recording of past events and that, as a piece of evidence, it "speaks for itself," obviating the need for any interpretation.<sup>428</sup>

Faced with a more complex set of options, the defense team chose to construct a "redefinition" narrative,<sup>429</sup> aimed at reinterpreting much of the same evidence presented by the prosecution so as to depict the episode as a justified use of police force rather than a brutal and illegal outburst of violence. In direct opposition to the prosecutors' basic *criminal act* narrative, the defense attorneys offered a *justification* narrative, both as a matter of legal doctrine and as a matter of story-telling. Accepting as true the prosecutors' contention that the officers used physical force against Rodney King, defense counsel created a story that explained this use of force as a prudent and even heroic police response to the aggressive behavior of a crime suspect.

The characters in the defense story played very different roles than they had played in the tale told by the prosecutors. While the

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<sup>425</sup> Richard A. Serrano, "CHP Officer's Testimony, Memo on Beating Differ," *Los Angeles Times*, March 10, 1992, p. B1.

<sup>426</sup> See Levenson at 525 - 526 ("The prosecution relied heavily on the videotape."); Loftus & Rosenwald at 1643; Lou Cannon, "Lessons Learned and Gambles Taken: How This Trial Was Different," *Washington Post*, April 18, 1993, p. A22; Lou Cannon, "Prosecutors in Beating Trial Seen as Making Better Case This Time," *Washington Post*, March 15, 1993, p. A4; Riley at \*2, \* 5; Chemerinsky at \*2; *What the Jury Saw*, Part One.

<sup>427</sup> Prosecutor Terry White explained his view of the tape's importance and objectivity in his closing argument, quoted in text at note 252 *supra*. See generally notes 245 - 257 *supra* and accompanying text.

<sup>428</sup> White repeatedly argued in his opening statement, objections to questions posed by defense counsel, and his closing argument that the jurors did not need to interpret the videotape, but merely to look at it. See, e.g., *What the Jury Saw*, Part Seven (White closing) ("Now, who are you gonna believe? The defendants? Or your own eyes?" [the version of this passage transcribed by the court reporter is set out in note 252 *supra*]); *id.* at Part Eight (White closing) ("You don't need to be an expert to look at that video and say that is wrong, that is bad, that is criminal."). And again see generally notes 245 - 257 *supra* and accompanying text. In the opinion of at least one observer who watched the entire trial, the prosecutors' inability to recognize that jurors would view the tape as susceptible to any degree of interpretation foreclosed the possibility of a conviction. Levin at 1627. See also Cannon & Smith at A29; Vick at 1A.

<sup>429</sup> See note 408 *supra* and accompanying text.

prosecution's story cast King only as the recipient of the police officers' baton blows and kicks, the defense attorneys' justification story featured King as a powerful main character who controlled the actions and responses of the story's other actors (*i.e.*, the LAPD officers) through his bizarre and combative behavior.<sup>430</sup> The central plot-line of their story developed through a series of actions taken by King – his refusal to stop his car,<sup>431</sup> his strange behavior after he did stop,<sup>432</sup> and, perhaps most important, his substantial efforts to resist arrest both before and during the officers' use of force.<sup>433</sup> The justification narrative also rewrote the parts played by the police officers, depicting them not as aggressors, but as persecuted heroes who reasonably feared that King was under the influence of PCP<sup>434</sup> and who carefully escalated their minimal applications of force in direct response to King's repeated attempts to flee or fight back.<sup>435</sup> By combining these altered characterizations of King and the officers into a "redefinition" narrative, the defense lawyers hoped to persuade the jury to accept a story that contained all of the elements of a classic legal justification defense.

The defense attorneys, however, had to overcome one quite substantial obstacle to the construction of such a story: the videotape of the incident. Most viewers of the so-called "Rodney King beating tape" saw it as a piece of evidence that powerfully furthered the prosecution's *criminal act* story and fatally undermined the premises of the defense's *justification* story.<sup>436</sup>

In order to diminish the impact of the videotape upon the justification story, the defendants' lawyers incorporated into the defense narrative a significant subplot about the videotape itself and the methodology by which the jury should view it. In general, the theme that "appearances can be misleading" was the message of this subplot.<sup>437</sup> The subplot countered the prosecution's basic premise that a simple

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<sup>430</sup> Levin at 1626; Troutt at 109.

<sup>431</sup> Parloff at \*2.

<sup>432</sup> Richard A. Serrano, "CHP Officer's Testimony, Memo on Beating Differ," *Los Angeles Times*, March 10, 1992, p. B; Troutt at 109.

<sup>433</sup> Serrano & Wilkinson at A1 ("The defense strategy turned on persuading the jury that King was a combative suspect who did not comply with officers' orders.").

<sup>434</sup> Lou Cannon, "Focus Rests on 1 Officer in L.A. Trial," *Washington Post*, March 15, 1992, p. A3. See also notes 112, 249 *supra* and accompanying text.

<sup>435</sup> Riley at \*3 - \*5; [Special to the New York Times] "The Police Verdict," *New York Times*, April 30, 1992, p. D22 [hereafter "The Police Verdict"]. See also notes 93, 273, 275 - 276 *supra* and accompanying text.

<sup>436</sup> See Binny Miller, *Giving Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 501 (1994) [hereafter, "Binny Miller"]. See also note 340 *supra* and accompanying text.

<sup>437</sup> Note, *The Computer as Advocate: An Approach to Computer-Generated Displays in the Courtroom*, 71 IND. L.J. 439, 456 (1996).

viewing of the tape by laypersons could yield accurate conclusions about the events depicted. In place of this premise, it offered interpretive techniques – contextualization of the tape within a framework of technical concepts drawn from and by the “science” of professional law enforcement, and viewing of the tape in individual segments – that promised to make the tape comprehensible.<sup>438</sup> The tape itself was cast as a main character in the subplot, an enigmatic, mysterious figure that could be Deceiver or Oracle; and the jury’s attempt to solve the riddle of the tape’s identity and meaning provided the central action driving the story. Whereas the prosecutor had described the videotape as an objective representation of prior events,<sup>439</sup> the defense subplot cast the tape as a Tempter that created a misleading impression upon initial viewing but that offered a deeper, true meaning for those jurors perceptive enough to explore beneath the surface.<sup>440</sup> By putting the videotape and the jury in these roles, the subplot both warded the defendants’ broader justification story against the potentially damaging effects of the tape and used the tape to bolster that story’s central themes.

This subplot did not simply counter the idea that naïve lay observation of the videotape could generate the understanding of the incident needed to render a legal verdict. It also revealed several techniques which the jurors could use to solve the riddle posed by the tape. To begin with, the subplot depicted the tape as a piece of evidence that could be deciphered only with the assistance of law enforcement professionals. Such a depiction directly challenged the public perception of the tape, redescribing it as a record of a technical exercise performed by highly-trained professionals rather than as a street scene conveying a plain meaning to every home television viewer.

The defense could build this aspect of its case upon an uncontested foundation. As a legal matter, the defense of justification which the judge explained in his instructions to the jury required that the events shown on the videotape must be viewed from the point of view of the defendants as police officers.<sup>441</sup> And the prosecution itself invited the jury to adopt a law-enforcement perspective, by calling wit-

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<sup>438</sup> See notes 259 - 309 *supra* and accompanying text.

<sup>439</sup> See notes 246 - 256, 426 - 427 *supra* and accompanying text.

<sup>440</sup> Before the trial, Michael Stone explained this subplot as an element of his broader justification strategy. See Levin at 1625 (1993), quoting Stone:

I think this is a defensible case if the optical illusion on this videotape is cleared up . . . . [O]nce the jury understands there are a lot of things going on that you can’t see, everything will be cleared up.

See also *What the Jury Saw*, Part One; Binny Miller at 501.

<sup>441</sup> See note 102 *supra*.

nesses who attested to the “unprofessionalism” of the defendants’ conduct as a circumstance tending to demonstrate their guilt.<sup>442</sup> Defense counsel embraced the law-enforcement perspective and extended its implications by a double move: – first by treating the tape as a text written in the technical language of professional law-enforcement practice and requiring translation in order to be properly understood; and second, by carrying this notion a step further and insisting that *nothing* on the tape was quite what it seemed and that, far from “speaking for itself,” the tape was positively misleading unless and until the specialized language in which it was written had been deciphered for the jury, so that the jurors could see the activities reflected by the tape *in the way that the defendant officers had seen and understood them*.<sup>443</sup> As anthropologist Charles Goodwin has commented:

[T]he lawyers defending the police officers did not treat the tape as a record that spoke for itself. Instead they argued that it could be understood only by embedding the events visible on it within the work life of a profession. The defense proposed that the beating constituted an example of careful police work, a form of professional discourse with the victim in which he was a very active coparticipant – indeed, the party who controlled the interaction.<sup>444</sup>

The defense lawyers accomplished this “embedding” through the testimony of two expert witnesses, each of whom noted the need to view the videotape through a filter of professional norms and each of whom taught the jury how to do that in a way which made the incident on the tape come to mean what the expert said it meant.<sup>445</sup> After characterizing the baton as an appropriate instrument for curbing a suspect’s resistance, Sergeant Charles L. Duke, Jr., a twenty-year LAPD veteran who instructed officers in use-of-force principles and practice, dissected the tape frame by frame, maintaining that it demonstrated that the officers struck each individual blow in response to a specific threatening or evasive movement by King.<sup>446</sup> Former LAPD Captain

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<sup>442</sup> See *What the Jury Saw*, Parts Two and Seven (testimony of Melanie Singer, Tim Singer, and Michael Bostic).

<sup>443</sup> After the trial, Michael Stone described his ability to accomplish this shift in the jurors’ perspective as a key factor in the acquittals. See Serrano & Wilkinson at A1, quoting Stone:

I tried to put [the jury] in the shoes of the police officers, and I think I was able to do that. We got the jurors to look at the case not from the eye of the camera or the eye of the video cameraman, but from the eyes of the officers who were out there that night.

See also Riley at \*3; Cannon & Smith at A29.

<sup>444</sup> Goodwin at 616.

<sup>445</sup> *Id.* at 618 - 622.

<sup>446</sup> See *What the Jury Saw*, Part Four; Riley at \*5; Richard A. Serrano, “All 56 Blows to King Justified, Expert on Use of Force Testifies,” *Los Angeles Times*, March 24, 1992, p. B3.

Robert Michael engaged in a similar analysis of the videotape, breaking the police conduct it reflected into distinct periods of escalating and de-escalating force and contending that the amount of force used in these periods corresponded precisely to the aggressiveness exhibited by King.<sup>447</sup> By the testimony of these expert witnesses and by other exegeses of the videotape, the defense team “[took] the beating apart and renam[ed] it through the words of police experts with all their attendant police nomenclature.”<sup>448</sup>

The defense subplot conveying the message that the jurors needed to receive instruction in law-enforcement practice and professional vision as a prerequisite to understanding the videotape<sup>449</sup> served a number of functions for the defendants. Most obviously, it directly advanced the defendants’ justification story by giving the jurors a way to view the images on the tape as showing a justified use of force rather than a violent abuse of state power.<sup>450</sup> The subplot’s emphasis on the need for contextualization and expert opinion also provided more subtle support for the emerging defense narrative. Repeated reminders of the professional nature of the defendants’ work sowed the idea that professional standards and well-tested, well-taught, well-learned procedures dictated their response to Mr. King.<sup>451</sup> The focus on the technical character of police professionalism also contributed to the defense narrative through its tendency to minimize the degree of force actually used against Mr. King. Discussion of the incident in technical terminology redefined the instruments of violence – the truncheons used by Powell and Wind, and the kicks and stomps employed by Wind and Briseno – as tools of a craft,<sup>452</sup> while the repeated screenings of the tape and the detailed, intellectualized analyses of it by expert witnesses and lawyers desensitized the jurors to the violence it showed, making “the beating as familiar – and about as stimulating – as a cereal advertisement.”<sup>453</sup> By encouraging the ju-

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<sup>447</sup> *What the Jury Saw*, Part Five (testimony by Michael). *E.g.*:

There were ten distinct uses of force rather than one single use of force. In each of those uses of force, there was an escalation and a de-escalation, an assessment period, and then an escalation and a de-escalation, again, and another assessment period.

<sup>448</sup> Troutt at 110.

<sup>449</sup> Goodwin at 622, 624.

<sup>450</sup> *Id.* at 622 - 624.

<sup>451</sup> *Id.* at 621 - 622.

<sup>452</sup> *Id.*

<sup>453</sup> Loftus & Rosenwald at 1644. See also Deborah L. Mahan, *Forensic Image Processing*, 10 CRIMINAL JUSTICE, No. 1, p. 2 (Spring 1995), at p. 8; Binny Miller at 501; Chemerinsky at \*2; Vick at 1A. Indeed, after the trial, several jurors expressed their belief that the defendants had not really inflicted any serious injury upon Mr. King, despite the medical evidence presented regarding the multiple fractures, bruises, and other wounds he suffered. See, *e.g.*, Nina Bernstein, “Bitter Division in Jury Room: How 12 Ordinary Citizens

rors to examine the videotape of the incident through professional lenses, the defense lawyers simultaneously concretized their “appearances can be misleading” subplot and strengthened the broader narrative structure they were seeking to erect.

They also accredited their justification story through an aspect of the subplot that stressed the scientific precision – and thereby, implicitly, the improvement of the jury’s interpretive, detective work – achieved by focusing upon individual frames or portions of the videotape rather than upon the entire video recording. Throughout the trial, defense lawyers promoted this feature of their story, repeatedly pointing out that the jury could best understand the eighty-one-second videotape by breaking it into small parts.<sup>454</sup> They led their two expert witnesses through frame-by-frame analyses of the tape, asking them to scrutinize and explain in minute detail each visual configuration arguably implying the smallest movement.<sup>455</sup> During the examinations of other witnesses and their own statements to the jury, they remained faithful to the type of blow-by-blow analysis suggested by Duke and Michael.<sup>456</sup> These modelings of the manner in which the videotape should be seen and understood furthered the “appearances can be misleading” subplot, redefining the tape as an ambiguous record that yields different visions of reality when viewed in different ways. They impressed on the jury the greater scientific accuracy achievable by viewing the tape in small pieces and at slower-than-normal speed. In these ways, they both shielded the structure of the defense team’s justification story from refutation by a prosecutorial appeal to the shocking graphic impression left by the videotape when viewed from start to finish in real time, and advanced that defense story by repackaging the overwhelming police violence visible on the tape into a series of discreet, individual responses to King’s actions.<sup>457</sup>

In summary, then, the *Rodney King* prosecutors constructed a relatively uncomplicated story about a misuse of force in violation of law by abusive police officers – a story for which a finding of guilt represented the only acceptable ending. They told this story as a straightforward historical narrative, and they depicted the videotape as a piece of evidence embodying and revealing the history of the crime in the most accurate, objective form possible. The defense law-

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Met for 7 Days to Produce Verdict That Shook L.A.,” *Newsday*, May 14, 1992, p. 5 [hereafter, “Bernstein”]; Cannon & Smith at A29; “The Police Verdict” at D22.

<sup>454</sup> See Vick at 1A (The defense lawyers “framed [the events on the videotape] not as an outrage, but as a series of discreet [sic, maybe] reactions by officers encountering a dangerous unknown.”); Fiske at 918 - 919; GIBBS at 45.

<sup>455</sup> See notes 277 - 282, 443 - 448 *supra* and accompanying text.

<sup>456</sup> Parloff at \*5.

<sup>457</sup> Goodwin at 620 - 622; Troutt at 110.

yers accepted much of the prosecution's history as true but redefined the events by placing them in a different context, so as produce a story that logically, legally and morally pointed to an acquittal on the ground of justification as the sole right ending. In order to deal with the potential problems posed by the videotape of the incident, the defense story included an extensive subplot focused on the tape itself, a subplot that portrayed the tape not as an objective recording of history, but as a potentially misleading series of images from which the jurors could wrest real truth only by the use of interpretive techniques in which they required instruction by technically qualified experts in professional vision.<sup>458</sup> It is these competing stories and their underlying narrative structures that give us a starting point for analysis of Michael Stone's cross examination of Melanie Singer and its probable contribution to the outcome of the trial.<sup>459</sup>

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<sup>458</sup> A number of commentators have argued that the defense attorneys' narrative also involved an appeal to racial stereotypes, and that the defendants were acquitted because these attorneys persuaded the jury to accept a story which depicted the four LAPD officers as performing the brutal "dirty work" necessary to protect white America from drug-crazed black criminals like Rodney King. See Vogelmann; Johnson. Without question, Stone made nearly-explicit references to racial fears in his closing argument. See Note, *Restraining Adversarial Excess in Closing Argument*, 96 COLUM. L. REV. 1299, 1316 - 1317 (1996); Seth Mydans, "Defense Lawyer at Beating Trial Asserts Driver Prompted Violence," *New York Times*, April 22, 1992, p. A16; and see note 149 *supra*. Many key defense witnesses – most notably, Koon and Powell themselves – described King and the incident in terms that resonate with negative images of African-Americans. See Johnson at 1747, 1751 - 1753, 1755 - 1758; Vogelmann at 574 & n.6; [Special to the New York Times] "Reporter's Notebook; Baton is 'Star' in Police-Beating Trial," *New York Times*, April 6, 1992, p. A14; *What the Jury Saw*, Parts 4 and 5. While I do not disagree with the notion that racial stereotyping permeated the defense case and contributed to the acquittals, I have not elaborated on this aspect of the defendant's story here for two reasons. First, the appeals to racial stereotypes that occurred during other portions of the trial did not stand out in the cross examination of Melanie Singer. In fact, her two days of testimony do not contain a single reference to Mr. King's race, and Stone simply referred to him as "Mr. King" throughout his cross examination. A description of the defense team's story which focuses exclusively on race therefore cannot explain the contributions made to that story by Stone's questioning of Singer. In addition, the impact of racial bias on a trial can be best explained not in a vacuum, but by examining the manner in which such prejudice can affect a jury's interpretation of each side's story – for example, by studying the manner in which the invocation of myths of black super-aggressiveness can impact upon the structuring and acceptance of a story which describes a violent police response to an African-American as justified. See BENNETT & FELDMAN at 169 - 183; notes 61 - 62, 119 - 156 *supra* and accompanying text.

<sup>459</sup> Although I do not purport to examine the jurors' motivations in returning the verdict they did, it is interesting that, in post-trial media interviews, they defended the verdict by a rationale that closely follows the narrative structure outlined above. To explain the verdict, they incessantly reiterated the basic outline of the "justification" story, describing the causal link between King's aggressiveness, the fear he instilled in the police officers, and the force they used to apprehend him. See, e.g., Osborne at \*11; Bernstein at 5; Chemerinsky at \*1; Serrano & Wilkinson at A1. More strikingly, the jurors also repeated major portions of the defense subplot about the videotape, justifying their verdict by saying that they had been required to view the videotape in discrete segments and through the "lenses" of a

### C. *Story-telling in the Cross Examination of Melanie Singer*

Examined from this standpoint, Stone's cross examination of Melanie Singer clearly appears to have helped the defense not only – or principally – because he shook the credibility of Singer's testimony on direct examination as a prosecution witness. Rather, Stone was able to use his interactions with an adverse witness as an effective story-telling tool that powerfully advanced his own well-plotted defense narrative.

At first glance, Stone's cross examination of Singer appears to be precisely the sort of "destructive" cross examination portrayed in the journalistic accounts of this part of the trial.<sup>460</sup> A trial commentator who viewed Stone's strategy this way could divide Stone's questions into twelve thematic segments:

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law-enforcement professional. Some jurors specifically referred to Duke's testimony as the basis of their verdict, see Osborne at \*6; Riley at \*5, while others demonstrated their acceptance of the defense mini-narrative by peppering their descriptions of the videotape with professional jargon and detailed technical analyses of each baton blow. See Osborne at \*14 - \*15; Lou Cannon, "Prosecutors in Beating Trial Seen as Making Better Case This Time," *Washington Post*, March 15, 1993, at A4.

<sup>460</sup> In order to study Michael Stone's cross examination of Melanie Singer, I read the transcript of that portion of the trial and viewed the videotapes of Singer's testimony several times. Wherever possible, I have cited to the official court transcript of the cross examination, which took place on March 6 and March 9, 1992.

Because some of my citations refer to events in the courtroom that are not reflected in the transcript (e.g., the various positions in which Stone stood during the cross examination, and the duration of certain pieces of the cross examination), I also sometimes cite to portions of the tapes made for Court TV's live broadcast of *California v. Powell*. See note 192 *supra*. Melanie Singer was called to the witness stand by prosecutor Terry White at approximately 13:15 Eastern Standard Time on March 6, 1992. Her testimony on direct examination ran from that time until 17:19 on the same date. (This period included a lunch break and sidebar conferences.) Michael Stone cross-examined her from 17:19 until 19:03 on March 6 and from 12:16 to 15:01 on March 9. (Again, these periods include several breaks.) He conducted a re-cross examination from 19:01 until 19:07 on March 9, at which time the judge excused the witness. In citing to Stone's questions and other incidents during the cross examination, I have provided the date, hour, minute, and second, as indicated on the Court TV tapes. All times given are Eastern Standard Time.

For a number of reasons, some or all of my citations to these tapes may be slightly inaccurate. The tapes that I used have the date and time indicated on the outside of the tape box; I have proceeded on the assumption that Court TV properly labeled the times on these tapes when making the copies. I watched the tapes on a VCR which has a time-counter and used the counter in gauging the passage of time. Problems with the counter or with my ability to record times precisely may have thrown my citations off to a small extent. More problematically, some of the tapes begin with testimony which also appears at the end of the previous tapes, while in some places a period of unrecorded testimony has obviously occurred between tapes. Nonetheless, comparisons between the times marked on these tapes and the times indicated at various points in the transcripts (when, for example, the judge notes the time prior to or just after a break) have bolstered my confidence in the near-accuracy of the times indicated on the videotapes.

## Cross Examination, March 6, 1992

- (1) Questions casting doubt on Singer's characterization of Rodney King as non-aggressive (sixteen questions asked over a period of two minutes and four seconds)
- (2) Questions casting doubt on Singer's descriptions of Officer Powell's baton blows (two-hundred and sixty-eight questions; one hour, forty minutes, and twelve seconds)
- (3) Questions casting doubt on Singer's conclusion that Rodney King did not appear to be under the influence of PCP (8 questions; one minute and eighteen seconds)

## Cross Examination, March 9, 1992

- (4) A second battery of questions casting doubt on Singer's descriptions of Officer Powell's baton blows (thirty-one questions; six minutes and fifty-five seconds)
- (5) Questions implying that Singer's testimony may have been contaminated by her contacts with Officer Timothy Singer, her husband, who was also a prosecution witness (thirty-six questions; five minutes and one second)
- (6) Questions implying that Singer's testimony may be biased because of her status as a defendant in a civil suit filed by one of Mr. King's passengers (four questions; twenty seconds)
- (7) A second battery of questions casting doubt on Singer's characterization of Mr. King as non-aggressive (sixty-nine questions; seven minutes and forty-six seconds)
- (8) A third battery of questions casting doubt on Singer's descriptions of Powell's baton blows, focusing on inconsistencies between her testimony and the videotape (eighty-three questions; twenty-six minutes and thirteen seconds)
- (9) Questions casting doubt on Singer's conclusion that Powell's conduct violated police policy on the use of force (fourteen questions; three minutes and four seconds)
- (10) A fourth battery of questions casting doubt on Singer's descriptions of Powell's baton blows, focusing on inconsistencies between her testimony and photographs of King taken a few days after the incident (eight questions; two minutes and forty-nine seconds)
- (11) Questions casting doubt on Singer's testimony that Powell made false statements in his arrest report (five-hundred and four questions; one hour, five minutes, and fifty-five seconds)

## Re-cross Examination, March 9, 1992

- (12) A second battery of questions regarding the accuracy of Powell's arrest report (thirty-one questions; five minutes and eleven seconds)

Outlined in this fashion, the cross examination appears to have done little more than produce several hours of disparaging commentary on

the testimony that prosecutor Terry White had elicited from the witness regarding these several topics on direct examination.

