Raced Judicial Reasoning

Lawyers have uncovered and analyzed assumptions of race, gender, class, and heterosexual hierarchy underlying particular legal rules and judicial opinions and have explored the ways in which "facially neutral" rules of law operate to maintain these social hierarchies. My purpose here is to explore how race, in particular, is used as a persuasive tool—as rhetorical trope—to structure thought directed to judgment about contested matters within current legal practice.

Race-coded references function as tools of persuasion in a number of different ways. This part focuses on two: the communication of raced "information" and the creation of bonds with and among white readers. Racial codes convey information in alarmingly efficient fashion. The name "Quota Queen," applied to Lani Guinier and Norma Cantu, was read by some as very informative: it conveyed much information about Professor Guinier's and Assistant Secretary Cantu's political commitments and professional interests, information, however, that was false.[44] I call this usage "efficient" because so much information can be conveyed in just a few words.[45] It is also "effective" because the very encoding of this large amount of information both shields it from direct challenge (in order to contest each piece of information, one must first uncover it) and renders it "deniable," in the sense that the writer or his or her defenders can claim that the writer did not intend the encoded message.

At the same time, race-coded references create bonds between and among writer and readers that consist of both the security—or thrill?—of shared knowledge and the consolidation—or exhilaration?—of power displayed. In the moment at Howard Johnson's, Roberta and her two friends felt the comfort of shared knowing, unspoken, both secret and social—that she, the Other, is stupid, uncouth, degraded, not like we who belong—and the self-aggrandizement that comes from exercising the power to exclude Twyla, to hurt her in that small and visible way. So too the use of race-coded references creates bonds of inclusion and power between writer and reader.[46]

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44. Clint Bolick, *Clinton's Quota Queens*, WALL ST. J., Apr. 30, 1993, at A12; *see also* Steven Lisle Carter, *Forward* to LANI GUINIER, THE TYRANNY OF THE MAJORITY at xviii-xix (1994) (discussing raced coding in the term "quota queen"); Lani Guinier, *Who's Afraid of Lani Guinier?*, N.Y. TIMES, Feb. 27, 1994, (Magazine) at 38, 41-42 (noting the false message conveyed in the term "quota queen").

45. Toni Morrison has called this the "Economy of stereotype." PLAYING IN THE DARK, *supra* note 2, at 67 ("This allows the writer a quick and easy image without the responsibility of specificity, accuracy, or even narratively useful description.").

46. On the use of race-coded language in public political discourse, see David O. Sears, *Symbolic Racism*, *in* ELIMINATING RACISM 53 (Phyllis A. Katz & Dalmas A. Taylor eds.,

Wassell v. Adams

In January of 1986, Susan Wassell filed suit in the United States District Court for the Northern District of Illinois, alleging that Wilber and Florena Adams, doing business as Ron-Ric Motel, had negligently failed to warn or protect her when she stayed as a guest in the motel in September of 1985, and that she was raped as a consequence, causing her severe and lasting injury.[47] A jury found that the Adamses were negligent. The jury also found, however, that Wassell was negligent, and that her negligence was 97% responsible for the attack, while the Adamses' negligence was only 3% responsible. The district court entered judgment in accordance with this finding, and Wassell appealed.[48]

Wassell's attorney argued first that she had been nonnegligent or minimally negligent, as a matter of law, and, second, that the Adamses had been willful and wanton in their disregard for her safety.[49] These arguments depended upon an assessment of what each party knew or had reason to know about the danger of rape in the particular circumstances at the Ron-Ric Motel in September of 1985. The Ninth Circuit affirmed the lower court's entry of judgment, in an opinion written by Judge Richard Posner.[50]

Judge Posner began the opinion with this description of Wassell: "The plaintiff, born Susan Marisconish, grew up on Macaroni Street in a small town in a poor coal-mining region of Pennsylvania—a town