When inspected more closely, however, Stone's cross examination is remarkable not for its tendency to diminish the persuasiveness of Singer's testimony on direct, but for its success in advancing key elements of the defense team's justification story and its "appearances can be misleading" subplot. Although very few of the questions asked by Stone during his four hours of cross examination explicitly referred to any aspect of these narratives, his language, his metaphors, and the kinds of analysis he developed during the four hours significantly contributed to the stories he was telling on behalf of his client.

Several aspects of his cross of Singer provided support for the overarching justification story that he and the other members of the defense team labored to construct throughout the trial. As outlined above, that story cast King in the role of a controlling antagonist who, by his uncooperative behavior and aggressive movements, forced the police to use successive levels of force against him in a pattern of escalation and de-escalation that responded to his leads. During his cross examination of Singer, Stone reinforced the premise of this story – that King's actions directly caused each succeeding act of violence on the part of the officers – by offering a cause-and-effect metaphor for action.<sup>461</sup> He established the metaphor most vividly when questioning Singer about her recollection of the interaction between Mr. King and Officer Powell. Stone asked Singer to recount her observations on this subject in the form of a dramatization in which she played the role of Officer Powell and Darryl Mounger (defense counsel for Sergeant Koon) played the role of Rodney King.<sup>462</sup> After Stone had placed the two actors in the positions Singer said they were in when she first began observing the use of force, Stone asked Singer to use Mounger as a model to demonstrate the movements initially made by King.<sup>463</sup> Only after Mounger had made these movements to Singer's satisfaction did Stone ask Singer to act out the first violent response made by Powell.<sup>464</sup> Stone directed the actors to repeat this procedure for all of the blows witnessed by Singer, allowing them to show each use of the baton by Powell only after they had laboriously dramatized King's prior movements.<sup>465</sup> Stone also questioned Singer about other interactions between King and the police – the CHP's high-speed pursuit of

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<sup>461</sup> See *Closing Arguments* at 110 - 122.

<sup>462</sup> Tr. vol. 45, 5724/8 - 5758/24 (March 6, 1992).

<sup>463</sup> *Id.* at 5726/4 - 5741/1.

<sup>464</sup> *Id.* at 5741/4 *et seq.*

<sup>465</sup> *Id.* at 5724/8 - 5758/24.

his car,<sup>466</sup> Singer's initial attempt to approach King after he had exited his vehicle,<sup>467</sup> the LAPD's efforts to "swarm" and handcuff King,<sup>468</sup> and Koon's use of the taser on King<sup>469</sup> – in a manner that forced Singer to draw a direct connection between the actions of King and the reactions of the police. By forcing the behavior of Mr. King and the police into the mold of an invariable cause-and-effect sequence, Stone constructed an action/reaction metaphor for thinking about (and visualizing) the parties' conduct in the incident that explained the central action in accordance with the story line of the defense team's justification narrative.

Stone further promoted the development of that narrative through the linguistic and grammatical microstructure of the questions he put to Singer.<sup>470</sup> The construction of Stone's questions – which may have had a more potent impact on the jury than Singer's answers because the questions were generally of the leading sort that prompted Singer to answer simply "yes" or "no" or to utter a short, verbless phrase – embodied the core images of the justification narrative: *King as aggressor and dominating actor; the police officers as passive figures who acted only to the extent that King forced them to respond*. Stone powerfully reinforced these images through his use of nouns and pronouns. During his cross examination of Singer, Stone used nouns or pronouns referring to King a total of two hundred and nine times, while using such forms in reference to Powell sixty-three times, in reference to Koon eleven times, and in reference to unidentified police officers on the scene twelve times.<sup>471</sup> This unbalanced distribution of references conveyed an implicit message about the roles played by the several parties to the incident and set the stage for the defense narrative by casting King as the looming central character with the police reduced to his diminutive attendants.

Stone reinforced these characterizations grammatically through his use of the nouns and pronouns to attribute agency to the respective actors. Nominal forms referring to King were the subjects of verbs in ninety clauses in his questions, while nominal forms referring to all of the police officers involved in the use of force were the subjects of

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<sup>466</sup> See, e.g., Tr. vol. 46, 5886/2 - 5887/12 (March 9, 1992).

<sup>467</sup> *Id.* at 5820/25 - 5826/1.

<sup>468</sup> *Id.* at 5927/5 - 5930/11, 5934/9 - 5936/6.

<sup>469</sup> *Id.* at 5931:11 - 28.

<sup>470</sup> Such a linguistic analysis can often reveal as much about the means by which an advocate constructs a narrative as can a study of the explicit content of the advocate's arguments and story-telling. See *Closing Arguments* at 58:

[T]he story that is told and the manner of the telling are inseparable . . . Much of what a jury argument says is conveyed by implicit narrative and dialogic structure and by linguistic microstructure.

<sup>471</sup> Transcripts and Court TV tapes, March 6 and 9, 1992, *passim*.

verbs in fewer than a third as many clauses (twenty-three).<sup>472</sup> Stone often entirely omitted references to the officers in his questions about specific applications of force, thus putting offstage the launching of the blow whose delivery was the topic of his inquiry.<sup>473</sup> Similarly, despite the fact that the baton-wielding police-officer defendants beat and kicked King for over one full minute, Stone used nouns and pronouns referring to him as direct objects of active verbs fewer than twenty times in the more than one thousand questions he posed to Singer.<sup>474</sup> These distributions of nominal forms associated with *acting* or *being acted upon* strongly advanced the defense team's justification story that depicted King as controlling the course of events and depicted the police officers as simply responsive, reacting only as much as the situation required.

Like his selections of nouns and pronouns and his grammatical deployment of them, Stone's use of verbs furthered the character development basic to his justification plotline. Stone used the following verb constructions to describe the blows inflicted upon King by the officers:<sup>475</sup>

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<sup>472</sup> *Id.*

<sup>473</sup> See, e.g., Tr. vol. 45, 5720/15 - 26 (March 6, 1992) (emphasis added):

Stone: And as the tape roles [sic] forward and you see Mr. King get up and turn toward an officer and go towards him, on his feet, that occurred *after he was hit* four to six times in the head, correct?

Singer: No, sir. This – this occurred, from just looking at it, occurred right before the blows were struck.

Stone: All right. So you believe *the blows were struck* at some point after [a certain point on the tape]?

Singer: Yes, sir.

<sup>474</sup> Transcript and Court TV tapes, March 6 and 9, 1992, *passim*. Stone almost never used a noun or pronoun referring to King as the direct object of an active verb describing the violence inflicted by the defendants. In three of the eight clauses in which Stone used such a noun as a direct object, the verb was a form of "approach," and in one of these clauses the verb was "caused." Stone did use King's name as the direct object of "kick," "hit" and "rush" one time each, but only in hypothetical questions. Thus in only one question did a noun referring to King act as the object of an active verb describing the police officers' actual use of force. (In that question, Stone asked Singer if she could create a mental image of the positions the parties had assumed just before Powell "struck" King for the first time.) See Tr. vol. 45, 5725/27 - 5726/2 (March 6, 1992).

<sup>475</sup> Transcript and Court TV tapes, March 6 and 9, 1992, *passim*.

<i>Verb construction</i>	<i>Number of uses</i>
“delivered” or “delivering”	13
“attempted to deliver”	1
“land” or “landed”	15
Active forms of “to strike”	8
Passive forms of “to strike”	3
Passive forms of “to hit”	4
Active forms of “to hit”	1
“received” or “receiving”	1
“receive the impact”	3
“came into contact with”	3
“attempt[ing/ed] to muster”	2
“tried to muster”	1
“was/were driven”	2
“used all the force he could muster”	2
“began”	1
“occur” or “occurred”	1
“sustained the impact”	1
“impact was sustained”	1
“injury was sustained”	1
“began to fall forward” (the baton)	1
“been power-stroked”	1

In most of the questions asked by Stone in which he referred to an officer’s striking of King, the verbs described the act of violence in neutral, not conspicuously active language: the vast majority of these clauses spoke of blows as being either “delivered” by the officers or “landing” on King or having an impact that King “received.” In contrast, Stone referred to an officer’s striking of King in clauses containing active verbs of violence (*e.g.*, active forms of “hit” and “strike,” and the phrase “used all the force he could muster”) approximately a dozen times in his entire cross examination.<sup>476</sup>

Stone also used his cross examination of Melanie Singer as an opportunity to build support for his “appearances can be misleading” subplot, the defense team’s counter to the popular perception of the videotape as objective support for the prosecution’s historical narra-

<sup>476</sup> Stone’s omission of active verbs of violence from his questions about the officers’ use of force against King also stands in marked contrast to his use of such verbs when asking Singer about the amounts of force that the CHP teaches its officers to apply in confrontation situations. In questioning Singer about the training she had received regarding the use of a baton to control a resisting suspect, Stone used the verbs “strike” and “explode” twice each during a two-minute period. Court TV tape, March 9, 1992, at 13:14:11 - 13:15:31; 13:26:55 - 13:27:28; Tr. vol. 46, 5860/11 - 5862/16, 5871/17 - 5872/7 (March 9, 1992). The stark difference between the degrees of activity implied by verbs relating to the police actions in the King incident itself and by verbs relating to police training underscored a primary element of the justification story – that the defendants did not go out of control but exercised a considerable measure of restraint.

tive.<sup>477</sup> Throughout the cross examination, Stone developed his subplot about the videotape – a subplot in which the jury could fulfill its hero's role as Quester-After-Truth only if it resisted the temptation to accept the video's beguiling superficial images and took a resolutely interpretivist stance regarding the tape<sup>478</sup> – both by demonstrating that initial observations of the tape cannot yield conclusions about historical truth and by promoting alternative mechanisms for interpreting this piece of evidence.

To begin with, Stone took pains to demonstrate that the videotape could not be regarded as a completely self-sufficient, self-explanatory piece of evidence. He apparently recognized that the mechanical difficulties which the lawyers and court clerks appeared to experience in setting up and running the VCR in the courtroom would serve as a constant reminder that a relatively new and erratic technology had produced the tape.<sup>479</sup> Stone emphasized the complexities involved in viewing this evidence by repeatedly declaring himself incompetent to work the equipment properly.<sup>480</sup> He highlighted the difficulties that Singer – an eyewitness to the incident who had viewed the tape at least a dozen times before testifying<sup>481</sup> – manifested in identifying individual figures on the tape<sup>482</sup> and in describing the events it depicted,<sup>483</sup> thereby casting further doubt upon the notion that this mechanical contrivance was capable of generating images which self-evidently resurrected past events.

During Singer's cross examination, Stone and several of the other

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<sup>477</sup> Stone had to contend with assertions that the videotape "speaks for itself" even during his cross examination of Singer. At one point, Judge Stanley Weisberg interrupted Stone's questioning to ask him, "Doesn't the tape speak for itself?" *Id.* at 5844/25. At a sidebar conference, Stone apparently satisfied Weisberg's doubts about Stone's line of examination but the examination was soon interrupted again when defense counsel for Officer Briseno objected that "[t]he video speaks for itself. Her interpretation of the video is not relevant." *Id.* at 5851/10 - 12. Stone persisted and Weisberg allowed him to continue questioning Singer about the videotape for another ten minutes. Court TV tape, March 9, 1992, at approximately 13:02:30 *et seq.*

<sup>478</sup> Cf. *Closing Arguments* at 62 - 65 & n.23.

<sup>479</sup> Stone delayed the trial for six minutes the first time he set up the videotape, see Court TV tape, March 6, 1992, beginning at 17:42:21, and for almost four minutes the second time he did so, see Court TV tape, March 9, 1992, beginning at 12:39:25.

<sup>480</sup> When setting up the tape for the first time, Stone assured the judge, after several minutes of fruitless work on the VCR and the monitor, "I've gotten some expert advice on how to do this." Tr. vol. 45, 5705/27 - 28 (March 6, 1992). Then, before the second screening of the tape, Stone had a technician help him set up the equipment. Tr. vol. 46, 5832/16 - 19 (March 9, 1992).

<sup>481</sup> Tr. vol. 45, 5706/13 - 21 (March 6, 1992).

<sup>482</sup> Stone's cross examination demonstrated, for example, that Singer could not establish whether certain figures on the tape were herself and her husband. *Id.* at 5708/5 - 5710/19.

<sup>483</sup> Most notably, Stone established that Singer was unable to describe a sequence in which King allegedly rushed toward Powell until she once again viewed the tape in court. *Id.* at 5722/8 -14.

defense attorneys also made use of an elaborate exhibit-handling procedure to advertise the difficulty of finding any plain meaning in the tape. Far from allowing the tape to “speak for itself,” they repeatedly commented on what it appeared to show, prefacing any questioning of Singer about a particular segment of the tape not only with an announcement of the counter number on each frame (as would be required to preserve an adequate appellate record) but with a description of the position of all of the figures on the screen.<sup>484</sup> Stone further emphasized the inherent inability of the tape to provide useful evidence without interpretation or commentary by asking questions which upset any notion that a visual image can convey some free-standing, independent meaning. For example, while leading Singer through the opening frames of the videotape, Stone suddenly froze the tape and excitedly asked two questions in rapid succession:

Stone: “Do you see that?”  
Singer: “Yes, sir.”  
Stone: “Did you just see that?”  
Singer: “Yes, sir, I see that.”  
Prosecutor: “Objection, Your Honor, that is ambiguous. See *what?*”<sup>485</sup>

Despite the prosecutor’s failure to “see” it (and consequent involuntary contribution to the defense subplot), Stone’s point was epistemological in substance and dramaturgical in form: he *showed* human perception at work *actively creating meaningful actions* out of the images on the video screen.

Stone also used another dramatic technique in his questioning to strengthen the defense subplot that warned against attributing straightforward truth-telling virtue to the videotape. He conspicuously cross-examined Singer from a variety of perspectives. The prosecution had adopted only a single perspective during Singer’s direct examination, presenting her testimony as a historical narrative. Throughout direct examination, both the prosecutor and the witness had talked about events in the past tense; they had proceeded through events in chronological order; and, with the exception of one brief instance in which Singer demonstrated a baton blow by Powell, the witness had remained on the witness stand and the prosecutor had stood upright behind a lectern.<sup>486</sup> In sharp contrast, Stone conducted his cross examination from a multitude of angles, physical and interpretive. Looking at Stone’s cross examination as a demonstration of the possibility of

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<sup>484</sup> See, e.g., *id.* at 5710/23 - 27, 5713/10 - 21.

<sup>485</sup> *Id.* at 5716/15 - 20 (emphasis added).

<sup>486</sup> Court TV tapes, March 6, 1992, at approximately 13:00 - 15:00 and 16:30 - 17:19.

multiple perspectives, one can discern seventeen distinct segments:<sup>487</sup>

Cross Examination, March 6, 1992

- (1) Stone, standing behind the lectern in the same manner as the prosecutor had, asks Singer questions about King's actions and Powell's baton blows (Court TV tape, 17:19:50 - 17:25:00)
- (2) Stone sets up a posterboard displaying several pictures of King taken after the incident, gives Singer a pointer, and asks her to harmonize her testimony with the photographs (17:25:00 - 17:35:40)
- (3) Stone returns to the lectern, but leans on it and, with one hand in his back pocket, asks Singer about conversations she has had concerning the King incident (17:35:40 - 17:42:21)
- (4) Stone plays the videotape and asks Singer questions about parts of it, moving around the courtroom as he speaks (17:42:21 - 18:03:46)
- (5) Stone, again leaning on the lectern, asks Singer several questions about her recollection of the King incident (18:03:46 - 18:15:40)
- (6) Stone acts as the stage manager in a dramatic presentation of the incident featuring Singer as "Officer Powell" and Mounger as "Rodney King"; Stone couches his questions as directions to the actors (18:15:40 - 19:02:00)
- (7) Stone again asks Singer to compare her testimony to the photographs on the posterboard (19:02:00 - 19:04:06)
- (8) Stone returns to his original position behind the podium and asks Singer a few questions about PCP (19:04:06 - 19:05:24)

Cross Examination, March 9, 1992

- (9) Stone, walking around the courtroom, asks Singer to place red stickers on several blown-up photographs of King to indicate where she saw baton blows land (12:16:45 - 12:23:40)
- (10) Stone returns to a position behind the lectern and asks Singer about the biases she may have developed because of her relationship with Timothy Singer and because of her status as a defendant in a civil suit related to the King incident (12:23:40 - 12:29:01)
- (11) Still behind the lectern, Stone asks Singer about her approach to King after King had exited his vehicle; at one point, Stone asks Singer to stand and demonstrate a position she assumed at the scene (12:29:01- 12:38:57)
- (12) Stone again questions Singer about the photographs (12:38:57 - 12:39:25)
- (13) Stone, roaming around the courtroom, plays the FBI enhanced version of the videotape in slow motion and asks Singer various questions about it (12:39:25 - 13:13:00)

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<sup>487</sup> See Court TV tapes, March 6 and 9, 1992, *passim*.

- (14) Stone returns to the lectern and engages Singer in a dialogue about the baton training procedures of the CHP (13:13:00 - 13:15:31; 13:26:55 - 13:27:30)
- (15) Stone asks a final battery of questions about the photographs of King (13:27:30 - 13:30:49)
- (16) Placing blown-up copies of arrest reports completed by Powell and by Timothy Singer on an easel, Stone asks questions about the veracity of these reports; Stone sometimes stands behind the lectern and sometimes moves around the room; at one point, Stone requires Singer to harmonize her testimony with some photographs of an intersection which he has mounted on a posterboard (13:30:49 - 13:31:05; 13:56:11 - 15:01:20)

Re-cross Examination, March 9, 1992

- (17) Stone again questions Singer about the arrest reports (19:01:58 - 19:07: 26)

During his cross examination of Melanie Singer, Stone thus did far more than ask the witness to relate her version of what happened in the early morning hours of March 3, 1991. He used two dramatic performances, several sets of photographs, two versions of a videotape, and enlarged copies of documents to present his questions and her testimony. And he directed his questions to her from virtually every open space in the courtroom. By employing this variety of narrative forms (history, drama, visual arts), by comparing a number of different types of evidence, and even by questioning the witness from a range of physical locations in the room, he hammered home the point that interpreters of an event must consider a variety of perspectives or angles in order to arrive at Truth.<sup>488</sup> He concluded his four-hour-long dialogue on the need to consider multiple perspectives by asking Singer the disarmingly simple question: “And you were able to see *all* of these things?”<sup>489</sup> This amounted to a powerful negative summing-up of everything that Singer’s cross-examination had demonstrated about the failure of any single human or camera’s-eye view to capture the complete reality of past events – the distinctly Proustian theme of the defense team’s “appearances can be misleading” subplot.

In addition to advancing the central theme of the subplot, Stone’s cross examination of Singer also bolstered those aspects of the subplot that specifically undertook to teach the jury a proper methodology for viewing the tape. To foster a view of the tape as a piece of evidence understandable only within the context of professional police practices, Stone seized every opportunity to emphasize the professionalism

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<sup>488</sup> Some studies have found that words play less of a role in advancing a message than do vocal delivery and nonverbal communication. Ogborn at 57; Binny Miller at 502.

<sup>489</sup> Tr. vol. 46, 6065/18 - 19 (March 9, 1992) (emphasis added).

of law enforcement work. He repeatedly referred to police training procedures in his questions, asking Singer about her baton training on three separate occasions,<sup>490</sup> and at other points interrupting his apparent lines of questioning to ask her about the training she had received concerning techniques for approaching suspects<sup>491</sup> and concerning the taking of “mental notes” during crime investigations.<sup>492</sup> Stone also went out of his way to elicit information from Singer about police policies – for example, about the CHP’s policies regarding the filing of reports with supervisors,<sup>493</sup> partnership duties,<sup>494</sup> approaching crime suspects,<sup>495</sup> and even the recitation of compass directions<sup>496</sup> – that had little or no substantive evidentiary value, as well as to pepper his questions to Singer with police jargon.<sup>497</sup> This continual emphasis upon the technically specialized, esoteric nature of police work bolstered the defense story that portrayed the videotape as an arcane text which the jury could decipher only by learning and adopting a professional perspective.

The same implication of professionalism also permeated Stone’s discussion of police use of force. In questioning Singer, Stone referred to the weapon used by his client against King in terms that called attention to its status as a tool of a craft rather than as an instrumentality of violence. He usually referred to it as a “baton” instead of as a “club,” “stick,” or “truncheon”; and he frequently resorted to its technical names, calling it a “PR-24” or a “side-handle baton.”<sup>498</sup> He added to the weapon’s professional image by asking Singer several sets of questions about the training and retraining required for proper use of the baton. He also chose precise, technical language in talking about the violent acts that his client and the other officers performed with their batons. Stone most often referred to these acts as “blows” in his questions to Singer; he called them “strikes” only six times while describing them in more elaborate technical terms (*e.g.*, as “full-swing power stroke strikes” or as “forward and reverse power strokes”) thir-

<sup>490</sup> Tr. vol. 45, 5680/6 - 5681/2, 5699/8 - 11 (March 6, 1992); Tr. vol. 46, 5860/11 - 5872/6 (March 9, 1992).

<sup>491</sup> Tr. vol. 45, 5680/17 - 18 (March 6, 1992).

<sup>492</sup> *Id.* at 5922/2 - 12.

<sup>493</sup> *Id.* at 5697/15 - 25.

<sup>494</sup> Tr. vol. 46, 5814/9 - 5815/5 (March 9, 1992).

<sup>495</sup> *Id.* at 5820/2 - 5822/28.

<sup>496</sup> *Id.* at 6062/6 - 8.

<sup>497</sup> See, *e.g.*, *id.* at 5741/22 - 5742/15 (Stone paraphrases Singer’s testimony as referring to the “tuck position” for carrying a baton and then describes Singer’s demonstration of the position), 5821/3 - 4 (Stone asks Singer whether she had her gun in a “low ready” position), 5935/1 - 10 (Stone asks about the LAPD’s “swarm technique”). Stone’s own experience as a law enforcement officer undoubtedly assisted him to use this jargon with comfort and an appearance of authority. See *What the Jury Saw*, Part Two.

<sup>498</sup> See Transcripts and Court TV tapes, March 6 and 9, 1992, *passim*.

teen times.<sup>499</sup> Stone's use of such language helped to lay the groundwork for the expert testimony of Duke and Michael and reinforced the defense subplot that made professional analysis indispensable for understanding the videotape.

Stone's cross examination of Singer also contributed to developing the aspect of the "appearances may be misleading" subplot that taught the jurors to look at the tape as a series of still photographs of individual police actions rather than as a running record of a continuing flow of violence. Stone most overtly addressed the need to examine each individual blow in isolation when he was directing Singer and Mounger in the dramatization of the beating.<sup>500</sup> Stone labeled this dramatization a "slow motion" reproduction of the incident<sup>501</sup> and treated it as a unique way to focus the jury's attention on what were (according to the defense story line) the most significant features of the interaction between King and Powell. He stressed the precise positions assumed by both King and Powell before, during, and after every blow, asking Singer to place the actors in these physical positions and arranging to have one of the other defense attorneys orally describe the actors' positions and movements at a level of minute, technical detail that was plainly unnecessary for the appellate record (especially since the entire trial was videotaped<sup>502</sup>). Once the actors had positioned themselves to the satisfaction of both Singer and Stone, Stone ensured that the focus of the drama remained on the individual baton blow by asking numerous questions about the setting and performance of each blow while the actors remained in their respective poses.<sup>503</sup> This entire fragmented, "slow motion" dramatic presentation

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<sup>499</sup> See Transcripts and Court TV tapes, March 6 and 9, 1992, *passim*.

<sup>500</sup> Tr. vol. 45, 5724/8 - 5758/24 (March 6, 1992).

<sup>501</sup> *Id.* at 5756/16 - 17. See also *id.* at 5725/18 - 23 (Judge Weisberg refers to the demonstration as "slow motion"). Stone subsequently referred to the copy of the videotape he used in court as a "slow motion" version. Tr. vol. 46, 5833/22 - 5834/3 (March 9, 1992).

<sup>502</sup> Paul DePasquale, counsel for Officer Timothy Wind, played this "narrator" role. See, *e.g.*, Tr. vol. 45, 5740/15 - 5741/1 (March 6, 1992) (statement by DePasquale):

For the record, if I may, Mr. Mounger is in a position which was described before the sidebar conference. The witness has assumed a position with her left foot approximately a foot forward and to the right of Mr. Mounger's right knee, toe pointed forward in the same direction as Mr. Mounger's body is pointed and her right foot perhaps eighteen inches back. She is holding the baton with her right hand on the side handle thumb up toward the end of the side handle, her left hand gripping the bottom of the long handle of the baton with her baby finger at the bottom of the baton and her index finger and thumb of her left hand toward the side handle of the baton.

See also, *e.g.*, *id.* at 5726/14 - 19, 5741/8 - 15, 5743/21 - 23, 5744/21 - 23, 5745/6 - 12, 5746/17 - 24, 5748/19 - 28, 5749/19 - 27, 5752/7 - 16, 5753/12 - 20, 5754/9 - 12, 5756/28 - 5757/6, 5758/10 - 17.

<sup>503</sup> For example, after Singer had placed herself and Mounger in the positions she claimed Powell and King were in just before Powell clubbed King for the second time,

cohered perfectly with the message in Stone's subplot regarding the proper methodology for viewing the videotape.

Stone also promoted the use of this methodology during other portions of his cross examination of Singer. He underscored the need for a frame-by-frame analysis of the videotape by discussing the incident itself in blow-by-blow terms<sup>504</sup> and by asking Singer to scan the videotape for specific moments.<sup>505</sup> Stone even advanced this aspect of his subplot during his battery of questions about the veracity of Powell's arrest report.<sup>506</sup> His questions about the arrest report modeled the same microscopic procedure for interpretation of a text that the subplot instructed the jury to apply to the videotape. He asked Singer to comment on virtually every sentence of Powell's report, showing through her testimony that a statement which appears to be untrue when read as a whole can prove to be substantially accurate when an interpreter breaks it down into individual clauses, considers alternative possible definitions for various separate words, and explicitly articulates what the sentence does not say.<sup>507</sup> By demonstrating that one

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Stone asked four relatively complex questions about that blow:

Stone: Would you please demonstrate that blow using the same slow motion [that you used to show the first strike]?

[Singer demonstrates, and *DePasquale* describes her position and actions.]

Stone: And in that – in delivering that second strike, did it appear to you that Officer Powell was attempting to muster all the energy he could into the striking portion of the baton by moving his body in the way you demonstrated?

[Objection by the prosecution overruled.]

Singer: Yes, sir.

Stone: All right. Did he twist his body in the – withdraw that. Did he swing his body in a counter-clockwise position as you just did?

Singer: Yes, sir.

Stone: All right. And what effect, if any, did that have on Mr. King?

Singer: He screamed and dropped back down to the ground.

*Id.* 5746:1 - 5748:10.

<sup>504</sup> When asking Singer to place stickers on those portions of a photograph of King's face where she claimed the blows struck, Stone focused on each blow one at a time, asking between two and eleven questions about each baton strike. Tr. vol. 46, 5807/20 - 5813/4 (March 9, 1992).

<sup>505</sup> See, e.g., *id.* at 5841/22 *et seq.*, 5852/23 *et seq.*

<sup>506</sup> *Id.* at 5874/3 *et seq.*

<sup>507</sup> At several points during this portion of the cross examination, Stone undermined Singer's characterization of a statement in Powell's report as untrue by breaking the statement or Singer's testimony into segments. See, e.g., *id.* at 5886/9 - 5887/19:

Stone: Reading along with the report [written by Powell]: "When they were west of Osborne, Officer Singer activated their vehicle emergency lights and siren." Is that correct?

Singer: Just the emergency – the red overhead light.

Stone: Well, did you testify Friday that first the officers, meaning yourself, activated the emergency lights?

Singer: I didn't have all the lights activated until we were just at the 118 [freeway], sir.

can see different things by examining an object of study in distinct, isolated parts rather than as a whole, Stone encouraged the jurors to fulfill the role in which his subplot cast them *vis-à-vis* the videotape – the role of astute interpretive detectives digging truth out of the very core of a maze of misleading appearances.

### III. CONCLUSION

The existing accounts of Michael Stone's cross examination of

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Stone: All right. At some point, you were trying to stop the vehicle, correct?

Singer: That is correct.

Stone: And you turned on the vehicle lights, right?

Singer: The overhead red lamp.

Stone: Correct. And even that didn't have any effect on the driver, right?

Singer: That is correct.

Stone: So then you turned on the alternating headlamps, correct?

Singer: That is correct.

Stone: And that didn't have any effect?

Singer: That's true.

Stone: And then you turned on the siren?

Singer: Yes, sir.

Stone: And that didn't have any effect?

Singer: That's true.

Stone: All right. So at this point, the statement [in the report] that "Officer Singer activated their vehicle emergency lights and siren" is simply – doesn't say you did all this in three steps, correct?

Singer: That is correct.

Stone engaged Singer in a similar dialogue just before ending his cross examination. See *id.* at 5925/28 – 5927/4:

Stone: [The report reads:] "After several more orders over the public address system, defendant exited his vehicle, then got back in and then exited again." Is that true?

Singer: No, sir, that is not correct.

Stone: How is it incorrect?

Singer: He did not get out of the vehicle and get back in and then get out again.

Stone: Okay. You testified that he started out the vehicle then fell back in?

Singer: No, sir, I said that he leaned towards the door or the passenger – the driver's side opened door, but did not get out and get back in.

Stone: Kicked open the door?

Singer: That is correct.

Stone: He started out of the vehicle?

Singer: He leaned towards getting out of the vehicle. He did not clearly exit the vehicle.

Stone: Okay. And he had to struggle because of his size?

Singer: That is what I felt, yes, sir.

Stone: Rocked back and forth. Do you recall that testimony?

Singer: Yes, sir. Yes, I do.

Stone: All right. And then he finally got out of the vehicle?

Singer: Yes, sir.

Stone: All right. That took about two minutes?

Singer: It seemed like, yes, sir.

Melanie Singer in the *Rodney King* trial thus appear to be only partly correct. While Stone's cross examination did score important points for the defense, it did not do so merely or primarily by attacking the credibility of her direct-examination testimony. Rather, it affirmatively advanced the major story line of the defense case (portraying the defendants as heroic police officers who overcame an aggressive Rodney King by the measured use of discrete increments of force that responded precisely and professionally to each of King's numerous, separate acts of aggression), and it simultaneously advanced the crucial defense subplot (portraying the jurors as heroic truth-seekers who could overcome the temptation to interpretive lethargy posed by the prosecution's beguiling claim that the videotape "spoke for itself").

This reading of Stone's performance does not, of course, imply that all cross examinations will (or should attempt to) make significant contributions to the cross examiner's own story line. In many instances, the nature of the cross examiner's story or the content of the witness's testimony will call for nothing beyond a purely "destructive" cross examination. Michael Stone's cross examination of Melanie Singer does, however, reveal that attorneys can sometimes strengthen their important, central trial narratives during the testimony of an adverse witness; and it should alert resourceful litigators to the existence of yet another avenue of opportunity for story-telling in court.

## THE BRISENO DILEMMA

TY ALPER AND SONYA RUDENSTINE

*You know, the facts have a way of pursuing the lawyers, even prosecutors, throughout the case. They just can't seem to escape the facts, and of course they shouldn't be able to escape the facts. The facts should control the outcome and not the skill of the attorneys trying to put, you know, square pegs into round holes.*

John Drummond Barnett, closing to the jury on behalf of  
Officer Briseno.<sup>508</sup>

At the end of his closing argument, prosecutor Terry White played the videotape of the beating one last time for the jurors and then asked, "Now, who are you going to believe, the defendants or your own eyes?"<sup>509</sup> For White, the question was purely rhetorical. Not only had he presented what he saw as the only two options available to the jury, but he seemed confident that the videotape would convince the jurors to reject the defendants' claim that they did not use excessive force. By framing the issue in this way, White betrayed his inability to conceive of a postmodern world in which a videotape that showed a cadre of officers repeatedly beating and kicking the recumbent Rodney King could fail to prove a case of excessive force.<sup>510</sup>

All was not necessarily lost for White, though, even if the jurors were inclined to believe the testimony of the defendant officers over the jurors' own eyes. The testimony of one particular defendant, Officer Theodore Briseno, provided an alternative view of the facts that could have supported at least some of the convictions White was seeking.

In Briseno, White had a potentially powerful weapon against the defense witnesses who invoked the technical police jargon of "escalation and de-escalation of force" to portray the beating as a reasonable response to Rodney King's purportedly aggressive actions.<sup>511</sup> Briseno was a co-defendant and one of the many officers present throughout the beating. On the videotape, Briseno is seen initially attempting to stop the other officers from hitting King. Later in the tape, however, he is seen placing his foot on King's head or neck and pressing or stamping down. That is the only potentially criminal act with which Briseno was charged, and the prosecution's legal theory was that Briseno had used excessive force by "stomping" on King's head.

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<sup>508</sup> Tr. vol. 77, 13921/12 - 18 (April 22, 1992).

<sup>509</sup> Tr. vol. 75A, 13604/11 - 12 (April 20, 1992).

<sup>510</sup> See the second chapter of this article, text at notes 163 - 338 *supra*.

<sup>511</sup> See notes 276, 288 - 309, 461 - 474 *supra* and accompanying text.

Briseno's attorney characterized the "stomp" as a protective measure designed to subdue King so that Briseno could safely handcuff him and stop the beating.

Briseno testified on *direct* examination that Officer Powell was "out of control,"<sup>512</sup> that the other officers were "wrong"<sup>513</sup> in their continued beating of Mr. King, and that Briseno later screamed to a colleague (a probationary officer whom Briseno was supervising that night) that "Sergeant should have handled this a lot different[,] . . . a lot better" and that "the officers should have their asses reamed."<sup>514</sup> These are damning indictments of his fellow officers. They have the ring of authenticity; they corroborate the images on the videotape that portray the beating as excessive; they are consistent with White's persistent refrain that what the videotape shows is what actually happened. And coming from one of the four defendants, Briseno's testimony threatened to undermine seriously the relatively united front that the defense had otherwise constructed.

Yet, White was paralyzed. Because he was prosecuting Briseno as well as the other three officers, he encountered a strategic dilemma, one that we will call the "Briseno Dilemma." White wanted the jury to rely on Briseno's outrage at his fellow officers as a basis for convicting them of using excessive force. At the same time, White also wanted the jury to convict Briseno of using excessive force himself when he stomped on King's head. In other words, White wanted the jury to view Briseno as sufficiently decent and honest so that it could rely upon his testimony to convict others of brutality, and at the same time turn around and convict Briseno of committing the very same crime. White was aware of this dilemma. His strategy for resolving it appears in his rebuttal closing argument:

Ladies and Gentlemen, the force Mr. Briseno used was unreasonable. He may not have had an evil heart, he may not have had an evil mind. It was unreasonable and you have to judge it under the reasonable person standard of the instruction the court is going to give you.<sup>515</sup>

White's concession that Briseno may have lacked an "evil heart" and an "evil mind" was apparently a tactic designed to bolster Briseno's testimony against his fellow officers. By distinguishing Briseno from the officers whose hearts and minds *were* unquestiona-

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<sup>512</sup> Tr. vol 65, 10937/12 (April 3, 1992). This is Briseno's explanation for his attempt to stop Officer Powell from hitting King: "[W]hat I recall was I didn't see Mr. King moving and I thought Officer Powell – Officer Powell was out of control then." *Id.* at 10937/10 - 12.

<sup>513</sup> In response to Barnett's question, "[D]id you think from what you had seen that what they were doing was wrong?," Briseno answered, "Yes, sir." *Id.* at 10941/20 - 23.

<sup>514</sup> *Id.* at 10970/13 - 16.

<sup>515</sup> Tr. vol. 77, 14030/2 - 7 (April 22, 1992).

bly “evil,” White hoped to persuade the jury that Briseno was a reliable witness, albeit one who acted unreasonably in the line of duty. The flaw in this strategy is not a logical one – surely, one does not need to be inherently evil to act unreasonably – but rather a narrative one. What *motivation* accounts for Briseno’s behavior? *How does one who is not evil come to act so unreasonably as to stomp on another man’s head when force of this kind is unnecessary?* White’s strategy for resolving the Briseno Dilemma had potential but was flawed in its execution. To make the strategy work, White had to offer the jury a narrative that explained how Briseno could at one moment be outraged at the brutality he witnessed, yet at the next moment engage in such brutality.

Perhaps White was trapped by the limits of his imagination and could not contemplate such a narrative. Perhaps as a prosecutor he was not finely attuned to the varying degrees of improper police behavior, and could only perceive a world of “good” cops and “evil” cops. Perhaps as a prosecutor he felt that the image of the LAPD he could present to the jury was limited; perhaps he did not want to admit that there are more than just two or three “bad apples” on the force – that there exists a whole range of officers who fall within a gray area of morality. Regardless of the reason why there emerged only two kinds of cops in White’s narrative (the Melanie Singers, who do the “right” thing in a Rodney King situation,<sup>516</sup> and the Officer Powells, who take advantage of such situations to live out their racist, rogue-cop fantasies), White was undone by this polarity when he tried to tell a story about Briseno. He could not characterize Briseno solely as a rogue cop because the jury would then likely dismiss Briseno’s indictment of his co-defendants as merely the desperate act of a man willing to sell out his colleagues to protect himself. Briseno’s defense – that he was trying to protect King – depended upon the depiction of the other officers’ force as dangerous and excessive. In asking the jury to question Briseno’s defense, White ran into the danger of having them question *all* of it, including his valuable assessment of the force used by the other officers. At the same time, however, White could not portray Briseno as a “good” cop, because such a characterization would undermine his condemnation of the stomp and weaken his chance to convict Briseno.

As a result, White was forced to walk a thin line between crediting Briseno’s defense and discrediting his testimony against the other officers. As we develop below, White seems to have found no way to

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<sup>516</sup> White called Melanie Singer as a prosecution witness and elicited her testimony that the defendants’ beating of Mr. King was indefensible. See notes 349 - 355 *supra* and accompanying text.

navigate this line adroitly. He began by gently coaxing Briseno into giving powerful testimony against the other defendants and ended by undermining that testimony through sarcastic questions about Briseno's own behavior. White's lack of a coherent narrative to guide him through the witness examinations was evident in his tendency to try to win points wherever he could, even if doing so undermined his larger goals. In the end, he all but abandoned Briseno's potential usefulness as a witness against Powell, Koon and Wind. Despite Briseno's damning testimony against his fellow officers, White referred to this testimony only *once* in his entire closing argument, and even then only in passing. His attempt to salvage a conviction of Briseno also turned out to be a failure: he offered no counter to the defense deconstruction of the videotape<sup>517</sup> that constituted his sole evidence of any wrongdoing on Briseno's part.

The Briseno Dilemma was a challenging one. It demanded considerable narrative flexibility and creativity. It required that the prosecutors not only view the players and the evidence in a complicated way, but that they credit the jury with the ability to see the case in this more complicated way. In Part I below, we analyze the narrative problem that Officer Briseno posed and White's responses to it. To assist the reader in appreciating the choices White had and the decisions he made at each point in the trial, we describe and discuss the relevant portions of the trial proceedings in chronological order. Then, in Parts II and III, we offer and develop possible narrative frameworks within which a creative litigator might have worked to solve the problem.

## I. THE TRIAL

### A. *White's Opening Statement*

White's first opportunity to present a narrative that accounts for the Briseno Dilemma was in his opening statement. He began by chronologically describing his version of the events of the night in question. When he reached Officer Briseno's involvement in the scene, White told the jury what they would see on the tape. The following is White's only specific mention of Briseno in his opening statement:

Also during the tape you are going to see another officer, Defendant Briseno, appear to intercede to stop Officer Powell from continuing to strike Mr. King. You are later going to see in the video, however, that Officer Briseno, while Mr. King is on the ground lying on his stomach, as his hands are moving back toward putting them behind his back, Officer Briseno walks over and delivers a

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<sup>517</sup> See the preceding two chapters, text at notes 163 - 507 *supra*.

stomp to the head and neck area of Mr. King.<sup>518</sup>

In mentioning Briseno's apparent attempt to stop Officer Powell, White did not seem to be crediting Briseno with a decent act, but rather seemed to be warning the jury not to be fooled by this act. Significantly, White said Briseno "appear[s] to intercede," not that he actually interceded. The transition to the next sentence was marked by White's "however"; its use here suggests that whatever Briseno was doing when he "appear[ed] to intercede" on Mr. King's behalf at one point in the beating, his true motives are betrayed by his stomp to King's head.

White had not, by the end of his opening, tried to explain or reconcile these two seemingly contradictory actions. Neither had he remained neutral with regard to which of the two actions was indicative of the real Ted Briseno. His description of Briseno's stomp was significantly more judgmental than that of the apparent interception: not only did Briseno stomp on King's head, he did so while King was "on the ground lying on his stomach, as his hands are moving back toward putting them behind his back." Again, White seemed to be saying, "Don't be fooled. Briseno is just like all the others."

Two aspects of White's opening are striking with regard to Briseno. First, White gave no indication that he was going to ask the jury to credit anything Briseno would say later in the trial. At this point in the trial, of course, White did not know what Briseno's trial strategy would be, or even whether the officer would testify. Nevertheless, he knew from the videotape, if nothing else, that Briseno at some point in the beating may have attempted to intercede. From this, White should have been on notice that Briseno's defense theory might be at odds with that of the other defendants and might lead his attorney to condemn their behavior in the process of distancing Briseno from it. Whether White considered this possibility and rejected it we do not know. In any event, his opening prematurely committed him to the proposition that Briseno was not to be trusted. Second, despite his insinuation that the stomp was more true to Briseno's nature than the apparent intercession, White did not attempt to explain why the same person might have committed both acts. Perhaps he was making a deliberate choice to wait and see what the defense strategy would be; perhaps he was simply unable to create in his own mind a convincing story that would account for both actions.

### *B. Barnett's Opening Statement*

White's first glimpse into Briseno's defense strategy came during

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<sup>518</sup> Tr. vol. 44, 5267/15 - 24 (March 5, 1992).

the opening statement of Briseno's lawyer, John Drummond Barnett. Describing what his client saw when he arrived on the scene, Barnett explained:

He then saw Officer Powell take his baton and with a power stroke smash him [Rodney King] right in the face. . . . ¶ . . . After that blow was struck, Officer Powell, in a torrent of blows, continued to hit Mr. King, as Mr. King was on the – on the ground and on his knees. He continued to hit him backwards and forward [sic] in power strokes. Power strokes meaning like a baseball bat[,] like Louisville Slugger[,] [sic] like this baton.<sup>519</sup>

Barnett's use of the word "smash" was strongly at odds with the technical "escalation of force" rhetoric employed by the other defense attorneys.<sup>520</sup> In addition, the invocation of baseball seemed designed to foreshadow later testimony about Powell's notorious, callous statement when King was brought to the hospital after the beating, "We played a little baseball tonight, didn't we?" The description of the other officers as "out of control"<sup>521</sup> was a necessary ingredient of the defense theory (discussed in detail in the following subsection) that Barnett presented: *Briseno was the hero, who valiantly attempted to save Rodney King from the torrent of blows visited upon him by a mob of out-of-control cops.* This defense theory involved a twist on the Briseno Dilemma, making it necessary for Barnett, and not only White, to come up with a solution. For Barnett, the problem was this: In portraying his client as a hero, how could he explain the stomp to King's head? Barnett's answer was as simple as it was dubious. According to Barnett, Briseno's "press down"<sup>522</sup> on King's body was an attempt to put King in a position in which King could be handcuffed, "so that Mr. King . . . [could] be put safely in custody, and . . . so that the actions of these batons . . . [would] cease."<sup>523</sup> This behavior was perfectly consistent with Briseno's earlier attempt to stop Powell from striking King, Barnett claimed: both actions were attempts to intercede on King's behalf. By the time Barnett finished, it should have been apparent to White that Briseno's upcoming testimony could prove very valuable to the prosecution's case.

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<sup>519</sup> *Id.* at 5343/23 - 5344/6.

<sup>520</sup> See the references in note 511 *supra*.

<sup>521</sup> *Id.* at 5346/18. Barnett was describing what was going through his client's mind as he "place[d] his foot down" on King's body: "He sees Wind winding up like this, (indicating). He knows Powell is behind his back. He believes, his perception is that they're out of control and that he has to be mindful of his own safety." *Id.* at 5346/15 - 19

<sup>522</sup> *Id.* at 5346/14. According to Barnett, the "stomp" was not a stomp at all. Rather, Briseno "doesn't want to get hit with the baton . . . being wielded by Officer Wind, and so he puts his foot out like this, his weak foot, and he starts to press down." *Id.* at 5346/11 - 14

<sup>523</sup> *Id.* at 5347/1 - 3.

### C. Barnett's Direct Examination of Briseno

Briseno's direct testimony detailed every aspect of his defense theory. The theory was as follows:

Briseno arrived on the scene and initially attempted to help secure a fairly compliant<sup>524</sup> King for what looked like a straightforward arrest. Then, all of a sudden, things got out of hand. King began to ignore some of the officers' commands and was not subdued even after he was shot twice with a taser gun.<sup>525</sup> Powell was out of control, hitting King with a series of power strokes that were, in Briseno's mind, unnecessary and dangerous.<sup>526</sup> Briseno attempted to intervene and stop Powell, but was rebuffed. Other officers joined in the beating, and Koon did nothing to stop them.<sup>527</sup> Briseno thought that the other officers must have seen something he didn't; from his vantage point, the beating appeared to be totally unjustified.<sup>528</sup> Finally, Briseno decided to take action. He was worried for King's life; he thought that someone might pull a gun.<sup>529</sup> He wanted to subdue King and get him in a safe position to handcuff him, but he did not want to get hit by the other officers' batons.<sup>530</sup> If he could get King to stop moving, the other officers would stop hitting him. So he leaned in and attempted to place his left (weak) leg on King's shoulder to hold him down or stop him from moving, which would enable Briseno to kneel and handcuff King.<sup>531</sup> King rolled over and up when Briseno placed his foot on his shoulder, giving the act the look of a stomp rather than behavior designed to protect King.<sup>532</sup> The attempted intervention was unsuccessful, and the beating continued. Afterwards, Briseno was furious.<sup>533</sup> Throughout the entire beating, he never saw anything that would justify the other officers' behavior.<sup>534</sup> He was planning to report the incident to the lieutenant on duty at the station house, but when he got to the station the lieutenant was not there.<sup>535</sup> At the station, Briseno happened to see a message from Koon alluding to a "beating" and a "big time use of force" that night.<sup>536</sup> Briseno was sat-

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<sup>524</sup> At least initially, Briseno described King as compliant with the officers' commands. See, e.g., Tr. vol. 65, 10914/2 - 10915/14, 10917/14 - 10918/7 (April 3, 1992).

<sup>525</sup> *Id.* at 10919/12 - 10925/5.

<sup>526</sup> *Id.* at 10930/11 - 10935/19.

<sup>527</sup> *Id.* at 10941/3 - 10944/17, 10966/19 - 10969/7.

<sup>528</sup> *Id.* at 10941/3 - 10944/23, 10947/6 - 10948/22.

<sup>529</sup> *Id.* at 10944/18 - 23, 10971/13 - 10972/4.

<sup>530</sup> *Id.* at 10940/24 - 10941/1, 10948/2-4, 10954/22 - 10955/5.

<sup>531</sup> *Id.* at 10954/9 - 10955/28.

<sup>532</sup> *Id.* at 10956/14 - 10957/21.

<sup>533</sup> *Id.* at 10969/24 - 10972/13.

<sup>534</sup> *Id.* at 10947/6 - 10, 10952/7 - 18.

<sup>535</sup> *Id.* at 10974/24 - 10975/10.