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1988); Susan Estrich, *The Politics of Race*, WASH. POST, April 23, 1989, (Magazine) at 20; John Herbers, *Race Issue in Campaign: A Chain Reaction*, N.Y. TIMES, Sept. 27, 1980, at A8. For more general analysis of the role of race-coding in the maintenance of racial domination, see OMI & WINANT, *supra* note 32; John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2160 n.105 (1992) ("Much of today's racialization is coded and covert. Ironically, we have now a policy of what I call 'racialized color blindness,' which never explicitly refers to race in talking about cultures of poverty, welfare cheats, inner-city poor or underclass poor[;] . . . the unstated reference is to blacks."); Linda R. Hirshman, *The Rape of the Locke: Race, Gender, and the Loss of Liberal Virtue*, 44 STAN. L. REV. 1133, 1138 (1992) (discussing the development of race-coded language in the United States in the last thirty years: "Built on [George Wallace's] talk of populism and [Richard Nixon's talk of] self interest, a coded language of racial dominance developed."); D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437 (1993).

47. 865 F.2d 849, 850-52 (7th Cir. 1989). I thank Taunya Banks for mentioning this case in a presentation in 1992. Taunya Banks, Problems Relating to Integrating Race Consciousness into Teaching, Presentation to the American Association of Law Schools Workshop for Minority Law Teachers (Oct. 9-10, 1992) (cassette recording available from Recorded Resources Corp., Millersville, Md.).

48. 865 F.2d at 852.

49. *Id.*

50. *Id.* at 856.

so small and obscure that it has no name. She was the ninth of ten children, and as a child was sexually abused by her stepfather."[51] Judge Posner did not explicitly mention the plaintiff's race. Translating Posner as he translated a white norm, I assume that she is white.[52]

Judge Posner then described the defendants' motel:

> a small and inexpensive motel that caters to the families of sailors at the Great Lakes Naval Training Station a few blocks to the east. The motel has 14 rooms and charges a maximum of $36 a night for a double room. . . . [T]o the west of the Ron-Ric motel is a high-crime area: murder, prostitution, robbery, drugs—the works.[53]

Translating Posner's translation, I understand that the neighborhood close to the motel, and particularly that to the west, is predominantly black and generally low-income.[54] Judge Posner's dismissive, disrespectful description of the neighborhood is striking. I wonder in anger if I am implicated as an "ideal reader" of this text.[55] I read Posner's description as an invitation to some readers to join in this public exhibition—celebration?—of white, class-privileged power, to appreciate the display of scorn for poor and working-class black people as Roberta and her friends appreciated their visible dismissal of Twyla, and as a warning to other readers that judicial power includes the power to hate.

After recounting that Susan Wassell was staying at the Ron-Ric Motel with the parents of her then-fiancé, Michael Wassell, in order to attend his graduation from basic training, and that Michael stayed with her for the first two nights that she was in North Chicago, Judge

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51. *Id.* at 850.

52. My assumption was confirmed by Harvey J. Barnett, attorney for Susan Wassell. Telephone Interview with Harvey J. Barnett (Feb. 11, 1994).

53. 865 F.2d at 850-51.

54. This was confirmed in conversation with Ms. Wassell's attorney. Interview with Harvey J. Barnett, *supra* note 52. For discussion of crime as a racial code in electoral politics, see Estrich, *supra* note 46.

55. *See generally* JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 90-100 (1985). Professor White wrote, "one might say of any literary text that it defines an ideal reader whom it asks its audience to become, for the moment at least and in some sense forever." *Id.* at 91. In discussing the notion of an ideal reader of a literary text, White emphasized that each actual reader must decide whether to become the ideal reader of a particular text—"as one works through a text one is always . . . deciding whether one wishes to become one's own version of such a person even for the moment." *Id.* Regarding legal texts, however, White did not suggest that an actual reader has such a choice, emphasizing instead the authoritative power of legal texts:

> [A] legal text is authoritative in a different way from a literary text, and this means that the kind of tentativeness it requires (or permits) is different. Whether one likes it or not, as reader of the . . . judicial opinion one is in the first instance its servant, seeking to make real what it directs.

Id. at 95.

Posner described the events preceding the rape on the third night at the Ron-Ric Motel:

> [S]he was awakened by a knock on the door. She turned on a light and saw by the clock built into the television set that it was 1:00 a.m. She went to the door and looked through the peephole but saw no one. Next to the door was a pane of clear glass. She did not look through it. The door had two locks plus a chain. She unlocked the door and opened it all the way, thinking that Michael had come from the base and, not wanting to wake her, was en route to the Adamses' apartment to fetch a key to the room. It was not Michael at the door. It was a respectably dressed black man whom Susan had never seen before. He asked for 'Cindy' . . . . She told him there was no Cindy there.[56]

The man asked for a glass of water and then assaulted Wassell; she ran out of the room; he ran after her, dragged her back into the room, and raped her.