<sup>536</sup> *Id.* at 10975/17 - 28.

isfied – it looked as though Koon was properly reporting the incident – and Briseno did not feel the need to do so, given that he was now confident that the incident would be properly investigated.<sup>537</sup>

Barnett elicited on direct examination of Briseno the following themes that are central to this defense theory. What they all have in common is their potential usefulness to the prosecution.

1. *The other officers, particularly Powell, were so out of control in their beating that they would not have stopped even if it meant hitting one of their own.* For example, Briseno testified that he saw Powell hitting King “from the shoulder up”<sup>538</sup> and “to the head”<sup>539</sup> with a series of forward and backward power strokes that appeared to him that night to be “improper.”<sup>540</sup> Briseno himself was worried that he would be hit by the other officers’ blows, and for that reason he did not want to get too close to King.<sup>541</sup> With the aid of the videotape, Briseno testified about the beating at various points as follows:

MR. BARNETT: All right. And what are you doing?

MR. BRISENO: This is when I am stopping Officer Powell.

MR. BARNETT: All right. Are you stopping Officer Powell – Why are you stopping Officer Powell?

MR. BRISENO: Because what I recall was I didn’t see Mr. King moving and I thought Officer Powell – Officer Powell was out of control then.

MR. BARNETT: And so what are you trying to do?

MR. BRISENO: Stop Officer Powell.

.....

MR. BARNETT: Are you concerned – All right. So your purpose is what?

MR. BRISENO: To stop Officer Powell.<sup>542</sup>

.....

MR. BARNETT: . . . Did you think that from what you had seen that what they were doing was wrong?

MR. BRISENO: Yes, sir.

MR. BARNETT: Did you – Were you thinking anything else besides what they were doing is wrong?

<sup>537</sup> *Id.* at 10976/1 - 10977/8.

<sup>538</sup> *Id.* at 10931/7.

<sup>539</sup> *Id.* at 10931/15.

<sup>540</sup> *Id.* at 10935/15 - 19. See also *id.* at 10941/20 - 10944/6.

<sup>541</sup> *Id.* at 10954/22 - 27. See the references in note 530 *supra*.

<sup>542</sup> *Id.* at 10937/4 - 20.

MR. BRISENO: I was thinking a lot of things. I was thinking that – I thought that maybe they saw a weapon I didn’t see. I didn’t know what they were doing. I just couldn’t understand why they were continuing doing what I saw there was no reason for.<sup>543</sup>

.....

MR. BARNETT: That night what were you thinking at this point?

MR. BRISENO: Like I was telling you, I just – I didn’t understand what was going on out there. I just didn’t understand it. It didn’t make any sense to me. I couldn’t see why they were doing what they were doing.

MR. BARNETT: What do you mean doing what they were doing?

MR. BRISENO: It was like he moved. They hit him. I couldn’t see it. I can’t understand it. I couldn’t understand it. I was trying to look at and view what – what they were looking at and I couldn’t see it. I thought, you know – I understood a lot of things that night, but I’m thinking evidently they saw something I didn’t see.

MR. BARNETT: Are you thinking that that night?

MR. BRISENO: Yes, sir.<sup>544</sup>

2. *Briseno, who had as clear a view of the incident as anyone, did not see anything that justified the beating. He saw King did not have a weapon.* Briseno repeatedly testified on direct that he did not see what the other officers must have seen. A typical example is: “Again, I didn’t know what was going on. I just didn’t know what was going on out there. I couldn’t see – I tried, I looked everywhere from the beginning of the car back to where we traveled from. I couldn’t see it. I didn’t understand it.”<sup>545</sup> Briseno also testified that at one point at least he had a clear vantage point and called out to the other officers that King was not armed:

MR. BARNETT: You seem to be pointing here at 4:10:25. Do you remember what you were saying?

MR. BRISENO: Yes, sir.

MR. BARNETT: And what was that?

MR. BRISENO: I was yelling that Mr. King’s hands were free.

MR. BARNETT: And why were you yelling that?

<sup>543</sup> *Id.* at 10941/20 - 10942/3.

<sup>544</sup> *Id.* at 10942/24 - 10943/14.

<sup>545</sup> *Id.* at 10947/12 - 17.

MR. BRISENO: I wanted the officer [sic] to know because I thought he might have had a weapon in his hand earlier. I just didn't know why they were doing what they were doing. I was trying to let them know his hands were free.<sup>546</sup>

3. *Briseno thought that King's life was in danger.* Regarding his thinking before he put his foot on Mr. King, Briseno testified:

MR. BARNETT: Were you concerned?

MR. BRISENO: Sure.

MR. BARNETT: What were you concerned about?

MR. BRISENO: Mr. King. I just – I didn't know what was going to go on from here. I just didn't know at this point.<sup>547</sup>

And in describing an emotional conversation he had immediately after the episode with the probationary officer who had accompanied him to the scene, Briseno's testimony was:

MR. BARNETT: What did he say?

MR. BRISENO: He said he had never seen anybody get hit in the face before, he didn't like it, and he said he thought he was going to have to shoot Mr. King.

MR. BARNETT: All right. And what did you say?

MR. BRISENO: I said I thought we were going to have a shooting also.

MR. BARNETT: Why did you think you were going to have a shooting?

MR. BRISENO: Because the officers, to my opinion, reached that fatigue factor, there is only one other thing left, and I thought somebody is going to pull their gun out.<sup>548</sup>

4. *Briseno was outraged at the incident, and angry with Sergeant Koon as well as with the officers who had done the actual beating. He also believed, at least in the hours following the incident, that the officers involved deserved punishment.* Briseno was not only critical of Powell; he testified to his anger with Sergeant Koon's handling of the situation as well. Barnett also took pains to elicit Koon's refusal to acknowledge Briseno's protests during the beating:

MR. BARNETT: And what are you saying [at a certain point on the tape]?

MR. BRISENO: I went to Sergeant Koon.

MR. BARNETT: Well, and what did you say?

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<sup>546</sup> *Id.* at 10948/10 - 22.

<sup>547</sup> *Id.* at 10944/18 - 23.

<sup>548</sup> *Id.* at 10971/12 - 25.

- MR. BRISENO: I asked him “what the fuck was going on out here”?
- MR. BARNETT: Well, were you – did you use just those words?
- MR. BRISENO: Yes, sir.
- MR. BARNETT: All right. Were you – did he even acknowledge you were there?
- MR. BRISENO: No, sir.
- MR. BARNETT: Did he respond to you in any way?
- MR. BRISENO: No, sir.<sup>549</sup>

Note how Barnett’s use of the word “even” in the question, “Did he even acknowledge you were there?” turns a conventional, straightforward direct-examiner’s question about the sergeant’s behavior that night (a variant of “How did he respond?”) into a leading question that conjures up an image of a totally unresponsive Sergeant Koon. Furthermore, in an attempt to mitigate the potential harm that Briseno’s failure to report the incident might cause,<sup>550</sup> Barnett elicited from his client explicit testimony regarding Briseno’s anger following the incident:

- MR. BARNETT: Could you describe what your mental state was . . . immediately following the beating]?
- MR. BRISENO: I was very angry, very upset, very frustrated.
- MR. BARNETT: Well, why were you angry and frustrated and upset?
- MR. BRISENO: Of the incident that I just saw.
- MR. BARNETT: Well, what did you tell your probationer?
- MR. BRISENO: Well, I was taking my anger and my frustrations out on my probationer because I was upset with the sergeant.
- MR. BARNETT: All right. Well, what did you say?
- MR. BRISENO: I recall telling him that I was upset with the situation, that –
- MR. BARNETT: Tell the jury what you said to him.
- MR. BRISENO: I told him – my probationer that I was upset with the sergeant, that “Goddamn, sergeant should have handled this a lot different, he should have handled it a lot better” and that “the officers should have their asses reamed.”
- MR. BARNETT: Is that the exact words that you used?
- MR. BRISENO: Yes, sir.

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<sup>549</sup> *Id.* at 10961/9 - 21.

<sup>550</sup> A jury might well have thought that the fact that Briseno did not report the incident belied his claim that he was genuinely shocked at the officers’ behavior and had feared for King’s life.

MR. BARNETT: Were you saying it in this normal tone of voice?

MR. BRISENO: No, sir.

MR. BARNETT: What were you doing?

MR. BRISENO: I was screaming. I was yelling at him. I was taking my anger and frustrations from the sergeant and I was delivering it to my probationer.<sup>551</sup>

In short, Briseno testified on direct examination that he was in a prime position to see a justification for the beating of Rodney King and did not see one, that the other officers were out of control and utterly unresponsive to his pleas to cease the beating, and that he was so angry at his fellow officers' behavior that he was screaming in frustration after the incident.

Much of this testimony was powerfully incriminating evidence against the other three officers. One important indication of the potentially damaging effect Briseno's testimony may have had on the other officers, particularly Powell, was the decision of Powell's attorney, Michael Stone, to cross-examine Briseno immediately following Barnett's direct.<sup>552</sup> Stone apparently felt the need to minimize the damage done to his client on direct. For example, Stone spent much of his cross attempting to establish that Briseno believed Powell's initial strike to King's face was accidental:

MR. STONE: The strike of the baton to Mr. King's face appeared to you to be accidental, right?

MR. WHITE: Objection, calls for speculation.

THE COURT: Overruled.

MR. BRISENO: I believed it was accidental, yes.

MR. STONE: Well, and you saw it, didn't you?

MR. BRISENO: Yes.

MR. STONE: And you were watching?

MR. BRISENO: Yes.

MR. STONE: And it was accidental?

MR. WHITE: Objection, calls for speculation.

THE COURT: Sustained.

MR. STONE: According to your perception? . . . ¶ Is that right? Your perception was it accidental [sic]?

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<sup>551</sup> *Id.* at 10969/24 - 10970/26.

<sup>552</sup> Defense counsel for Officers Koon, Powell and Wind appear to have worked as a team throughout the trial. It is obvious from the record that the team chose Stone to do the principal cross examination of Briseno. Possibly, this was because Briseno's testimony was most damaging to Stone's client, Powell. Or, by virtue of Stone's highly successful cross-examination of prosecution witness Melanie Singer (see the preceding chapter, text at notes 339 - 507 *supra*), Stone may have been given the role of defense "hatchet man" by his colleagues.

.....  
MR. BRISENO: Yes.  
MR. STONE: All right. And that is based on what you saw?  
MR. BRISENO: Yes.<sup>553</sup>

At this point in the trial, White had the evident option of giving up the conviction of Briseno and concentrating on accrediting his testimony in order to increase the likelihood of convicting the other three officers. Assuming that White did not elect this strategy – and there is no indication that he did – his task on cross-examination (and in his closing argument) was to maximize the effect of Briseno’s incriminating direct-examination testimony while at the same time presenting to the jury a narrative explaining Briseno’s stomp to King’s head.

#### *D. White’s Cross-Examination of Briseno*

The story White began to tell on cross-examination was the story he stuck to throughout the trial: a cadre of “rogue” cops went wild one night and beat a black man within an inch of his life. White knew that Briseno could help him tell this story, and he began the cross with a long series of general questions about the incident – about King’s behavior, the officers’ behavior, Briseno’s perception of the beating. Had Briseno been a non-defendant witness, this initial testimony would have been near-perfect from the prosecution’s perspective. White asked respectful, relatively non-confrontational questions in order to take advantage of Briseno’s incriminating testimony against his co-defendants.<sup>554</sup> For his part, Briseno was mildly resistant, but far from hostile, to White’s questioning, and he eventually ended up testifying in accordance with what appear to have been White’s intentions.

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<sup>553</sup> *Id.* at 10990/15 - 10991/14. This excerpt is also important because, in fighting to keep out Briseno’s testimony that Powell’s initial strike appeared to be accidental, White displayed an obvious appreciation of the potential value of Briseno’s testimony. Other examples of Stone’s attempts to minimize the damage of Briseno’s direct are at *id.* at 10991/19 - 10994/2 (attempting to establish that Powell’s blow did not have much “power” behind it or to be intentional) and *id.* at 10993/19 - 10994/25 (establishing that Briseno did not actually see any of Powell’s blows strike King’s face or head). On re-cross, Stone and Briseno became even more adversarial toward one another. See, e.g., *id.* at 11072/14 - 24 (Briseno responding testily to Stone’s contention that King was moving: “I don’t care, too much force was used.”); *id.* at 11082/25 - 11086/16 (Stone grilling Briseno about whether Briseno really wanted the beating to stop and questioning Briseno’s failure to ask other officers to help him stop it).

<sup>554</sup> Note that White’s initial treatment of Briseno on cross was inconsistent with White’s opening statement, in which he had discussed Briseno only in negative terms. White, who had not known at the time of his opening statement whether Briseno would testify at all and, if he did, what he would say, appeared to be reacting to – and attempting to take advantage of – Briseno’s defense strategy. It is only later in the cross that, as we discuss below, White failed to find a way to preserve the parts of Briseno’s testimony that he wanted the jury to credit while discrediting the parts that he wanted the jury to reject.

White first established that King basically complied with the officers' orders.<sup>555</sup> He then got Briseno to testify to the important point that while Powell was continually striking King, none of the officers was issuing commands to King, and Koon was standing by idly.<sup>556</sup> Briseno also testified that King was not making any "aggressive" or "combative" movements.<sup>557</sup> White was further able to elicit Briseno's opinion that the beating was unreasonable and improper. In an interesting exchange that illustrates both Briseno's value to the prosecution's case and his reluctance to sell out his co-defendants, he testified as follows:

MR. WHITE: . . . What were you thinking at this time during these second series of baton blows?

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<sup>555</sup> The following is a good example of Briseno's reluctance to give White the most prosecution-friendly answers at first but willingness to go along with White in the end:

MR. WHITE: Now, when Mr. King got out of the car he was given orders, is that correct?

MR. BRISENO: Yes, sir.

MR. WHITE: And in your mind he was complying with those orders, wasn't he?

MR. BRISENO: No, sir.

MR. WHITE: All right. What orders did you hear Mr. King being given?

MR. BRISENO: "Put your hands up. Turn around."

MR. WHITE: Did he comply with those orders?

MR. BRISENO: No, sir.

MR. WHITE: Did he eventually comply with those orders?

MR. BRISENO: Yes, sir.

MR. WHITE: He eventually put his hands up in the air, didn't he?

MR. BRISENO: Yes, sir.

MR. WHITE: He was told to get to his knees?

MR. BRISENO: Yes, sir.

MR. WHITE: He eventually complied with that order, didn't he?

MR. BRISENO: Yes, sir.

MR. WHITE: He was told to lie on his stomach?

MR. BRISENO: Yes, sir.

MR. WHITE: And he eventually complied with that order, didn't he?

MR. BRISENO: Yes, sir.

*Id.* at 10999/6 - 11000/4.

<sup>556</sup> *Id.* at 11007/16 - 11008/3. The fact that nobody was even ordering King to do anything as he was being beaten damaged the defense claim that the beating was provoked by King's refusal to obey the officers' commands. White also painted a picture of Koon as unconcerned with King's welfare. Briseno answered "No" to the following three questions: "Did you hear Sergeant Koon giving Mr. King any commands?"; "Did you hear Sergeant Koon tell Officer Powell to watch out, don't hit him in the head?"; and "Did you hear anything from Sergeant Koon up to this point in time from the first baton blow to the second series of baton blows?" *Id.* at 11007/22 - 11008/3.

<sup>557</sup> *Id.* at 11008/13 - 18, 11012/8 - 11, 11023/24 - 28. White was careful to ask Briseno questions using these words, as he later introduced the LAPD guidelines that prohibit the use of the baton absent "aggressive" or "combative" movement. *Id.* at 11011/17 - 11012/7, 11023/6 - 23.

MR. BRISENO: I was just thinking that from my perception that it was – seemed to be he was striking – being from the upper shoulders and the head from the back where I was standing, it looked like they wish [sic] just hitting him everywhere. I wanted to get up and stop it.

MR. WHITE: All right. You wanted to get up and stop it?

MR. BRISENO: Yes, sir.

MR. WHITE: Would that – would that mean that you thought these blows were unreasonable?

MR. BRISENO: Yes, sir.

MR. WHITE: Would that mean that you thought these blows were excessive, these blows were excessive?

MR. BRISENO: That it was just a lot of force. I don't know about excessive.

MR. WHITE: Well, you didn't think they were reasonable, did you?

MR. BRISENO: No.

.....

MR. WHITE: You didn't think this was a proper use of force, did you, at this time?

MR. BRISENO: Not at this time, no.

MR. WHITE: Okay. You thought this was an unnecessary use of force at this time, didn't you?

MR. BRISENO: I can't say that it was unnecessary, because of my perspective of where I was standing. I don't know what Officer Powell saw. I don't know what was going through Officer Powell's mind.

MR. WHITE: All right.  
But you didn't see anything that would justify the – this second series of baton blows, did you?

MR. BRISENO: I didn't see anything, no.

MR. WHITE: You didn't see any aggressive movements by Mr. King, did you?

MR. BRISENO: No, I didn't.

MR. WHITE: You didn't see any combative movement by Mr. King, did you?

MR. BRISENO: No.

MR. WHITE: You didn't see any threatening movements by Mr. King, did you?

MR. BRISENO: No, sir.<sup>558</sup>

This exchange was devastating to the other defendants notwith-

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<sup>558</sup> *Id.* at 11009/1 - 11010/20.

standing – indeed, all the more because of – Briseno’s determined reluctance to testify to the legal conclusion that the force used was “excessive.” White continued, effectively eliciting testimony from Briseno that Powell was using “too much” force,<sup>559</sup> that Briseno had never before tried to stop another officer from using force but thought that this situation required “drastic” measures,<sup>560</sup> that Koon was negligently allowing the beating to continue,<sup>561</sup> that Briseno was moving around specifically to see if King had a weapon or was otherwise acting in a threatening manner and that he failed continually to see a justification for the beating,<sup>562</sup> and that Briseno made the highly unusual decision to report to his superiors what he agreed was the “misconduct” of all three of his co-defendants.<sup>563</sup> At this point, however, the impressive narrative that White had just constructed – a story of “rogue” cops bravely accused of brutality by a concerned “good” cop – took a perplexing turn. White began asking a series of questions about Briseno’s failure to report the incident to his superiors.<sup>564</sup> Briseno responded in a straightforward manner that he did indeed fail to report the incident.<sup>565</sup>

Why did White dwell on Briseno’s failure to report? Briseno was not charged with that offense. Moreover, White’s previous series of questions was designed to establish that the force used by the officers was so excessive that Briseno took the highly unusual step of returning to the station to make a report. By highlighting Briseno’s decision not to make the report once he got to the station,<sup>566</sup> White either totally undermined his previous narrative (the outraged “good” cop determined to see his fellow officers punished for their behavior) or at the very least threw into serious doubt the veracity of someone who had turned out to be one of his star witnesses.

White did make one attempt to provide a narrative explanation for Briseno’s failure to report. The idea was to show that in refusing to report the other officers, Briseno was adhering to the “code of silence” – the unwritten rule that requires police officers to “look the other way” when they witness their colleagues engaged in wrongdoing. By showing that Briseno was willing to follow the code of silence,

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<sup>559</sup> *Id.* at 11013/15 - 18.

<sup>560</sup> *Id.* at 11014/12 - 11016/12.

<sup>561</sup> *Id.* at 11015/3 - 11016/22.

<sup>562</sup> *Id.* at 11024/4 -27, 11026/3 - 11027/26.

<sup>563</sup> *Id.* at 11028/15 - 11031/17.

<sup>564</sup> *Id.* at 11030/21 - 11032/15.

<sup>565</sup> *Id.* at 11030/15 - 11032/12.

<sup>566</sup> As we have noted, Briseno’s testimony was that he did not make the report because he saw Koon’s transmission on the ACC and was satisfied that the sergeant was properly reporting the incident. See his direct examination testimony, *id.* at 10976/12 - 10977/8.

White could explain – without justifying – Briseno’s decision not to report the incident while, at the same time, White managed to preserve the helpful testimony he had elicited from Briseno about the unjustifiability of the other officers’ behavior toward King. Here was an officer who knew that the force used by the others was unreasonable, but his fraternal tie to his colleagues prevented him from stopping or reporting it. The code of silence was so strong that even an essentially “good” cop was forced to forgo speaking out when “bad” cops engaged in unreasonable force. This code-of-silence narrative could be substantiated by Briseno’s earlier, repeated testimony that while he felt the force used by the other cops was unjustified and unreasonable, he assumed that they must have seen something that he did not see. He was unwilling to blame the other officers, even as he questioned their behavior.

White successfully established this narrative. Immediately after eliciting Briseno’s failure to report the incident, White asked him, “Officer Briseno, are you familiar with the code of silence?”<sup>567</sup> Over Barnett’s objections, Briseno said that he had heard of the code. He also conceded that an officer invoking the code will at times use the excuse of *I-don’t-know-what-was-going-through-that-officer’s-mind* in order to justify a failure to report an apparent incident of unreasonable force. White skillfully juxtaposed this concession with reminders of Briseno’s earlier testimonial reluctance to brand Powell’s behavior as “excessive” because, in Briseno’s words, “I don’t know what Officer Powell saw. I don’t know what was going through Officer Powell’s mind.”<sup>568</sup> By so doing, White made a strong pitch to the jury that Briseno had adhered to the code of silence.<sup>569</sup> But what could this pitch possibly accomplish, in the end?

The problem with White’s version of the code-of-silence narrative was that it did nothing to explain the stomp to King’s head, and thus did nothing to solve the Briseno Dilemma. In fact, it contradicted virtually any narrative designed to convict Briseno of the stomp. In order to convict Briseno of having used excessive force, the jury had to find that he partook, albeit to a lesser extent than the other officers, in the beating of Rodney King. The code-of-silence narrative that White told was predicated on the notion that Briseno was indeed appalled at his fellow officers’ behavior but was willing to forgo reporting it. In White’s story, Briseno watched the other officers in horror, but was willing – in deference to the code of silence – to grant them the possibility that they saw something he did not see. This particular telling of

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<sup>567</sup> *Id.* at 11032/16 - 17.

<sup>568</sup> *Id.* at 11010/4 - 6.

<sup>569</sup> See *id.* at 11033/6 - 11035/10.

a code-of-silence story left no room for the officer obeying the code of silence to have participated in the offensive behavior. Conceivably, White could have told a code-of-silence story that implicated Briseno in the offensive behavior: *i.e.*, Briseno's reluctance to report the incident was borne out of a desire to protect his fellow officers *and* a growing realization that his own behavior was potentially blameworthy. But that is not the story White chose to tell.

The narrative and logical flaws in the code-of-silence story became increasingly apparent as White continued his cross of Briseno. White next grilled Briseno again about his failure to report, arguably driving home the point that the failure was a direct result of the code.<sup>570</sup> White then embarked on a long series of questions emphasizing again that the officers were out of control, that King was not being combative, and that Briseno was angry, frustrated, scared, and looking for a way to stop the beating.<sup>571</sup> So far, so good, if Briseno was a non-defendant witness and White had only been using the code-of-silence narrative as an explanation for a potentially impeaching inconsistency (the failure to report) in his star witness' story. But because White's job was to prosecute Briseno as well as the other three officers, he culminated this series of questions about Briseno's desire to stop the horrific beating with the question: "So, you went over and you stomped on Mr. King; isn't that correct?"<sup>572</sup> The question reeked of sarcasm. Its underlying meaning was *You expect us to believe that you wanted the beating to stop when we can all see in the video that you stomped on Mr. King's head?* The tone and substance of the question were standard-issue demolition techniques for a prosecutor crossing a criminal defendant's exculpatory testimony, but here the implication undermined completely the code-of-silence narrative that White had just finished constructing. And by calling into question Briseno's professed desire to stop the beating, White risked losing the value of Briseno's entire previous testimony about the other officers' use of unjustified and improper force.<sup>573</sup>

White continued in this vein, grilling Briseno about the stomp and suggesting that this seemingly violent act was a bizarre way to *stop* a beating.<sup>574</sup> In doing so, White implied that far from wanting to stop the beating, Briseno was eager to join in. Other aspects of White's cross further demonstrate his failure to solve the Briseno Di-

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<sup>570</sup> *Id.* at 11031/23 - 11035/10.

<sup>571</sup> *Id.* at 11038/1 - 11040/8.

<sup>572</sup> *Id.* at 11040/10 - 11.

<sup>573</sup> White's closing argument to the jury suggests that he did in fact decide to pass up any value that he might have gained from Briseno's favorable testimony. As mentioned above, White referred to this testimony only once – in passing – in his closing.

<sup>574</sup> *Id.* at 11040/13 - 11048/7.

lemma. He seemed to be trying to score points piecemeal wherever he could, without working to develop a narrative capable of tying them all together. He allowed Briseno's answers to dictate the direction of the cross and undertook to accredit specific nuggets of testimony that he found helpful while continuing to deride Briseno generally as a liar. For example:

White attempted to show that Briseno's stomp on King was not only a move he was never taught at the police academy, but that it was less likely to end the beating than if Briseno had tried more forcefully to verbally or physically stop the *officers*.<sup>575</sup> The point was a good one: certainly, it seems odd to attempt to subdue the victim rather than the beater if one's goal is to stop a beating. But when Briseno protested that he *did* yell to Koon to stop the beating and Koon ignored him, White changed the direction of his cross practically in mid-sentence. He immediately embarked on a series of questions designed to elicit from Briseno the fact that Koon was negligent in his supervisory capacity.<sup>576</sup> In bolstering and expanding on Briseno's testimony that Koon was unresponsive to Briseno's pleas to cease the beating, White was contradicting the thrust of his previous line of questions aimed at casting doubt on Briseno's concern for King. The switch in direction made no narrative sense and illustrates Whites's tendency to try to score isolated points at the expense of narrative coherence.

Another illustration is the following passage:

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<sup>575</sup> *Id.* at 11041/5 - 11043/13.

<sup>576</sup> *Id.* at 11041/17 - 11042/21:

MR. WHITE: . . . You could have gone in and covered up Mr. King with your body, isn't that correct?

MR. BRISENO: No.

. . . . .

MR. WHITE: Why is that?

MR. BRISENO: Well, I'm not going to bend over there and end up maybe possibly getting hit by batons and I'm not going to tie up with him.

. . . . .

MR. WHITE: You could have gone over to Sergeant Koon and said, 'Stop this right now'; isn't that correct?

MR. BRISENO: I had yelled at Sergeant Koon earlier.

MR. WHITE: And what did you yell at him?

MR. BRISENO: It was - again, it was like, 'What the fuck are you doing?'

MR. WHITE: All right. And that was because this force was continuing, and continuing; is that correct?

MR. BRISENO: Yes.

MR. WHITE: And Sergeant Koon was doing nothing?

MR. BRISENO: Yes.

MR. WHITE: The supervisor at the scene, the person who had control over these officers was doing nothing?

MR. BRISENO: Yes.

- MR. WHITE: As you were approaching Mr. King, were you still angry?
- MR. BRISENO: Yes.
- MR. WHITE: Were you still frustrated?
- MR. BRISENO: Yes.
- MR. WHITE: You wanted this incident to stop, didn't you?
- MR. BRISENO: Yes.
- MR. WHITE: You didn't want to see this man beaten to death, did you?
- MR. BRISENO: No.
- MR. WHITE: Didn't want to see this man shot, did you?
- MR. BRISENO: No.
- MR. WHITE: You didn't want to see this man shot for no reason, did you?
- MR. BRISENO: No.
- MR. WHITE: You wanted this incident to end?
- MR. BRISENO: Yes.
- MR. WHITE: So you went over to place – to rest your foot on Mr. King's shoulder?
- MR. BARNETT: Objection, argumentative.
- THE COURT: Overruled.
- MR. BRISENO: Yes.<sup>577</sup>

White then went on to question Briseno at length about how forcefully Briseno placed his foot on Mr. King,<sup>578</sup> implying that Briseno, who weighed less than half what King weighed, could not really have intended to subdue King with a gentle placing of a foot on his shoulder. The narrative difficulty with this line of questioning is that it is the *initial* questions and answers about Briseno's fear for King's life that were most helpful to White. Yet when White sarcastically questioned Briseno about the stomp, White was telling the story of a witness who was lying about his fear for King's life. Again, White displayed his fundamental inability to resolve the Briseno Dilemma. In the abstract, both Briseno's testimony that he feared for King's life *and* White's caustic cross deriding Briseno's justification for the stomp were valuable components of the prosecution's case. But White failed to craft a line of questioning that allowed him to milk the value from each point without canceling the other out.

The deficiencies of White's cross examination of Briseno reside almost entirely in the narrative dimension. His question-framing and performative skills as a cross-examiner are not at issue. (Indeed, they are impressive.) Our point has to do with his failure to tell a story that was capable of accepting and endorsing Briseno's valuable testimony

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<sup>577</sup> *Id.* at 11050/2 - 25.

<sup>578</sup> *Id.* at 11051/23 - 11054/1.

that Briseno was appalled by his fellow officers' violence against Rodney King while simultaneously explaining Briseno's deliberate choice to join in the violence by stomping Mr. King. This failure is manifested again in White's closing arguments to the jury.

### *E. White's Initial Closing Argument*

White began his closing argument by emphasizing to the jury that "you have four separate cases here"<sup>579</sup> and that the jury must evaluate each one distinctly. The strategy of discussing each defendant separately would have been a useful one if White planned to use Briseno's testimony against the other officers. However, as mentioned above, White did not in fact go on to do this.<sup>580</sup> He made only one passing mention of Briseno's favorable testimony, forbore completely to take advantage of its dramatic, damning force as evidence of the guilt of Powell, Koon and Wind, and proceeded to argue for Briseno's own conviction by ridiculing Briseno's purported justification for the stomp.

White's theory for conviction of Briseno was fairly straightforward. He sarcastically referred to the stomp as "this so-called placement"<sup>581</sup> of Briseno's foot on King, and he repeatedly referred to the apparently "violent reaction of Mr. King's body" to this "foot placement, according to Officer Briseno."<sup>582</sup> He played the video of Briseno's stomp for the jury and asked them to evaluate for themselves whether the behavior was "reasonable or unreasonable."<sup>583</sup> White did nothing in his closing to account for the fact that he had spent much of his cross examination of Briseno *accrediting* Briseno's testimony. White's undifferentiating incredulity toward Briseno's story in closing argument seems strained – and may perhaps even have registered on the jury as feigned or hypocritical – after the jury saw White treat Briseno with kid gloves through a substantial portion of his cross.

The only time White attempted to provide a narrative that explained Briseno's behavior consistently with conviction was at the end of the argument:

Now, why did Mr. Briseno do that? Well, maybe he just got caught

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<sup>579</sup> Tr. vol. 75A, 13503/11 - 12 (April 20, 1992).

<sup>580</sup> The fact that White did not intend to use his opening remarks about "four separate cases" as a foundation for Briseno's testimony against the others is evident from the following comment by White: "You can't say, well, if one is guilty, they are all guilty. ¶ The prosecution believes that is the case, but that is not how your deliberations work." *Id.* at 13503/22 - 25.

<sup>581</sup> *Id.* at 13579/12.

<sup>582</sup> *Id.* at 13579/11 - 13580/19. The quoted passage is at *id.* at 13579/16 - 18.

<sup>583</sup> *Id.* at 13579/10 - 13581/1. The quoted passage is at *id.* at 13579/24 - 25.

up in the frenzy of this event. Maybe after determining or after seeing this force being used against Mr. King again and again and again for no apparent reason, maybe he just got caught up in it.

He saw King move, Mr. King wasn't resisting, Mr. King wasn't doing anything as far as trying to escape, he saw Mr. King move and he got the same mind-set as these other . . . defendants. Every little movement produced a use of force. Every movement, no matter how insignificant[,] produced a use of force.<sup>584</sup>

Thus, it appears that White's explanation for Briseno's behavior was that he "just got caught up in" the collective fury of the officers and, all of a sudden, "got the same mind-set" as the others. This narrative may or may not have had some potential convincing power, but it comes across as saying too little, too late. These eight lines represent White's only attempt to reconcile the Briseno Dilemma in his entire closing argument, and he had not said one word to prepare the jury for such a narrative, either in his opening statement (which may be understandable because he did not yet know Briseno's strategy) or, more significantly, in any of his questioning of Briseno.

Furthermore, in making this argument for Briseno's conviction, White risked hurting his case against the other officers. Inexplicably, White emphasized in his closing that Briseno's stomp came at a time when the blows of the other officers had subsided somewhat. White apparently brought this up to make Briseno's stomp look worse. In response to the anticipated defense that Briseno was protecting King from imminent harm, White asked, "was this injury that Mr. Briseno is alleging, did it appear to be imminent? Well, at that point in time Officer Powell looked like he was reaching for his handcuffs."<sup>585</sup> In the context of a closing argument devoted for the most part to emphasizing the relentless abuse of King by the other officers, it seems risky to have pointed out their momentary self-restraint in an effort to convict Briseno. After all, "this injury that Mr. Briseno is alleging"—as White referred to it sarcastically here—is precisely the injury that formed the core of White's case against the other officers. White's implicit suggestion that Briseno was *wrong* to have feared for King's life (and not just that he disingenuously stated that he feared for King's life) undercut his case against the other officers.

#### F. Barnett's Closing Argument

Barnett framed his closing argument as a search for the answer to one crucial question: "[I]s there some evidence from which Mr. Briseno could believe that . . . it was necessary to protect Mr.

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<sup>584</sup> *Id.* at 13583/14 - 26.

<sup>585</sup> *Id.* at 13582/17 - 21.

King?”<sup>586</sup> Thus framed, Briseno’s defense theory was a potential boon to White’s prosecution of the other officers. There are two ways in which the jury could have bought the theory and acquitted Briseno, one of which aided White immensely. The jury could have believed either that at the time of the incident Briseno reasonably thought King was in danger and acted accordingly *but was wrong* to have been worried about King, or that he was right to be worried and acted properly. White would have preferred a variation of the latter, with a narrative twist that would also allow for the conviction of Briseno. Briseno theoretically would have been happy with either. Perhaps he would have preferred the former, so as not to help convict his fellow officers, but to take this line would have required Barnett to argue to the jury that Briseno was reasonable but mistaken in his attempted defense of King. Probably deciding that this argument would concede too much, Barnett argued instead that Briseno “needed to take that action so that Mr. Wind and Mr. Powell would quit beating Mr. King to a pulp.”<sup>587</sup> Barnett did not hesitate to condemn the actions of the other officers.<sup>588</sup> At one point, he portrayed his client as the hero of the entire incident: “Of all the police officers at the scene, one officer steps forward and tries to stop his fellow officers, and that policeman sits there and it is Officer Theodore Briseno. He is the one[,] he is the only one[,] who tried to stop this beating.”<sup>589</sup>

White’s failure throughout the trial, and particularly in his closing, to capitalize on Briseno’s damaging testimony is most surprising, however, in light of Barnett’s open attack on Stone in Barnett’s closing argument. Barnett not only explicitly acknowledged that Briseno’s testimony was extremely damaging to the other officers,<sup>590</sup> he argued at length that Stone tried to prevent Briseno from testifying against

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<sup>586</sup> Tr. vol. 77, 13879/27 - 13880/2 (April 22, 1992). Barnett’s legal theory was one of “defense of another.” He argued that the state has the burden of proving that Briseno did not act in defense of King. See *id.* at 13872/21 - 13873/16 (“They have to prove the negative. They have to prove and they’ve got to prove beyond a reasonable doubt that Ted Briseno did not attempt to help Mr. King.” *Id.* at 13873/2 - 5).

<sup>587</sup> *Id.* at 13882/11 - 13.

<sup>588</sup> For example, Barnett distinguished Briseno’s kick from Officer Wind’s kicks: “[Briseno] used his left foot, his weak foot, not like Mr. Wind.” *Id.* at 13883/11 - 12. See also *id.* at 13884/18 - 22 (“Look at what Mr. Briseno did not do. He did not, for instance, thereafter, after he had been thrown off, after putting his foot down and going backward, he didn’t go up and start kicking him like Mr. Wind did or start beating him.”), 13887/1 - 3 (“You have to step into Mr. Briseno’s shoes. Powell is out of control, Wind is out of control. The situation is electric.”).

<sup>589</sup> *Id.* at 13885/16 - 20.

<sup>590</sup> *Id.* at 13895/17 - 23: “[T]hey got a problem and that problem is Ted Briseno. What are they going to do with him? What are they going to do with Ted Briseno who was at the scene and who said in word and in deed what they did was wrong? ¶ If he repeats that, it is very damaging to their case.”

his fellow officers by threatening Briseno in Stone's opening statement, and that Stone then put on perjured testimony in an attempt to discredit Briseno.<sup>591</sup> The following statement summed up Barnett's attack on Briseno's co-defendants: "[Briseno's] detractors reached into the depths of the sewer of perjury to blunt this truthful testimony, and to no avail. ¶ Ted Briseno stood and stands alone against the power of the state and against the cruel weapons of slander, deceit and perjury and the extortion of his former comrades."<sup>592</sup>

Barnett ended his argument by explicitly articulating the narrative incoherence of White's prosecution theories, although in a slightly different way than we have been discussing. Barnett's argument was that White's condemnation of the brutality of the other officers by itself created a reasonable doubt as to whether Briseno may not have been acting in response to that brutality and thus in defense of King: "In evaluating the argument the prosecutor made in this case you might want to consider the argument they made against the other defendants and see if you can detect a certain tension in their logic, a certain inability to make the facts work for the prosecution of the others, as well as the prosecution of Ted Briseno."<sup>593</sup> Therein lies the Briseno Dilemma, of course; and White's last opportunity to solve it came in his final argument to the jury.

### G. *White's Rebuttal Closing Argument*

White did little in his rebuttal argument either to highlight Barnett's tirade against the other officers or to answer Barnett's question about the inconsistency in the prosecution's theories of the case. White did spare Barnett and Briseno from his opening remark that "[a]fter listening to . . . Mr. Mounger, Mr. De Pasquale, and Mr. Stone [the other three defendant's lawyers], I'm reminded of the comment that desperate men do desperate things."<sup>594</sup> But then, just a few minutes later, he included Briseno in his list of men who are not "above the law."<sup>595</sup> He did not address Briseno's specific defense-of-another defense until the end of his argument, when he made the important point that "usually . . . [this defense] is used in cases where someone

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<sup>591</sup> *Id.* at 13895/23 - 13918/9. Barnett recalled that Stone explained what looked like Briseno's attempt to stop Powell as instead an attempt to protect Powell from getting "shocked" if he touched the just-tasered King. Barnett argued that the "problem is it isn't true," *id.* at 13896/13, and that Stone was telling Briseno what he'd better testify if he wanted to stay in good with the other officers: "Join the team or become the enemy." *Id.* at 13899/1.

<sup>592</sup> *Id.* at 13918/3 - 9.

<sup>593</sup> *Id.* at 13921/5 - 11.

<sup>594</sup> *Id.* at 14002/17 - 20.

<sup>595</sup> *Id.* at 14004/1 - 4.

attacks another person and then an individual steps in and fights off the attacker,” whereas here Briseno testified he “had to inflict damage on Mr. King in defense of Mr. King.”<sup>596</sup> White then reminded the jury it only had to conclude that Briseno acted unreasonably in order to convict him.

It is at this point that White conceded that Briseno “may not have had an evil heart, he may not have had an evil mind,”<sup>597</sup> arguing at the same time that his actions were nonetheless unreasonable. Yet White just left it at that, and did not create any story at all to explain why this man, who was not evil, came to act in such an unreasonable, and hence illegal, manner.

## II. ALTERNATIVE NARRATIVES

We have described the Briseno Dilemma and White’s reaction to it in order to illustrate a complex narrative challenge that a particular prosecutor encountered. As we have discussed, White failed to develop a solution to the dilemma – one that would take advantage of Briseno’s powerful testimony against his fellow officers without eliminating the possibility of obtaining a conviction of Briseno himself. White failed to imagine and present a narrative framework within which the Briseno Dilemma could be solved. The remaining parts of this article suggest such possible frameworks.

They do not suggest that White necessarily should have employed one or another *particular* narrative structure in pursuit of his aims. Rather, they demonstrate that narrative resources fitted to the task exist – available stories that a creative litigator faced with White’s dilemma would have done well to consider. The point is that once a litigator faces up to the need to create a coherent and cohesive narrative for his or her jury and recognizes that the job is difficult, more than one possible story may be summoned up to do the work.

### A. *Doublethink: Theodore Briseno as Winston Smith in 1984*

If you want a picture of the future, imagine a boot stamping on a human face – forever.

George Orwell, *1984*<sup>598</sup>

The narrative question that White had to answer with regard to Theodore Briseno is, *How does one who is not evil come to act so unreasonably?* An answer to this question may be found in George Orwell’s *1984*. Orwell’s protagonist, Winston Smith, is a futuristic

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<sup>596</sup> *Id.* at 14029/15 - 21.

<sup>597</sup> *Id.* at 14030/3 - 5. See text at note 515 *supra*.

<sup>598</sup> GEORGE ORWELL, 1984 220 (Plume Books, reissue edition, 1983) [hereafter, “ORWELL”].

Theodore Briseno. Living in a society devoid of individuality, where critical thought is punishable by death, Smith is initially wary of the omnipotent “Party.” He takes steps – albeit tiny, insignificant, and futile ones – to effectuate the Party’s destruction, but he ultimately succumbs to its power. In the end, Smith is as mindless a minion of the evil Party as anyone else; he believes he has “won the victory over himself”;<sup>599</sup> and his silent, callous obedience to the Party’s orders bespeaks not evil, but the ultimate submission.

This subsection analogizes the plight of Winston Smith to that of Theodore Briseno, suggesting not that there is an exact parallel between the two (although some of the narrative similarities are striking) but that Smith’s story provides a framework within which a creative litigator could have shaped Briseno’s. Just as a reader of *1984* could convict Smith of various atrocities despite his obvious lack of an “evil heart” or an “evil mind” (to use White’s words) – and would very likely damn the Party as pure evil – a jury asked to consider Briseno’s story in this context may have been more inclined to convict both Briseno for the stomp to King’s head, and the other officers for their more demonstrably “evil” behavior.<sup>600</sup>

Analogizing Briseno’s behavior, motivation, and mentation to those of Orwell’s protagonist, Winston Smith, provides one way in which White might have solved the Briseno Dilemma. How did Briseno appear so comfortable describing the other cops’ actions as “out of control” and his own stomp to King’s head as perfectly reasonable? White could perhaps have argued that he did so by using what Orwell calls “doublethink” – “conscious deception while retaining the firmness of purpose that goes with complete honesty.”<sup>601</sup> Orwell’s words are also a fairly accurate description of a liar who makes a good trial witness. For the process of doublethink involves more than a willingness to lie. In an important sense, one must be willing and able to lie to oneself, not only in order that others will believe the lie more readily, but also so that the lie is internalized and perpetuated. Orwell explains, “The process has to be conscious, or it would not be carried out with sufficient precision, but it also has to be unconscious, or it

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<sup>599</sup> ORWELL at 245.

<sup>600</sup> By invoking Orwell’s novel we do not imply that White needed to refer explicitly to *1984* in the courtroom in order to tap the sources of the novel’s power. *1984* is a masterpiece in part because of how chillingly it convinces readers of Smith’s transformation from hate to love of the Party’s leader, “Big Brother.” White’s narrative failed to convince the jury of Briseno’s transformation from fear of and disgust with the other officers’ actions to active participation in them. By drawing parallels between the two narratives – one coherent and moving, the other incoherent and easily dismissed – we intend only to present an example of a narrative *structure* that White might have employed in order to prosecute all four officers more effectively.

<sup>601</sup> ORWELL at 177.

would bring with it a feeling of falsity and hence of guilt.”<sup>602</sup>

Smith is eventually taught to doubt the existence of objective reality. As a Party official lectures him, “When you delude yourself into thinking that you see something, you assume that everyone else sees the same thing as you. But I tell you, Winston, that reality is not external. Reality exists in the human mind, and nowhere else. . . . That is the fact that you have got to relearn.”<sup>603</sup> Briseno has learned this fact well. When he sees the beating continue despite his protests, his reaction is not to continue to question the behavior of the other officers, but to assume that they must be seeing something that he doesn’t see.

Perhaps it is necessary for every police officer to have a certain amount of trust in his or her fellow officers and to believe that they will behave properly. Perhaps, therefore, it is understandable that Briseno’s initial reaction to his fellow officers’ continuing violence was confusion and self-doubt. Yet, is there not some point at which the behavior of one’s fellow officers goes so far that it becomes unreasonable to keep giving them the benefit of the doubt? The Party teaches that there is no such point. Rather, when one remains unable to see the reality that the Party seems to see, the proper course is to go on forever accepting that one is simply missing something which *must* be real *because* the Party seems to see it.

This much, perhaps, explains why Briseno stopped trying to fend off Powell and the other officers who, to his individual perception, were beating King for no reason. But White’s narrative needs to go further to explain Briseno’s own affirmative act of stomping Rodney King. It needs to explain how one who is not evil comes not only to accept but to mirror the actions of those who *are* evil.

Winston Smith, the protagonist of *1984* is not evil; the Party is. The Party murders, tortures, and most important, controls. In the country of Oceania, the Party controls the work done, the language spoken, and the thoughts thought. Smith is one of the very few who has somehow managed to elude the grasp of the Party’s thought-control, and he rebels by making furtive notes in his diary – “Down with Big Brother”<sup>604</sup> – when he believes the omniscient telescreen in his apartment is not watching him. He also arranges a secret meeting with someone he believes to be an officer of a subversive group and he eagerly reads “the book” that contains a plan for the overthrow of the Party. He defies the Party’s strict prohibition against love by enjoying an illicit affair with a woman he met at work. Yet despite these small steps toward subversion of the Party, Smith is essentially a Party regu-

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<sup>602</sup> *Id.*

<sup>603</sup> ORWELL at 205 - 206.

<sup>604</sup> ORWELL at 19.

lar, as he carries out his daily task of forging records and participates in daily hateful screeds against the Party's enemy.

Like Smith, Theodore Briseno was initially appalled at what he saw going on around him. He testified truthfully that he thought the other officers were "wrong" and "out of control." He testified truthfully that he was worried for Rodney King's life. He testified truthfully that he tried to put an end to the beating, by reaching out to Powell to stop the blows and by yelling to Koon. And (so White's narrative might go), Briseno was entirely right in his perceptions and his first reactions to them. But Koon and Powell ignored Briseno, and the beating continued, and Briseno began to wonder, "Do they see something I don't see?," and that became the constant refrain in his mind (as in his testimony). Smith, too, at several points in the narrative, wonders whether he is the insane one and is wrong to think that the Party is evil.<sup>605</sup>

Once it became clear to Briseno that his fellow officers (including the supervising officer on the scene, Koon) were not going to heed his pleas to stop, three things happened, all of which also happen to Smith. (1) Briseno further doubted himself. (2) He felt pressure from the others to act as they were acting. And (3) the part of Briseno that had been indoctrinated by the evil culture surrounding him began to reveal itself. The manifestation of these three phenomena was the stomp to King's head.

In 1984, a similar manifestation is Smith's evolving reaction to the "Two Minutes Hate," a regular part of the Oceania workday, in which the nation's hated enemy is shown on the telescreen denouncing the Party. The Party uses the "Two Minutes Hate" to inflame the people, to unite them against the enemy, and to instill in them a fear of revolution. Smith, despite his sympathy for the subversive enemy, finds it frighteningly easy to join in the "Two Minutes Hate," initially for fear of being discovered as a traitor but very quickly as a willing participant:

The horrible thing about the Two Minutes Hate was not that one was obliged to act a part, but that it was impossible to avoid joining in. Within thirty seconds any pretense was always unnecessary. A hideous ecstasy of fear and vindictiveness, a desire to kill, to torture, to smash faces in with a sledge hammer, seemed to flow through the whole group of people like an electric current, turning one even against one's own will into a grimacing, screaming lunatic.

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<sup>605</sup> See ORWELL at 68: "He wondered, as he had many times wondered before, whether he himself was a lunatic. Perhaps a lunatic was simply a minority of one. . . . But the thought of being a lunatic did not greatly trouble him; the horror was that he might also be wrong."

Another poignant example of Smith's increasing desensitization to violence and brutality comes when he is walking through town and a bomb goes off, demolishing a city block. Smith dives for cover. After brushing himself off, he sees on the pavement the bloody stump of a severed hand. Detachedly, he kicks the hand into the gutter "as though it had been a cabbage stalk" and walks home.<sup>606</sup> Remembering this event several weeks later, Smith acknowledges that the Party has succeeded in stripping him of his humanity.<sup>607</sup>

Why was it so easy for Smith to join in the hate, not as a pretender but as a participant? Partly because the electricity he felt was real; it was a mob mentality at work. Partly because of his nagging doubts about his own sanity. But perhaps the most compelling explanation for the ease with which Smith succumbed is related to the way in which the Party structured the Two Minutes Hate. It is no accident that the object of the hate is the Party's enemy, who is shown on screen delivering "an attack [on the Party] so exaggerated and perverse that a child should have been able to see through it, and yet just plausible enough to fill one with an alarmed feeling that other people, less level-headed than oneself, might be taken in by it."<sup>608</sup> The Party minions are placed in a binary dilemma; to doubt the Party is to sympathize with the enemy. The enemy is so clearly wrong and dangerous that Smith has little choice but to side with the Party, not only for fear of being branded a traitor but, importantly, for fear of being as wrong as the enemy is.

Briseno was in a similar position. Prior to stomping King, Briseno had yelled at Koon to stop the beating; after stomping King, Briseno raged against the other officers; but *while* stomping King – like Smith during the "Two Minutes Hate" – Briseno's behavior exuded hatred *of King*. Even if the stomp cannot easily be explained simply as a concession to peer pressure or simply by a sudden access of the infectious fear and loathing that made the other officers want to punish King, it makes sense as a volatile mixture of the two – an initial desire to avoid detection as a "wimp" (or maybe even as a "nigger lover"),<sup>609</sup> compounded by confusion and distrust of what his eyes were telling him ("The other officers must see something I don't see"), triggering increasing self-doubts about his own paralysis in the midst of violent action, and finally transformed into genuine, momentary sharing of

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<sup>606</sup> ORWELL at 137.

<sup>607</sup> ORWELL at 136 - 137.

<sup>608</sup> ORWELL at 14.

<sup>609</sup> King's apparent refusal to heed the officers' commands and his startling resistance to the taser stymied the officers' efforts to enforce the law and challenged their authority. If Briseno didn't join in the beating, he might be said to have condoned King's behavior.

the group hatred of King and desire to hurt him.<sup>610</sup> This telling of the story has the advantage of emphasizing the evil of the other cops, because it highlights their effect on the impressionable one among them. That is the truly frightening thing about the Party in *1984* – not simply its oppression of the people it governs, but the way in which it is able to control, brainwash, and convert any dissenters.<sup>611</sup>

By utilizing a variant of the COPS=PARTY analogy, White may have been able to concede that that Briseno's stomp was not necessarily evil but insist that it was nonetheless unreasonable. Were White prosecuting Winston Smith, rather than Theodore Briseno, he might have had a tough time getting a jury to blame Smith for anything, given the totality of the Party's brainwashing and the all-consuming force of its evil. But the analogy is *only* an analogy, not an equation; White could draw upon *1984's* narrative structure without asserting that the cops who beat Rodney King were as powerful or as evil as the Party in *1984*. Thus, the very reason why an exact equation of the cops with the Party pushes the analogy too far would provide the means by which a jury could condemn Briseno for unreasonable-though-not-evil behavior: Briseno could not as convincingly plead submission to overpowering Party dominance as Smith might have.

### B. *Theodore Briseno As Bernard Marx in Brave New World*

Aldous Huxley's *Brave New World*<sup>612</sup> is a futuristic novel about a world state called Utopia, in which the governing power maintains complete, authoritarian rule. Creativity and free-thinking are not only discouraged, they are prevented, using electric shocks on babies

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<sup>610</sup> Briseno's response to the complicated and explosive environment in which he suddenly found himself recalls the results of the famous "Stanford Prison Experiment" in which psychologists Philip Zimbardo, Craig Haney and W. Curtis Banks asked a group of "normal" college students to simulate a prison environment for several days. As Haney and Zimbardo describe in a recent retrospective, "[t]he outcome of our study was shocking and unexpected to us. . . . Many of these seemingly gentle and caring young men . . . [who had been chosen to play the role of prison guards and who] had described themselves as pacifists or Vietnam War 'doves,' soon began mistreating their peers and were indifferent to the obvious suffering their actions produced." Craig Haney & Philip Zimbardo, *The Past and Future of U.S. Prison Policy – Twenty-Five Years After the Stanford Prison Experiment*, 53 AMERICAN PSYCHOLOGIST 709 (1998) [hereafter, "Haney & Zimbardo"], at p. 709. Haney and Zimbardo conclude that the experiment "demonstrated the power of situations to overwhelm psychologically normal healthy people and to elicit from them unexpectedly cruel, yet 'situationally appropriate' behavior." *Id.* at 719.

<sup>611</sup> See, e.g., ORWELL at 211, where a Party member describes the brainwashing process: "What happens to you here is forever. . . . Never again will you be capable of ordinary human feeling. Everything will be dead inside you. Never again will you be capable of love, or friendship, or joy of living, or laughter, or curiosity, or courage, or integrity. You will be hollow. We shall squeeze you empty, and then we shall fill you with ourselves."

<sup>612</sup> ALDOUS HUXLEY, *BRAVE NEW WORLD* (1932; Harper Perennial ed. 1969) [hereafter, "HUXLEY"].

before they have a chance to develop such potentially “deviant” characteristics. Humans no longer give birth but are cloned through a process of egg-splitting, producing children who are all alike and who will obediently serve one very narrow, predetermined function in society. Those who are not cloned properly — or, worse, who are products of natural childbirth — are exiled to Savage “reservations” so that they are unable to taint the mainstream society with their deviance. The characters in the novel are arrayed along a spectrum of acceptance of the authoritarian rule forced upon them. Some blindly obey; some directly challenge; one, Bernard Marx, finds himself caught in the middle — believing that the social control has gone too far but unable to muster the strength to risk his own destruction by challenging it head-on. Terry White, in fashioning a prosecution theory as to why the four defendants were culpable for beating Rodney King and why their culpable behavior should not go unpunished, might have drawn on this narrative to convince the jury of the vices of extreme state-sponsored social control. The officers’ force was excessive, the theory might go; and if we allow it, we will be ceding an unacceptably dangerous amount of power to the state. Within this frame story, Bernard Marx would provide a model for telling Briseno’s sub-story in particular, for explaining his seemingly contradictory behavior on the night of the beating.

### 1. *The Technocracy*

After painting the overall picture of Utopia as an engineered society, a programmed, well-run machine in which individuality and deviance from the tightly-structured norm are allowed no place, Huxley begins to question the wisdom of such social stability when it is purchased at the double cost of oppressing particular, ill-fitting individuals and denying members of the general public the power to think and act for themselves. White might have taken the same tack by acknowledging that most, if not all, of the jurors would enter the trial accepting the premise that the police are an integral and positive component of society, indispensable to the maintenance of social stability. He then might have questioned whether this premise calls for ceding to the police force an unbounded power to use brute force upon defenseless individuals whenever police officers conclude that that course is a necessary means to stability. In seeking the conviction and punishment of all four officers, White could begin by depicting the dangerous paradox of an out-of-control police force within the larger context of a society concerned with controlling crime. *Brave New World* could serve as a parable not only to illustrate the ultimately destructive physical and moral implications of a such a rogue

police force but also to point up the connection between those frightening implications, the defendants' specific actions on the night they beat Rodney King, and the defendants' trial strategy for justifying the beating.

In Huxley's novel, technology plays a central role in fortifying an authoritarian regime. Utopia is a scientifically-engineered society that relies on virtual drones to keep it functional. The manufacturing of single-purpose humans and their further regimentation through the use of electric shock conditioning ensures that each person will unquestioningly fulfill his or her role in society. This technocracy is what makes the suppression of the "other" – the dark-skinned Savages – and social stability possible. It is eerily similar to the increasing use of technology by the police for the purpose of effectuating social control. The tasers, the batons and baton maneuvers, the "swarm" tactic, and the number of officers called in to subdue one defiant individual are all emblematic of the extent to which the police are rapidly approaching Utopia's extreme of technocratic control in the service of a well-ordered society.

As an element of its program for preserving social order, the Utopian State provides an anesthetic drug, soma, for productive citizens so that they can live in ignorant bliss, using the drug whenever they find themselves confronted with the horror of imperfection. More progressive members of the dominant society may go on vacation to visit the Savage reservations, but they do not venture there without their soma on hand to dull the pain of witnessing poverty, filth, and defiance. Through its manipulation of technology – the video and its systematic deconstruction into stills; the charts showing the LAPD's taxonomy of authorized uses of force – the defense team in the *Rodney King* trial metaphorically dispensed soma in the courtroom so that the jury would not have to suffer the painful reality of the violence mustered by the state to control deviance. By remaking the video frame by frame and "educating" the jury about the "approved" levels of force to be used in programs of "escalation" and "de-escalation," the defense team was seeking to convince the jury that the brutality used on Mr. King was an acceptable, even necessary component of social control. The defense was assuming that the jury, like the soma-users in *Brave New World*, would be amenable to taking the path of least resistance – that, if sufficient soma were made available as a means of denying that we live in a society where police officers beat defenseless citizens, the jury would be inclined to take it. White could have commented on the insult to the jurors that is implicit in this defense assumption and cautioned them about the danger of taking the drug that the defense was offering.

Inhabitants of Huxley's *Brave New World* become unhappy and incapable of functioning when the soma wears off because it is difficult to face the realities of that world. It is similarly difficult for citizens who rely on the police for protection to face the reality that police officers can be brutal, oppressive, corrupted by bigotry and the seduction of power. For, if we cannot trust the police, who, then, will hold society together? But the comfort of soma must be exposed for the artifice and the lure that it is. Soma is no cure-all but, like any drug, is part of the disease. Put it aside and we can see that it is the source of an illusion which magnifies the Savages into menacing figures in order to conceal the real menace lurking in a society that has given its police officers unrestrained power to brutalize citizens. In asking the jurors to put soma aside, White could have drawn their attention to the savage-like image of King that the defense had conjured up as an excuse for beating him bloody. White could then have asked the jurors: Do you want to be conditioned into believing that this kind of force is actually necessary to preserve law and order? How can you let them brainwash you this way?

## 2. *Briseno*

To obtain convictions of all four officers, White needed to find a way to explain the behavior of one of its members who was not entirely complicit in the evil intentions of the others but who participated in their actions sufficiently to be responsible for the part he played. Huxley's novel is rich with characters who fall at various points along the spectrum of conformity and hence of complicity in evil. One in particular, Bernard Marx, fails to challenge Utopia's authoritarian rule, though recognizing its faults. It is Marx who most resembles Officer Briseno.

Two other characters in the novel occupy positions that illuminate Marx's – John (a Savage) and Mustapha Mond (a senior member of the Utopian State). These two have a discussion in which Mond reveals how he, a thinking, feeling, member of the power structure, can continue to play his part in it although he is aware of its evils. When John is brought to Utopia from the reservation, he is struck by the lunacy of it all. Children are conditioned not to read, not to enjoy art or religion, not to be emotionally touched by death. John much prefers his world, full of poverty and filth as it is, because it is not sterile and devoid of feeling and meaning. Mond understands the problems John sees in Utopia's system of social control and has nevertheless chosen to be a part of it. He is not an unthinking follower, like most Utopians – he appreciates the benefit of high art – yet, he is more interested in a society in which everyone can be stable and con-

tent than one in which unhappiness and unpredictability exist. Mond recognizes that the science of Utopia is just a “cookery book, with an orthodox theory of cooking that nobody’s allowed to question, and a list of recipes that musn’t be added to except by special permission from the head cook.”<sup>613</sup> He was on the verge of being sent into exile in his younger days because he began to experiment with “recipes,” but then chose stability and happiness over inquisitiveness and creativity.

Somewhere in between these two thinking characters lies Bernard Marx. He is a questioning tool of the state, though one who is ultimately self-motivated. He takes an interest in John and brings him from the reservation to Utopia so that others may learn from and study him. When confronted with a choice between alliance with a Savage and allegiance to the State, however, Bernard yields to the power of the State, as the following scene demonstrates:

John visits his mother in the hospital and is outraged by callous treatment that he and his mother receive. Seeing children brought in to ogle the dying woman as part of their state-mandated desensitization to death particularly enrages him. John erupts, trying to shake the workers from their ignorant bliss, to force them to see that they are slaves to the State. He throws boxes of soma tablets out the window, shouting, “I’ll teach you; I’ll *make* you be free whether you want to or not.”<sup>614</sup> Bernard looks on in horrified disbelief, knowing that the workers will mob the Savage and tear him apart, knowing that John is inviting certain destruction.

Bernard is facing a dilemma distinctly similar to Briseno’s. Will he step forward and protect one defiant individual against the doom that awaits anyone who persists in challenging the power of the state? As Bernard wavers between abandoning John and daring to intervene, another improbable rebel joins the Savage in fronting the mob and throwing soma out the window by handfuls. Huxley captures Bernard’s predicament and response to this dreadful situation:

Hesitant on the fringes of battle, “They’re done for,” said Bernard and, urged by a sudden impulse, ran forward to help them; then thought better of it and halted; then, ashamed, stepped forward again; then again thought better of it, and was standing in an agony of humiliated indecision — thinking that *they* might be killed if he didn’t help them, and that *he* might be killed if he did — when . . . , goggle-eyed and swine-snouted in their gas-masks, in ran the police.

Bernard dashed to meet them. He waved his arms; and it was

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<sup>613</sup> HUXLEY at 232.

<sup>614</sup> HUXLEY at 219.

action, he was doing something. He shouted, “Help!” several times, more and more loudly so as to give himself the illusion of helping. “Help! *Help!* HELP!”<sup>615</sup>

Bernard wants to protect John from annihilation by the mob but cannot bring himself to intervene and risk being identified with John and mobbed himself. Paralyzed by indecision, in the end he chooses the easy way out: he can appear to be helping both sides by calling for help from the police. The police will quell the mob. Of course, they will stifle John as well. Still, Bernard can simultaneously scramble to safety and salve his conscience in the “illusion of helping.”

Briseno may have responded similarly. As a police officer, he is inextricably tied to his fellow officers in the necessary work of preserving order and stability. Rodney King represents a threat to order and stability, yet Briseno is able to see that his fellow officers are overreacting and that King does not deserve the terrible beating they are giving him. Does he step forward to protect this defiant individual, risking identification with that defiance? Ultimately, he seeks safety in self-delusion, stomping King and justifying the stomp as an attempt to *help* King. Then, at trial, he again takes the course that offers him maximum self-protection, disassociating himself from his fellows’ manifestly criminal conduct but simultaneously telling himself that he is trying to help them by claiming that they must have seen something he did not.<sup>616</sup>

### C. *Theodore Briseno as One of Browning’s “Ordinary Men”*

Still another narrative that White might have drawn upon to explain the seemingly contradictory behavior of Briseno is one that has recurred in explanations of how the hideous atrocities of Nazi Germany came to be perpetrated, at least in part, by individuals whom Holocaust scholar Christopher Browning describes as “ordinary men.”<sup>617</sup> In his seminal work, Browning focuses on the members of one German Police Battalion – Battalion 101 – stationed in Poland during World War II. Most of the men recruited for Battalion 101 came from a characteristically anti-Nazi social class and a city that was one of the “least Nazified cities in Germany.”<sup>618</sup> In fact, the vast majority of the members of the battalion “had no affiliation whatsoever

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<sup>615</sup> HUXLEY at 220.

<sup>616</sup> While Bernard does not actively assist the swine-snouted police in subduing John, his beckoning to them for help accomplishes the same goal as Briseno’s stomp – falsely signaling to them that Bernard is on their side.

<sup>617</sup> CHRISTOPHER BROWNING, *ORDINARY MEN: RESERVE BATTALION 101 AND THE FINAL SOLUTION IN POLAND* (Harper Collins ed. 1992) [hereafter, “BROWNING”].

<sup>618</sup> *Id.* at 48.

with the major Nazi institutions.”<sup>619</sup> They joined the force believing that their job, like the job of police in the United States, was to protect the innocent. Yet the vast majority of these men eventually became ruthless killers.

Again, our goal here is to suggest analogies, not equations. As a narrative framework that might have assisted the prosecution to think through possible solutions to the Briseno Dilemma, an analogy to the “ordinary men” of Battalion 101 opens another way to tell stories about the *degrees* of good and evil, the *degrees* of integrity and perversion of judgment, that account for a range of violent human conduct. While there may be strategic or legal reasons why the prosecution would choose not to employ one or another specific story line,<sup>620</sup> White was unlikely to be able to *both* benefit from Briseno’s testimony *and* secure his conviction without asking and aiding the jury to contemplate varying degrees of culpability of human behavior.<sup>621</sup>

In his essay “The Grey Zone,”<sup>622</sup> Primo Levi explains that along a spectrum of moral culpability, most people do not occupy the outer fringes (that is, they are not clearly villains or clearly victims) but,

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<sup>619</sup> DANIEL JONAH GOLDHAGEN, *HITLER’S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* 208 (Vintage Books ed. 1996) [hereafter, “GOLDHAGEN”].

<sup>620</sup> A direct comparison between the officers of Battalion 101 and the LAPD officers involved in the Rodney King beating might well cause a jury to take offense at the suggestion that there is any similarity between American police officers on trial for an isolated incident of possible brutality against a criminal suspect, and Nazi soldiers who participated in the mass murder of innocent Jews. Nonetheless, the story of Battalion 101 offers potential instruction precisely *because* the behavior of its soldiers was so much more extreme than that of the LAPD officers. If many of the “ordinary,” non-party members of Battalion 101 could be convinced to round up and kill large numbers of Jews – after quickly overcoming initial hesitations about the necessity of and justifications for this work – it seems very possible to imagine that Briseno’s one act of violence against Rodney King was the result of a questioning man’s struggle between his own instincts and his desire to trust and please his supervisor and fellow officers. Certainly, a Holocaust narrative would have to be used with appropriate sensitivity to its inherently explosive nature. See the Conclusion of this chapter for an illustration of one possible way to draw upon the narrative without making an overt, potentially offensive analogy between the police officers on trial and Nazi murderers.

<sup>621</sup> Each of the alternative narratives that we suggest relies to some extent upon psychological theories of how individuals react to authority. In addition to using these theories as a guide to shape the narrative that White could have presented at trial, he might have also done well to consider presenting expert psychological testimony to support the story he was trying to tell. Would expert testimony along these lines have been helpful? Admissible? Would it have opened the door to damaging contrary expert testimony or created a no-win battle of experts? See text at notes 311 - 313 *supra*. White might reasonably have decided to forgo expert testimony after pondering these questions. But the possibility of using expert testimony to corroborate a prosecution narrative was at least a possibility worth exploring.

<sup>622</sup> PRIMO LEVI, “The Gray Zone” in *THE DROWNED AND THE SAVED* (Vintage Books ed. 1989).

rather, fall within a large gray area between the extremes. Somewhere between a genocidal killer like Hitler, who apparently never questioned the morality of his actions, and the utterly innocent, defenseless Jewish Holocaust victim there are people like the Nazi who refuses (even if only once) to kill a particularly sympathetic victim<sup>623</sup> and the police officer who believes the actions of his fellow officers to be morally wrong but who falters and commits a single act of violence in solidarity with them.<sup>624</sup> The Jewish extermination camp inmates who dig the graves of others in order to save their own lives occupy yet another position on the spectrum, their actions encompassing so many complicated external factors that a characterization of their level of culpability may be virtually impossible.

By creating a narrative that allows for a gray zone of morality, White would not have had to abandon a general prosecutive theory of the case directed against the four officers as a group. Each could be portrayed as standing at a different point along the spectrum of culpability, though all were sufficiently culpable to deserve conviction. White may have been able to place Briseno at a point in the gray zone closer to the “good” end – thus encouraging the jury to credit his testimony against the other officers, who fall elsewhere in the gray zone, closer to the “evil” end – while still insisting that Briseno’s use of force against King was sufficiently bad to be found “unreasonable,” hence illegal. White’s task, if he took this tack, would be to persuade the jury, *first*, that a gray zone exists on the spectrum of human morality, and *second*, that Briseno’s conduct fell within that zone, though it was not as morally reprehensible as the conduct of the other officers. The fact that Briseno was within the gray zone would explain, without justifying, his one moment of weakness; it would explain how, while questioning the actions of his fellows, he might still feel compelled to participate in them.

How, then, might the prosecution have presented a “gray zone” story to the jury? Examining the less zealous participants in the killing of Jews prior to and during World War II presents one potential model for a convincing narrative. Scholars have highlighted three factors as

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<sup>623</sup> On this end of the gray zone is SS Officer Muhsfeld of the Birkenau crematoria who discovered that a sixteen-year-old girl had survived a gas chamber. The officer hesitated before eventually ordering that she be killed, and then left before his orders were carried out. BROWNING at 187.

<sup>624</sup> Browning compares Muhsfeld’s “instant of pity” to another officer’s one weakness on the other end of the “gray zone”:

[E]ven Lieutenant Buchmann, the most conspicuous and outspoken critic of the battalion’s murderous actions, faltered at least once. Absent his protector, Major Trapp, and facing orders from the local Security Police in Lukow, he too led his men to the killing fields shortly before his transfer back to Hamburg.

BROWNING at 188.

playing a crucial role in the willingness of “ordinary men” to participate in brutal mass killings: an institutional authority structure with legitimacy among party and non-party members alike; the creation of a subhuman “other”; and the existence of personal risks for the ordinary men who did *not* kill, such as the risk of being viewed by peers as cowardly or weak. These three factors are arguably present in Briseno’s situation, as well, and could provide the setting for a narrative that explains his apparently inconsistent behavior.

There was no need for White to create this narrative out of thin air. In their opening arguments and direct examinations, the defense attorneys laid the foundation for a narrative predicated upon the existence of all three factors in the professional lives of the officers. At various points in the trial, each of the defense attorneys emphasized the constraints placed upon the defendants as police officers by the LAPD’s institutional structure. Through their own language, the defense attorneys worked to construct King as a member of an inferior and suspicious “Other” caste. Finally, the prevalence of peer pressure within the Los Angeles Police Department was made quite explicit by Briseno’s own testimony under cross-examination by White. White could have taken the subject further once he saw that Briseno was willing to be open about the pressure to conform that exists in the department. These three predicates, if reconfigured a bit by White, could have been used to create a narrative context in which Briseno’s actions could be comprehended – a context that would afford him understanding and a measure of credibility, but not acquittal. Such a narrative would be completely coherent with White’s theory of the case against Powell, Koon and Wind. By evoking factors like legitimate authority and peer pressure to explain Briseno’s understandable yet culpable behavior, White could place the bulk of the blame on Koon and Powell, who were in positions of power over the others, and on Wind for a willingness to blindly follow his superiors.

### 1. *A Legitimate Institutional Authority*

The presence of an authority figure having either the respect of subordinates or simply a legitimacy within the broader society due to the nature of its authority, can be extremely powerful in influencing human behavior. In his famous electric shock experiments, Stanley Milgram examined the role that the presence of authority plays in the willingness of ordinary people to inflict severe pain on innocent victims.<sup>625</sup> Milgram told the participants, who ranged in background

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<sup>625</sup> STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: THE UNIQUE EXPERIENCE THAT CHALLENGED HUMAN NATURE* (HarperPerennial Classics ed. 2004) [originally published as *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1974)] (hereafter,

from working class to professional, that the experiments were meant to explore the link between punishment and learning. A “victim” was strapped into a chair and an electrode was attached to his or her wrist in the presence of the participant. The participant was then placed in front of a fake shock generator in another room, with voltage markings indicated by both numerical level and evaluative degree (“slight shock” to “danger – severe shock”). The participant was told to ask the victim questions and administer increasing levels of shock with each wrong answer. The participant could hear the voice feedback of the victim at each shock, and the victims were instructed to express increasing indications of pain.<sup>626</sup>

Milgram found that the participants’ willingness to administer shocks varied significantly when the role of the authority figure (the experimenter) was altered. When the authority figure was in the room with the participant, ordering each successive shock, a substantial proportion of the participants (two-thirds) continued to apply the highest voltage shock on the generator even in the face of vehement pleading and cries of agony by the victims.<sup>627</sup> In spite of the fact that the experimenter had no direct authority over the participant,<sup>628</sup> most participants were hesitant to challenge the authority of the experimenter. They continued to obey even though they seemed to be exhibiting high levels of stress, even though many protested to the experimenter along the way,<sup>629</sup> and even though most claimed to be against the idea of electric shock when asked at the beginning of the experiment.<sup>630</sup>

The levels of obedience by the participants dropped significantly when the experimenter gave orders to administer the shocks by phone rather than in person. Several participants actually administered lower shocks than they were instructed to give when the experimenter was not present. In another variation, when the experimenter was present in the room, but was called away in the middle, leaving someone with no apparent authority to take over, there was also a sharp drop in the level of compliance with the directions.<sup>631</sup> Finally, when the choice was left completely to the participant (no orders were given), the vast majority of the participants delivered only the very lowest shocks on

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“MILGRAM”).

<sup>626</sup> *Id.* at 3.

<sup>627</sup> *Id.* at 22 - 23.

<sup>628</sup> The participants were being paid to participate and knew that they could leave at anytime by forfeiting the pay.

<sup>629</sup> MILGRAM at 5.

<sup>630</sup> *Id.* at 41.

<sup>631</sup> Sixteen of 20 participants did not follow the orders of the non-authority figure. *Id.* at 93, 97.

the generator.<sup>632</sup>

Milgram's experiments illustrate the powerful influence of the presence of an apparently legitimate authority figure who is part of a broader, well-accepted institutional authority – the scientific academic community, in Milgram's study – in evoking one or more acts of cruelty from otherwise "moral" individuals.<sup>633</sup> Milgram stressed that the core lesson of his study was that "ordinary people, simply doing their jobs, and without any particular hostility on their part, can become agents in a terrible destructive process."<sup>634</sup> He drew a connection between the participants in the study and the desk bureaucrat, Adolph Eichmann, who was responsible for ordering the murders of countless innocent Jews in Holocaust Germany. Milgram noted Hannah Arendt's perception in *Eichmann in Jerusalem* that it was incorrect to view Eichmann as a terrible, sadistic monster. Rather, Eichman was a bureaucrat whose actions could be understood through the lens of duty and obligation.<sup>635</sup> It was not necessarily fear of reprisal that led Eichmann to fulfill this obligation; a misguided acceptance of the hierarchy in which he operated and a desire to ascend the ranks of that hierarchy were sufficient.<sup>636</sup> "The trouble with Eichmann was precisely that so many were like him, and that the many were neither perverted nor sadistic, that they were, and still are, terrifyingly

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<sup>632</sup> MILGRAM at 70 - 72.

<sup>633</sup> *Id.* at 41. Milgram's work is complemented by the Stanford Prison Experiment ("SPE") discussed in note 610 *supra*. Whereas Milgram's research "focused on individual compliance in the face of an authority figure's increasingly extreme and unjust demands, the SPE examined the conformity pressures brought to bear on groups of people functioning within the same institutional setting." Haney & Zimbardo at 710.

<sup>634</sup> MILGRAM at 6. Holocaust scholar Daniel Goldhagen strongly disputes this claim of Milgram's and insists that while obedience to authority may be one factor in the willingness of ordinary Germans to engage in mass slaughter, deference to authority alone can not explain their actions: "[A]ll 'crimes of obedience' . . . depend upon the existence of a propitious social and political context, in which the actors deem the authority to issue commands legitimate and the commands themselves not to be a gross transgression of sacred values and the overarching moral order." GOLDHAGEN at 383. In the context of a narrative explanation for the beating of Rodney King, Goldhagen's point rings true. (White could not have expected a Simi Valley jury to be receptive to a story that assumed and taught that all human beings who operate within an authority structure – or even all police officers subject command – are potential perpetrators of a Holocaust.) We will discuss below other factors — the creation of a subhuman "Other," and a concession to peer pressure — that may contribute to explaining Briseno's contradictory behavior. Suffice it to say for now that even Goldhagen attaches some measure of importance to the appearance of a legitimate authority as the source of the gruesome orders. Before one of Battalion 101's mass killings, "[i]t needed to be made clear to the men that an order of such gravity came from the highest of authorities and was therefore consecrated by the state and Hitler." GOLDHAGEN at 212.

<sup>635</sup> MILGRAM at 5 - 6, referring to HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (Viking Press 1963).

<sup>636</sup> HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 33 - 34 (Penguin Books ed. 1963).

normal.”<sup>637</sup>

The men in Battalion 101 were “ordinary” police officers apparently motivated to kill hundreds of innocent Jews by (at least in part) their unquestioning belief in the authority of their superiors. As Goldhagen quotes one officer:

[I]t did not at all occur to me that these orders [to kill Jews] could be unjust. . . . The thought that one should disobey or evade the order to participate in the extermination of the Jews did not therefore enter my mind at all.<sup>638</sup>

The assumption for him was that the higher the rank of the authority figure giving the order, the more credible and justified the assignment. As Browning points out, although many of the men supposedly expressed doubt about the orders to kill, “a mere dozen out of nearly 500” actually opted out of the killing.<sup>639</sup>

To a certain extent, then, Briseno’s participation in the beating despite his initial disgust may be attributable to the LAPD’s own hierarchy and Briseno’s deference to the authority of his superiors. Perhaps Briseno first acted on instinct, trying to stop Powell from striking King. Then, as the use of force by the other officers continued and increased, Briseno looked to Koon for guidance. Getting none, Briseno acquiesced and joined in the beating. This would be consistent with Briseno’s somewhat blind deference to authority later, when, despite his outrage at the beating, he did not report the incident, leaving it to Koon to do so.<sup>640</sup> On the stand, Briseno tried to excuse Koon’s behavior by allowing for the fact that Koon may not have seen the force as excessive:

WHITE: Well, Sergeant Koon was the supervisor; isn’t that correct?

BRISENO: Yes.

WHITE: He was at the scene supervising the officers?

BRISENO: Yes.

WHITE: It was his job to stop any excessive use of force, wasn’t it?

BRISENO: If he had observed that, yes.<sup>641</sup>

This trust in institutional authority and its hierarchy is also consistent with Briseno’s unwillingness to indict his fellow officers at trial, even while claiming that he did not think their behavior was justified. Briseno testified over and over again that he did not see what the

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<sup>637</sup> *Id.* at 287.

<sup>638</sup> GOLDHAGEN at 179, quoting Kurt Möbius, former police battalion member who served in Chelmno, testifying on November 8, 1961.

<sup>639</sup> BROWNING at 71.

<sup>640</sup> See text accompanying notes 535 - 537, 564 - 566 *supra*.

<sup>641</sup> Tr. vol. 65, 11015/8 - 16 (April 3, 1992).

other officers must have seen and that he could say only that the force used was not justified *from his vantage point*. He continued to searched for some sign that would justify the beating, but found none.<sup>642</sup> On cross-examination, Briseno maintained that *according to him*, the officers' force seemed unreasonable.<sup>643</sup> Throughout his testimony, he was unwilling to say that the beating was, *objectively speaking*, unjustified – it was just that he himself could see no reason for it.<sup>644</sup> He placed trust not in what he actually saw, but in what a group of law enforcement officers did under the supervision of their superior officer. Thus, like the behavior of the participants in Milgram's study and of Browning's "ordinary" police officers, Briseno's behavior was prescribed to some extent by the presence of authority figures whose words and actions sanctioned the infliction of pain upon another human being. A prosecution story stressing that the presence of an institutional authority can in some way explain Briseno's behavior – though it cannot excuse it – would have had the added advantage of increasing Koon's responsibility as well, since Koon *was* that authority figure.

The defense attorneys reinforced the notion of authority for their own reasons – Powell's and Wind's attorneys, primarily to emphasize the chain of command and place blame anywhere but on their clients; Koon's attorney, to legitimize Koon's choice to allow extensive, heavy use of force against King on the ground of Koon's extensive experience and heavy responsibilities. While the purpose of a story with a strong emphasis on LAPD authority would have been different for the prosecution, White might have capitalized on this help from the defense if he chose to make a point of the impact of the department's rigid regimentation upon those within its ranks. Koon's attorney, in his opening statement, touched on the institutional authority structure of the LAPD:

[O]n the Los Angeles Police Department the highest ranking officer that you will normally see on the street is a sergeant. Lieutenants and captains are inside . . . . ¶ The sergeant is there and by his mere title, by his presence, he is in command of his officers, and we will not dispute that . . . . ¶ And because he is a supervisor he oversees what his officers do, and that is exactly what he [Sergeant Koon] was doing on March 3rd of 1991.<sup>645</sup>

Mounger further strengthened Koon's authoritative legitimacy in the following statements:

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<sup>642</sup> See text accompanying notes 528, 534, 543 - 545 *supra*.

<sup>643</sup> See text accompanying note 558 *supra*.

<sup>644</sup> See *id.*

<sup>645</sup> Tr. vol. 44, 5279/11 - 20 (March 5, 1992).

Now, you are going to hear testimony that Sergeant Koon has been a police officer for 14 and a half years and you can draw the inference from that that he has had a lot of experience. Except for five months in the police academy and one year when he was a supervisor at the jail division, the remainder of his 13 – over 13 years has been on the street, serving the citizens and dealing with the public.<sup>646</sup>

With 14 and a half years, ladies and gentlemen, the testimony will reveal that he has more time as a police officer than all these other defendants combined. He is experienced and he is in charge of his officers.<sup>647</sup>

Stone painted the same picture in his opening for Powell, stressing not only Koon's position of authority as a supervisor but the training that the officers receive from an even higher authority – those who oversee the entire police force and create its rules and regulations:

At that point Sergeant Koon had arrived, surveyed the situation and directed the four officers that he had there into the swarm position, as it is described, to take Mr. King into custody . . . ¶ Now, when those four officers approached Mr. King, they all went for one of the limbs, either the left hand or the right hand, one of the legs, while Sergeant Koon, armed with a taser, instructed them and directed them and he told them, 'If he starts to fight, back off,' because, you see, the training that these officers receive and you will hear about, is that they don't tie up with resistant suspects.<sup>648</sup>

The officers' perceptions are based on their experience and their knowledge and their training and their observations.<sup>649</sup>

The hierarchical nature of the police force – and of the group of defendants – was emphasized again and again by the defense attorneys, so that the jury slowly learned the rules of the structure and the responsibilities of each individual. The defense attorneys sought to lend legitimacy to the actions of the officers by emphasizing the extent to which they were acting under the authority of an institutional and conceptual structure infused into the officers' training, their manuals, and their protocol.

White could have tapped into this institutional-legitimacy theme to explain Briseno's slow conversion from one who took what he saw at face value (King was being beaten unjustifiably), to one who joined in the beating because his supervisor seemed convinced that the beating was necessary and proper, even though Briseno himself still saw

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<sup>646</sup> *Id.* at 5278/11 - 19.

<sup>647</sup> *Id.* at 5278/25 - 5279/1.

<sup>648</sup> *Id.* at 5303/14 - 27.

<sup>649</sup> *Id.* at 5326/6 - 8.

no need for it. He may or may not have feared adverse consequences for his career if he did not join in; but, in any event, he believed in the institution of which he was a part: he believed that his supervisor had the authority to tell him what to do; he accepted that his supervisor had more knowledge, more training and more experience than Briseno and was more likely to be “right.”

## 2. *The Creation of an “Other”*

Common to the experience of Battalion 101 and that of the white police officers who beat Rodney King was the creation of an “Other” to justify their behavior. In Nazi Poland, the “Other” was the Jews, and, to a lesser extent, homosexuals; in the United States, it has historically been African-Americans. Integral to Battalion 101’s belief in the legitimacy of its orders to kill was the acceptance of the notion that the Jews and homosexuals were not innocent, and further, that their suppression was a necessary part of protecting the innocent. As one officer explained:

It is true that I know that it is also the duty of the police to protect the innocent, but I was then of the conviction that the Jews were not innocent but guilty . . . I believed the propaganda that all Jews were criminals and subhumans and that they were the cause of Germany’s decline after the First World War.<sup>650</sup>

Browning argues that most of these men were probably not zealous anti-Semites themselves, but they “at least accepted the assimilation of the Jews into the image of the enemy.”<sup>651</sup>

Daniel Goldhagen, on the other hand, argues that it was in fact deep-seated anti-Semitism that allowed the ordinary Germans of Battalion 101 to commit mass murder; this is the central thesis of his book. Goldhagen asks us to “consider how intense the psychological pressure not to slaughter [the Jews] would have been had these men indeed been opposed to the slaughter, had they indeed not seen the Jews as deserving this fate.”<sup>652</sup> Working with essentially the same data as Browning, Goldhagen contends that Browning exaggerates the extent to which the members of Battalion 101 were conflicted about their roles as killers and that Browning underestimates the pleasure they took in the killing.<sup>653</sup>

For our purposes, and for the purposes of a litigator like White who might have thought to use the story of Battalion 101 as a narrative device at trial, it is not necessary to resolve the dispute between

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<sup>650</sup> GOLDHAGEN at 179.

<sup>651</sup> BROWNING at 73.

<sup>652</sup> GOLDHAGEN at 215.

<sup>653</sup> For Goldhagen’s most strident critique of Browning, see GOLDHAGEN at 546 n.1.

Browning and Goldhagen. As with *1984*, where White might have chosen to incorporate aspects of Orwell's narrative without adopting the whole of it,<sup>654</sup> White here would have been free to take the portions of Browning's and Goldhagen's story lines that best suited his aims and to discard the rest. It seems that an interpretation along the lines of Browning's – that the officers were inclined to believe that the Jews deserved what they got, but that they were nonetheless uncomfortable killers – would probably have been more useful to White in making an analogy to Briseno, in that White would have been attempting to reconcile what appears to be Briseno's legitimate disgust with the beating and his subsequent participation in it. While any analogy to the Nazis would not have been an easy one to convince the jury to draw, there were points of similarity that could have proven useful to a creative litigator. In particular, there were at least three characteristics of Rodney King and the situation in which the police defendants encountered him that would lead them to perceive and treat him as "Other."

First, King appeared to be a criminal, defying and resisting apprehension. Though Briseno had no information about any crime or crimes that King may have committed other than speeding, the desperate quality of his flight from the California Highway Patrol may well have led Briseno to assume that he was guilty of more serious offenses. He was, in any event, a perpetrator; and the job of the police was to place him in custody.<sup>655</sup>

Second, King was African-American. Just as certain groups have been stereotypically associated with various *types* of criminality (Italian-Americans with organized crime, for instance), African-Americans have never been free from the stigma of criminality generally.<sup>656</sup> Professor Randall Kennedy notes that slavery in the United States was often justified on the ground of the asserted tendency of blacks to engage in crime;<sup>657</sup> this stigma has been used throughout history to

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<sup>654</sup> See note 600 and accompanying text *supra*; text following note 611 *supra*.

<sup>655</sup> And see note 299 *supra*, discussing Koon's description of Rodney King as "buffed out," implying he'd been in prison.

<sup>656</sup> Regarding the prevalence of the stereotype in the early '90's, see notes 130 - 156 *supra* and accompanying text.

<sup>657</sup> RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 13 (Pantheon Books 1997) [hereafter, "KENNEDY"]. For suggestions that racial discrimination in capital sentencing and the continuing popularity of capital punishment in the American South are contemporary descendants of the institution of lynching African-Americans suspected of having committed crimes against whites, see David Jacobs, Jason T. Carmichael & Stephanie L. Kent, *Vigilantism, Current Racial Threat, and Death Sentences*, 70 *AMER. SOCIOLOGICAL REV.* 656 (2005), and FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* (2003).

defend lynching as a means of disciplining rogue blacks.<sup>658</sup> There existed a double standard for whites and for free blacks who committed crimes in the antebellum period: several states castrated blacks convicted for raping white women, while whites convicted of the same offense were merely imprisoned.<sup>659</sup> This discrimination, of course continued with the advent of the Black Codes. Today, African-Americans see that they are still disproportionately likely to suffer violence at the hands of law enforcement officers who suspect them of wrongdoing.<sup>660</sup> The white LAPD-officer defendants were acting in a long, pervasive national and local tradition in violently assaulting an African-American whom they could perceive as disobedient and threatening.<sup>661</sup>

Finally, the officers themselves asserted that they believed King to be under the influence of PCP, a drug that they understood would render him abnormally immune to pain and endow him with superhuman strength. The image of King as a dreaded “duster” serve to dehumanize him further.<sup>662</sup>

Once again, the defense attorneys themselves gave the prosecution abundant material to support a story featuring the “Otherization” of Rodney King. They portrayed him as a menacing animal, invoking his race implicitly but not the least bit subtly.<sup>663</sup> This obvious pitch might have been treated by White as based upon the insulting premise that the jurors shared the defendants’ bigoted perspectives<sup>664</sup> and as revealing the extent to which the defendants’ initially legitimate grounds for viewing King as a law violator and perhaps even for suspecting him of being a duster were warped and swollen out of all proportion by race-based fantasies.

For example, Mounger’s opening statement on behalf of Sergeant

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<sup>658</sup> KENNEDY at 13.

<sup>659</sup> Ursula Bentle, *Race and Capital Punishment in the United States and South Africa*, 19 BROOKLYN J. INT’L. LAW 235, 254 (1993).

<sup>660</sup> See, e.g., the articles by Jerome McCristal Culp, Jr., by Abraham L. Davis, and by David Dante Troutt and the essays in the volume edited by Robert Gooding-Williams collected and cited in note 5 *supra*; Ted Rohrlich, “The Times Poll: Majority Says Police Brutality is Common,” *Los Angeles Times*, March 10, 1991, p. A1. In the wake of an incident in the Bronx in which four police officers killed Amadou Diallo, an unarmed black immigrant from West Africa, by a fusillade of 41 shots in the entryway of his apartment complex, numerous African-Americans came forward to tell what seemed to be a universal story – that they had been stopped, questioned and searched by police officers more than once simply because they were black. See, e.g., Jodi Wilgoren & Ginger Thompson, “After Shooting, an Eroding Trust in the Police,” *New York Times*, February 19, 1999, p. A1.

<sup>661</sup> See notes 124 and 660 *supra* and the references collected there; notes 197 - 200 and accompanying text.

<sup>662</sup> See notes 111 - 112, 249, 342, 434 *supra* and the references collected there.

<sup>663</sup> See notes 149, 458 *supra* and the references collected there.

<sup>664</sup> The jury consisted of ten white jurors, one Asian-American and one Hispanic. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. LAW. REV. 867, 897 n.159 (1994).

Koon evoked a transparent image of Mr. King as “King Kong”:

But rather than causing Rodney King to fall down, you are going to hear that Rodney King rose up to his feet and groaned, ‘Ahh, Ahh’ and started advancing toward Koon, and Koon ordered him again, ‘Get down, get down,’ but Rodney King kept coming.<sup>665</sup>

Stone’s opening for Powell built on the image:

And Officer Powell went up, grabbed his wrist and tried to move it back to a handcuffing position, and King began to laugh and suddenly he went into a push up position and with the full body weight of Officer Powell [193 lbs.] on his back he pushed up and Powell rolled off and all of the officers scrambled away.<sup>666</sup>

Stone later used an officer’s own words to convey the image quite literally:

But her husband, Timothy Singer, what did he say? He wasn’t even involved in this and he said, “I was scared. This was like something out of a monster movie. This man, Rodney King, got up, and I could see the – the muscles in his face convulsing from the electricity and it was like right out of a monster movie.”<sup>667</sup>

These depictions of a monstrous beast out of control morphed readily into a zombie figure as soon as fears of PCP were added. As Mounger stated in his opening:

You are going to hear that Rodney King displayed the objective symptoms of being under the influence of something, and Sergeant Koon will tell you, “I knew he was under the influence of something. I saw a blank stare in his face. I saw watery eyes. I saw perspiration. I saw that he swayed. I saw that he was slow to follow the command of the officers. I saw him looking through me.”<sup>668</sup>

Stone also invoked the image:

Did King respond? Not really. He continued to pat the ground and make strange noises. Mr. King chose to do that.

Now, at that point every officer at the scene concluded, we got a duster on our hands and there is no doubt about that. There is no doubt about that. Their perception was this guy is under the influence of PCP, and oh, boy, look at how big he is. We have got problems.<sup>669</sup>

Both Stone and De Pasquale ended with powerful references to the duty and bravery of the officers, preserving the important distinction between them and the criminal:

These officers, these defendants, do not get paid to lose street fights.

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<sup>665</sup> Tr. vol. 44, 5289/7 - 12 (March 5, 1992).

<sup>666</sup> *Id.* at 5304/8 - 14.

<sup>667</sup> Tr. vol. 76, 13655/3 - 9 (April 21, 1992).

<sup>668</sup> Tr. vol. 44, 5282/17 - 25 (March 5, 1992).

<sup>669</sup> Tr. vol. 76, 13650/3 - 11 (April 21, 1992).

They don't get paid to roll around in the dirt with the likes of Rodney Glenn King. That is not their job. That is not their duty.<sup>670</sup>

The job that these law enforcement officers, these cops, are hired to perform and the job they perform is to constitute a line between the uncontrolled chaotic behavior of a person who drives wildly, who conducts himself wildly without thought for his own or other people's safety. That is a job that falls to these police officers, the line between chaos and society.<sup>671</sup>

The defense thus parlayed its picture of King as a soulless spawn-of-chaos with a claim of the legitimate authority of the police to define for themselves the kind and degree of force that they are permitted to use to put down such spawn. The overt conclusion of this line of argument was that the defendants were reasonable in their scrupulous adherence to the LAPD's rules regarding the escalation and de-escalation of force in dealing with the danger King appeared to present. The subtext was that the jury could not afford to deny Simi Valley the police protection that it needed against the ever-to-be-feared incursion of crime, drugs, and their black carriers from L.A.<sup>672</sup> But, however persuasive the defense story may have been to the jurors when unopposed by a counter-story combining the same elements in a different plot, the point to note is that the defense story *did* hand White, ready-mixed, two ingredients of a counter-story that cast Briseno in the role of one of the "ordinary men" of Browning's Battalion 101.

Briseno's deference to the authority of his supervisors, together with the presence of an "Other" on the scene, offers an altogether plausible non-exonerating explanation of Briseno's evolving response to the incident. Operating more or less on human instinct at the outset, he attempted to protect King from Powell's blows. But as the beating continued, the assent of his supervisor and his perception of the otherness of the thing being beaten – subhuman, expendable, threatening – allowed Briseno to justify the assault and even to participate in it. The other officers were swept up earlier, more completely, less questioningly, in their perceptions of King as subhuman.

### 3. *Peer Pressure*

A third factor common to Battalion 101 and Briseno was peer pressure. The members of the battalion were rarely, if ever, *forced* to commit the atrocities that many of them committed.<sup>673</sup> Some re-

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<sup>670</sup> *Id.* at 13617/3 - 7.

<sup>671</sup> Tr. vol. 77, 13828/20 - 27 (April 22, 1992).

<sup>672</sup> See note 91 *supra* and accompanying text; note 204 *supra*.

<sup>673</sup> See GOLDHAGEN at 555 - 56 n.98.

requested transfers and received them. Those who did refuse to kill Jews and asked to be given other duties had their requests granted, with little or no evidence of adverse professional consequences.<sup>674</sup> The opportunity did exist to opt out of the killings, but few took advantage of it.<sup>675</sup> Why did only twelve men of the 500-strong battalion choose to opt out when given the opportunity prior to a mass killing at Jozefow?<sup>676</sup> According to Browning, many of the police officers cited a desire to be respected by their fellow officers and to avoid being viewed as weak or cowardly. One officer testified that eventually his peers began to notice his absence at the killings:

It could not be avoided that one or another of my comrades noticed that I was not going to the executions to fire away at the victims. They showered me with remarks such as “shithead” and “weakling” to express their disgust. But I suffered no [professional] consequences for my actions.<sup>677</sup>

The men did not want to stick out.<sup>678</sup> “As important as the lack of time for reflection [in the decision of most members of the battalion to participate in the killings] was the pressure for conformity – the basic identification of men in uniform with their comrades and the strong urge not to separate themselves from the group by stepping out.”<sup>679</sup> “Who would have ‘dared,’ one policeman declared emphatically, to ‘lose face’ before the assembled troops.”<sup>680</sup> According to Browning, the men were extremely angry and ashamed after the particularly brutal massacre at Jozefow; they refused to talk about it with those who did not participate.<sup>681</sup> Yet, in spite of the difficulty they all

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<sup>674</sup> See BROWNING at 56 - 57.

<sup>675</sup> See GOLDHAGEN at 253 - 55; BROWNING at 71.

<sup>676</sup> Again, Goldhagen’s primary answer to this question is that very few of the officers had qualms about participating in the killings in the first place.

<sup>677</sup> BROWNING at 66.

<sup>678</sup> A more recent example of this sentiment is found in the anonymous testimony of a New York City police officer explaining why officers who object to their fellows’ abusive behavior do nothing to stop it: “‘You don’t want to be branded a rat. . . . If you were to challenge somebody for something that was going on, they would say: ‘Listen, if the supervisor isn’t saying anything, what the hell are you interjecting for? What are you, a rat?’ . . . You gotta work with a lot of these guys. . . . You go on a gun job, the next thing you know you got nobody following you up the stairs.’” Bob Herbert, “A Cop’s View,” *New York Times*, March 15, 1998, p. 17.

<sup>679</sup> BROWNING at 71.

<sup>680</sup> BROWNING at 72.

<sup>681</sup> BROWNING at 76. Compare Briseno’s testimony regarding his outrage after the beating of Mr. King, text at notes 549 - 551 *supra*. Goldhagen, however, cautions that Browning’s description of the officers as outraged ought to be taken with a grain of salt: “[T]he men’s postwar self-reporting of their own afflictions should be viewed with some circumspection . . . [I]t is hard to believe that the reaction was born from anything but the shock and gruesomeness of the moment, as their soon-thereafter-renewed, assiduous efforts in mass slaughter indicate.” GOLDHAGEN at 221 - 222.

experienced, “few went beyond complaining to extricate themselves” from the possibility of having to commit such atrocities again.<sup>682</sup>

Similarly, in Milgram’s shock study, the involvement of peers, in addition to an authority figure, made a great difference in the levels of shock that the participants were willing to administer. If the participant was part of a peer group that resisted orders and refused to administer the shocks, ninety percent of the participants would desist as well.<sup>683</sup> If, on the other hand, two collaborators inflicted escalating levels of shock before the participant, the participant was much more likely to do the same.<sup>684</sup>

In the same way, Briseno could have been depicted as torn between a desire to help King and a need to prove himself, to avoid being ostracized by his peers. Police conformity brought on by peer pressure has been well-documented, and White managed to tap into the idea to some extent when questioning Briseno about the “code of silence,” but White did not attempt to use it to explain Briseno’s participation in what White was arguing was excessive force. (White used the code of silence only to highlight Briseno’s failure to report the incident. And Briseno was not charged with any offense based upon this failure.) White could have followed up his code-of-silence examination with additional questioning about peer pressure and its effects on the members of the force. Once he saw that Briseno was willing to be honest about the existence of the code, White could then have attempted to get Briseno to go along with a broader suggestion about the strength of peer pressure. Whether or not Briseno would go as far as to admit that he succumbed to peer pressure does not matter. What matters is that the suggestion would be before the jury.

Karen Frewin and Keith Tuffin discuss what they term “police culture,” in their article focusing on conformity within police departments.<sup>685</sup> Through conversations with eight police officers,<sup>686</sup> the authors illustrate the strength of peer pressure on the behavior of the officers:

Peers are talked about as having intimate knowledge of one’s policing activities: ‘everyone knows the stupid things that you’ve done

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<sup>682</sup> BROWNING at 76.

<sup>683</sup> MILGRAM at 116 - 18.

<sup>684</sup> Stanley Milgram, *Group Pressure and Action Against a Person*, 69 J. ABNORMAL & SOCIAL PSYCH., No.2, p. 137 (1964).

<sup>685</sup> Karen Frewin and Keith Tuffin, *Police Status, Conformity and Internal Pressure: A Discursive Analysis of Police Culture*, 9 DISCOURSE & SOCIETY 173 (1998) [hereafter, “Frewin & Tuffin”].

<sup>686</sup> The officers varied in seniority, came from a variety of policing backgrounds, and included six men and two women. Officers attended interviews voluntarily.

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[‘]. . . [P]eople that have got a more liberal attitude to the homosexuality can’t stand up for people that come out . . . and to be honest I wouldn’t be prepared to make a stand[,] ah[,] because of the effect that it might have on my position in the department . . . .[’]<sup>688</sup>

The consequences of failing to conform range from mockery and rumor to much more serious results:

[‘]It could come from anywhere[,] yeah[,] it could be done on a supervisory role[,] it could be done from your peers[,] they could just make life so unpleasant[,] like they wouldn’t talk to you or they don’t respond to your call[;] you’re out there[,] you stop a vehicle[,] you go to an incident and you get hit[,] you get attacked[,] you call for a backup[,] and most calls for backup everyone goes the stops[,] come out red lights on[,] it’s make or break stuff[,] you get there as quick as you can[;] somebody else “Oh he’s been beaten up[,] I suppose we’d better go hadn’t we[.]” . . . mm . . . “I’ll just finish my cup of tea[.]” . . . right . . . you get there and he’s half dead or he is dead[;] “we tried but the traffic was heavy.”<sup>689</sup>

While Briseno may not have faced dismissal for standing by and doing nothing, he could have been subject to ridicule, anger or worse for having questioned his fellow officers, for standing up for such an unsympathetic victim as Rodney King. Had White capitalized on Briseno’s willingness to discuss the existence of peer pressure within the department, the prosecution could have woven that testimony into a story of a weak, sympathetic, yet culpable Briseno.

#### 4. *Conclusion*

Browning quotes the incredible justification offered by one member of Battalion 101 for killing children:

I made the effort, and it was possible for me, to shoot only children. It so happened that the mothers led the children by the hand. My neighbor then shot the mother and I shot the child that belonged to her, because I reasoned with myself that after all without its mother the child could not live any longer. It was supposed to be, so to speak, soothing to my conscience to release children unable to live without their mothers.<sup>690</sup>

Browning explains that the German word for “release” has the same religious connotation as the English word “save.”<sup>691</sup> Briseno’s claim that his stomp to King’s head was an effort to “save” King is perhaps

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<sup>687</sup> Frewin & Tuffin at 179.

<sup>688</sup> Frewin & Tuffin at 181.

<sup>689</sup> Frewin & Tuffin at 182.

<sup>690</sup> BROWNING at 73.

<sup>691</sup> *Id.*

as implausible as this Nazi officer's claim that shooting only children was an effort on his part to "release" them. In the same way that Goldhagen would dismiss the officer's claim as an after-the-fact fabrication designed to "self-exculpate"<sup>692</sup> and cover-up internal anti-Semitism, White would have done well to expose Briseno's justification for the stomp as self-exculpation designed to cloud his true motives for the stomp.

Briseno may well have been confronted with a real dilemma, a face-off between his own internal moral code and the structures of society that he presumably accepts to some degree – the legitimate authority of the LAPD, of Sergeant Koon as the supervising officer on the scene, and of his fellow officers; the socially constructed "Otherness" of an underclass of African-American men; the levels of peer pressure within the police force. Just as the men of Battalion 101 in Poland had difficult choices to make about compliance, even within a structure that seemed to allow for opting out of orders to commit atrocities, so, too, did Briseno, when placed in a situation where so many of his values urged him to collaborate in his comrades' brutality.

The three factors we have discussed can be seen as a web of forces that Briseno floundered in. His instincts are that he doesn't want to do what they are urging him to do, but he lacks the strength to resist them. In the end, he makes no clear choice: he tries to stop Powell from hitting King, then yells at Koon, then stomps King himself, then vents his anger and frustration on his probationary-officer sidekick, and finally fails to report the incident that has been so disturbing to him. Whether or not a jury believed that Briseno had the honest intention to protect Rodney King early on in the incident, there are lessons to be drawn from Browning's "Ordinary Men" that can persuasively explain his subsequent behavior by a story line which would accredit his testimony against the other officers but simultaneously warrant his conviction.

### III. AN ILLUSTRATIVE POSSIBLE CROSS-EXAMINATION OF BRISENO

The following is a potential line of cross-examination of Briseno that White might have drafted if he had chosen to try to develop a prosecution story based on the *1984* and *Brave New World* narratives that we have discussed. Our aim in offering it is not to specify the

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<sup>692</sup> GOLDHAGEN at 546 n.1: "[T]he unsubstantiated, self-exculpating claims of the battalion men to opposition, reluctance, and refusal, which have been rejected [in my book] for methodological reasons . . . permeate [Browning's book] and, since Browning appears to have generally accepted them uncritically, they inform and therefore substantially impair his understanding of the battalion."

precise form of each question that White should have included in such a draft, still less to dictate the exact words that he should use when actually putting questions to the witness in the give-and-take [or hide-and-peek, or dance, or fencing match, or tug-of-war] of courtroom dialogue. Our aim is, rather, to provide one example of a general line of cross that might incorporate some of our suggested narrative strategies. The following cross attempts to utilize both the *1984* and *Brave New World* narratives.

1. *Re-establish and highlight the portions of Briseno's testimony that are damaging to the other defendants.*

How long have you been a police officer with the LAPD?

You are considered a veteran, aren't you?

You've been involved in thousands of arrests over the course of your career, haven't you?

And you testified that on the night in question, the force used by the other officers was "unreasonable,"<sup>693</sup> is that correct?

You testified that they were "out of control"?

In your opinion, they were "wrong" to continue beating Rodney King, weren't they?

Their behavior that night was "improper"?

They were using "too much" force given the situation?

Ok, and you had a good view of the entire event, didn't you?

You were watching Mr. King as closely as you could, isn't that right?

You didn't see any aggressive movements by Mr. King, did you?<sup>694</sup>

You didn't see any combative movements by Mr. King, did you?

You didn't see any threatening movements by Mr. King, did you?

In fact, you initially tried to stop the beating, didn't you?

You were worried that they were going to kill Rodney King, weren't you?

And afterwards, you were angry at the other officers, right?

You thought they should be punished for what they had done?

In fact, you screamed to your probationer that they should have their "asses reamed," didn't you?

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<sup>693</sup> Words enclosed in quotations are taken from Briseno's actual direct testimony.

<sup>694</sup> This question and the next two were actually asked by White, see Tr. vol. 65, 11010/12 - 19 (April 3, 1992), and Briseno responded, "no" to each one.

2. *Establish that despite Briseno's anger at other officers, he began to doubt himself during the beating – that during the beating he thought that perhaps the other officers saw something that he did not see.*

The force used by the other officers that night was excessive, was it not?<sup>695</sup>

Well, according to what *you* saw, it looked excessive, is that fair to say?

But you can't speak for the other officers, is that right?

You testified several times on direct that on that night, you were thinking "they must see something I don't see," is that correct?

At the time, you didn't know why they continued to beat Mr. King, did you?

You didn't know what they saw that would justify this beating?

You were angry, right?

But you were also confused?

You couldn't understand why they continued to beat a man that was not moving?

You couldn't understand why Sergeant Koon was just standing there, letting it happen?

You couldn't understand why Officer Powell was ignoring your pleas to stop the beating?

You couldn't understand why Sergeant Koon was ignoring your pleas for *him* to stop the beating?

And so you thought at the time, "they must see something I don't see," is that right?

You thought perhaps you were missing something they could see that justified the beating of Mr. King, is that it?<sup>696</sup>

You thought that even though *you* couldn't see it, there had to be *something* that justified the beating?

So your thinking was that maybe they were right that the beating was justified, and you were wrong in the way you were sizing up the

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<sup>695</sup> This question is intended to elicit a quibble. In the actual cross, Briseno was predictably reluctant to grant White that the force used was "excessive." See text at note 558 *supra*.

<sup>696</sup> White can afford to make this concession because he can point to the videotape to demonstrate that Briseno was right to see no justification for the beating and wrong – *unreasonably* wrong – to imagine that the other officers were seeing some valid justification he couldn't see.

situation?

3. *Establish that Briseno allowed for the possibility that the beating was somehow justified and thus felt he should join in for fear of taking King's "side."*

You had worked with these officers before, right?

They were your buddies?

Your partners?

And you were going to have to work with them again after that night, weren't you?

Now, you said that Rodney King wasn't making any aggressive moves, right?

But he had just led the other officers on a high-speed chase, isn't that right?

You believed that he had committed a crime, didn't you?

You thought he was probably on PCP, right?

In the beginning, you testified that he didn't immediately comply with the officers' demands, right?

And the tasers didn't put him out of action, did they?

So when your fellow officers were beating this man, even though *you* didn't see anything to justify the beating, you wanted to give your partners the benefit of the doubt, didn't you?

Well, you thought they *might* be justified in the beating?

You thought *maybe* Mr. King did have a weapon, right?

After all, that wouldn't be unusual in a situation like this, would it?<sup>697</sup>

And if Mr. King *did* have a weapon, you'd look pretty silly if you tried to interfere with your fellow officers' efforts to subdue him before he could use it, wouldn't you?

If the officers *had been* justified in the beating, you didn't want to be the one *defending* Rodney King, did you?

You wanted to make sure the other officers knew that you were on

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<sup>697</sup> Again (see note 696 *supra*), here White can concede that *during the beating* Briseno may have believed that perhaps King was doing something to justify it. Such a suggestion is consistent with the jury's finding that although Briseno did not act with an "evil heart" or "evil mind," he did act unreasonably – either because his belief was not reasonable or because a belief that *perhaps* the other officers were justified in their actions did not give Briseno a reasonable ground to stomp on King when *Briseno himself* could see nothing to justify the stomp. White could point to the videotape as confirming that *in fact* Briseno was correct in seeing nothing to justify the beating or stomping.

their side, right?

That's why you stomped on Mr. King's head, isn't it?

This line of questioning does not undertake to develop the complementary idea of a paramilitary technocracy run amok. That idea would be better pursued during the cross of the defense experts,<sup>698</sup> the other defendants, or both. Nor does this line of cross tap into the story driving Marx's actions in *Brave New World*. Here is an example of how the last part of the preceding cross could be modified to mirror Marx's motivations:

4. *Establish that Briseno stomped on King in order to give the appearance of participating in the beating but without beating King as badly as the other officers were doing.*

You were horrified at the beating that was going on, right?

And you had tried to stop it, right?

But the other officers ignored you?

They weren't going to stop for anything, were they?

*They* certainly seemed to you to think the beating was justified, didn't they?

You were even worried that if you tried to protect Mr. King, the other officers would hit *you*, isn't that right?

You didn't want them to turn their anger at Mr. King onto you, did you?

You wanted to show the other officers that you were on their side, right?

But you didn't want to start beating Mr. King like the other officers were doing, did you?

So you gave Mr. King a quick stomp to the head?

That way you could appear to join in the beating without having to repeatedly hit Mr. King, isn't that right?

5. *Establish that Briseno failed to report the beating, even though he was angry at the other officers and thought they deserved punishment.*<sup>699</sup>

Immediately following the beating, you were still angry with the other

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<sup>698</sup> See draft LINE II of cross examination in the text between note 335 and note 336 *supra*.

<sup>699</sup> White delved into this area but did so in a way that implied that Briseno was not actually outraged at the beating. A more productive approach to the subject would be to

officers, weren't you?

In fact, you testified that you were yelling at your probationer that the other officers "should have their asses reamed," isn't that right?

You thought they should be punished?

But you didn't want to be the one to get them in trouble, did you?

If you had reported the incident, they would have learned sooner or later that you were the one who brought their actions to the attention of their superior officers, isn't that correct?

If they were going to get punished, you didn't want them to believe it was because of you, right?

And so, as angry as you were, you didn't report the incident, did you?

#### IV. AN ILLUSTRATIVE POSSIBLE CLOSING ARGUMENT REGARDING OFFICER BRISENO

What follows is a draft closing argument that White could have composed to deal with the Briseno Dilemma by evoking the "Ordinary Men" narrative. While not explicitly drawing an analogy between the officers on trial and the Nazis or going into Milgram's studies in any depth, this argument develops a story line that explains Briseno's behavior in a way which points to his conviction without discrediting or devaluing his testimony against the other officers:

Perhaps the most crucial testimony you have heard in this trial is that of Officer Theodore Briseno. Officer Briseno did a very courageous thing when he took the stand — he challenged the code of silence, the quiet agreement among police officers that covers up unlawful behavior when it occurs within our police departments and allows it to go unpunished. Breaking the code of silence is no small feat. Those who speak out against their fellow officers face potential ridicule and ostracism. Yet Officer Briseno sat before you and told you the truth. He told you that he thought the force used on Mr. King was unreasonable and that he saw no justification for it.

Officer Briseno had a choice — he could try to justify his own behavior by claiming that Mr. King deserved the beating he got, that Mr. King was dangerous and threatening and could not be stopped peacefully, even by a crew of more than ten police officers. Or Officer Briseno could tell you what really happened out there. He could tell you that the force used went beyond anything that was reasonable and

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use it to suggest that Briseno *was* outraged at the beating but declined to report his fellow officers for the same reason that he momentarily joined the beating himself: he didn't want to appear to be siding with King against his comrades.

that he saw absolutely nothing Mr. King did to deserve the blows he received that day. Officer Briseno chose to tell the truth, in spite of the cost to himself of his comrades' displeasure. Why? Perhaps because he knew that after you saw that videotape, you wouldn't buy anything but the truth. Or perhaps because Officer Briseno knows right from wrong, and is now trying to make up for the error of judgment that brought him here today – his stomp to Mr. King's head.

Why should you believe, though, that Officer Briseno told the truth about the unreasonable use of force by the other defendants and not about his own criminal behavior on the scene? How do we know that Officer Briseno was brave enough to indict his fellow officers, but that he lied about his own role in the beating when he told you that he was actually trying to help Mr. King by stomping on him? We know because we have the videotape, and we have our common sense. Officer Briseno's stomp was forceful, it was brutal, and it was unnecessary. If, as Officer Briseno has told you, Mr. King was unthreatening and was doing nothing to warrant the beating except moving in response to the constant barrage of blows he received, a stomp to the neck was not going to stop those blows. You've seen the video [White might show the tape of the stomp again here]. If you wanted to protect a man, is that how *you* would do it? Is that how any reasonable person would do it?

So how can Officer Briseno's behavior be explained? He sits before you today having told you that the force used on Mr. King was unreasonable, that he could not understand it, that it made him angry, that it left him frustrated and screaming. You can see from the tape that he may even have tried to stop it, first by fending off a baton swing by Officer Powell and then perhaps later when he is seen yelling at his supervisor, Sergeant Koon. And yet Officer Briseno dealt a brutal blow of his own to Mr. King. What are we to make of this inconsistent behavior?

It may be easier to understand than one thinks at first glance. We have all, at one time or another in our lives, been in a position in which we have had to make a difficult decision between right and wrong. From the child on the playground faced with a dilemma about whether to engage in teasing the class nerd so that she may be more popular herself, to the cog in the machinery of the Nazi regime who is unable to find the courage to refuse to participate in acts of horrific proportions, we all fall somewhere along a spectrum of guilt resulting from our complicity in morally questionable acts. How many of us have engaged in behavior we knew to be wrong, perhaps behavior as innocuous as speaking poorly about someone among others whom we hope to impress? Later, out of a sense of guilt, compassion, or perhaps

a different sort of peer pressure, we may then decide to reach out to that individual. Officer Briseno faced a serious, difficult dilemma. A man was being unjustifiably beaten before his very eyes by his friends and colleagues, by men who had vowed to protect the people. They were representatives of an institution that Officer Briseno respected, that he was part of, and his own supervisor refused to stop them. First Officer Briseno instinctively shielded Mr. King from Officer Powell's baton with his hand. Then, when the beating got worse, he appealed to Sergeant Koon. When this failed, Officer Briseno could not understand it. He was confused – you heard him testify again and again that he could not understand what was happening – and he began to doubt his own judgement and to become increasingly frustrated. All these other officers were going along with the beating. So he thought perhaps it *was* justified, even though he could see nothing Mr. King had done to warrant such treatment. Still, Officer Briseno, too, finally went along and made a snap judgment, in the heat of the moment, to join in what the others were doing. Perhaps he did so because he felt the pressure of his peers and did not want to have to explain to them later why he tried to stop them instead of helping them to subdue Mr. King; or perhaps he did it because he simply decided to place stock in the police department to which he belonged and its members – perhaps telling himself then, as he still insists might be the case, that they saw something, or thought they saw something, he didn't see. Or perhaps he subconsciously allowed himself to demonize Mr. King, to view Mr. King as a dangerous animal and to treat Mr. King as a dangerous animal, just as the defense has tried to do in its presentation to you in this courtroom. Mr. King had fled from the California Highway Patrol officers and driven at high speeds, and even after his car was stopped he was not prompt in submitting to arrest. Officer Briseno has dealt with hundreds of criminals and may have imputed the characteristics of a superhuman, pain-resistant “King Kong” onto Mr. King, even though he tested negative for PCP and, we now know, was not the aggressor but rather the victim in this case.

Most likely, what Officer Briseno experienced out there that night was a combination of all of these emotions, most of which we have all fallen prey to at one time or another. The problem in this case, however, is that no matter how much we may sympathize with Officer Briseno because of the situation he found himself in, no matter how much we may respect him for coming clean now and telling the truth about the force used out there by his colleagues, Officer Briseno committed a crime. He joined in the crime of using unnecessary, unreasonable, excessive force, knowing what he did was wrong. Just as we cannot consider the economic plight of a person in deciding

whether he is guilty or innocent of theft for taking someone else's property, you cannot accept Officer Briseno's excuses – even the excuses he may have given himself – for choosing to do what he knew was wrong. You cannot accede, as he acceded, to the pressures that may have been at work to overwhelm his better moral judgement. Somewhere between the child in the schoolyard and the Nazi of the Second World War, we must draw a line and say enough is enough. We do not want to live in a society that allows a person to commit a brutal and illegal act and to escape punishment for it merely because he was not alone in the act or because his motivations may not have been quite as bad as those of his co-defendants. It is within your power to draw the line, to say that what this man has done is wrong and that it cannot go unpunished. That is what needs to be said, and you will say it by returning a verdict of guilty against Officer Briseno.

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#### INCONCLUSION

#### THE EIGHT AUTHORS

“Inconclusion” is not a typo. We venture no general conclusions. We did not set out to document a thesis but to explore what we could learn by studying the performance of the lawyers at the *Rodney King* trial through analytic techniques particularly sensitive to narrative structure and rhetorical techniques. What we learned does not lend itself to summary exposition beyond saying that the trial was a rich exercise in story-telling by the defense lawyers and that the prosecutors were far less resourceful in creating narratives to convey the elements of their case to the jury. Stimulated by that contrast, we have also let our imagination play over stories that the prosecution might have told. Throughout our analyses and our imaginative work, the devil is in the details. Our readers will be the jury that ponders those details and interrogates the devil dwelling in them.

The stories told in and about the *Rodney King* trial are also stories about a surrounding culture. The academic analyses preceding ours (collected in footnote 5 *supra*) and the journalistic commentaries that recounted the trial to the general public (cited in our footnotes *passim*) are chapters in an anthology that will speak of that culture to the future. We have added our chapters, and of course others will be added as future story-tellers react with fascination and frustration to the incompleteness of the anthology. It is an inevitable incompleteness, since the stories that we tell about our cases and our culture not only record and explicate them but constitute them.