Evaluating Wassell's behavior, Judge Posner wrote: "It is careless to open a motel or hotel door in the middle of the night without trying to find out who is knocking."[57] Why was it careless to open the door? When would it ever be careless or negligent to open a door? Surely it would be careless only if she had some knowledge that danger would result. What did Wassell know about the risks of opening the door?

Apparently responding to this question, Judge Posner mentioned her lawyer's argument that Wassell was "naive and provincial."[58] What might naiveté and provincialism have to do with her opening the door? Was it that her level of understanding was determined by naiveté and provincialism? What information might she have missed or failed properly to comprehend? A "naive" woman might fail to know the risk of rape? And a "provincial" white woman might fail to fear black men?

After posing this possibility, Judge Posner dismissed it: "[H]er testimony suggests that she is not so naive or provincial . . . ."[59] Judge Posner does not elaborate or justify this conclusion, so he must assume its self-evidence. I wonder to what in her testimony Judge Posner referred—was it that she was sexually assaulted as a child?—or that she was sexually active as an adult? Is that why Judge Posner mentioned this history so prominently in his description of Wassell? Raped as a child and sexually active as an adult, Wassell was, by definition, not

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56. 865 F.2d at 851.
57. *Id.* at 854.
58. *Id.* at 855.
59. *Id.*

"naive" (virginal?) and, thus, should have understood the risk of rape to an adult woman? Again Judge Posner seems to invite the reader to engage unstated assumptions, here in the construction and dismissal of this woman as the object and creation of male sexuality.

Struggling against my own hurt and resistance, I work harder to understand the *recitatif* in Judge Posner's opinion. And I do not get it yet. Some crucial event or twist of character is missing. It is not enough to say that Wassell knew about male violence and, therefore, should have known not to open the door. Judge Posner's conclusion depends on something more. It depends upon an image of violence awaiting Wassell on the other side of the motel-room door. If it was not dangerous outside, then it could not have been careless to have opened the door. Is every outside dangerous? I have opened doors late at night; I have even opened motel-room doors late at night. Was I negligent in each case? Is it negligent to think that the person waiting outside is your lover and not your rapist? What information was Judge Posner assuming Wassell had that would move this story forward in a coherent way? Where is the *recitatif*?

Judge Posner's opinion makes sense only if the reader assumes that Wassell imagined or should have imagined that the area outside her room was dangerous. And why should she have imagined this? How could the court be confident in concluding that she *should have* imagined this? There is no evidence in the record that Wassell had any specific information about the history or future likelihood of criminal activity at the motel. Upon what basis was she to form an apprehension of danger outside her room? Only race, class, and gender. Wassell saw black people in the neighborhood surrounding the motel. She saw that some of the buildings were run down, that there were bars in the area, and that it was not an affluent white residential neighborhood. She knew that she was a white woman. Translating Posner, these stand as indicia of danger that were available to Wassell. From these marks of race, class, and gender, Judge Posner implied, she should have concluded that there was danger outside her motel door.

Judge Posner described the neighborhood close to the motel as "a high-crime area: murder, prostitution, robbery, drugs—the works."[60] Whatever basis this metonymy may have in the frequency of crime in that neighborhood, Judge Posner did not claim that Wassell had any specific information about a historical record of crime. Instead, in the raced *recitatif* of this opinion, this description functions to name this neighborhood as black. Having been told this, the reader is invited to

60. *Id.* at 851.

conclude that *Wassell knew* that the neighborhood surrounding the motel was black and, *therefore*, that Wassell knew that the area outside her room was dangerous, or at least was a place in which the "average person" (translation: a white middle class person) would be afraid and, thus, would exercise extreme caution.[61] By this decision—this exercise of judicial power—Wassell and others are compelled to accept the racist presumptions that Judge Posner employed, and by this opinion—this contribution to legal discourse—readers and others who participate in this discursive practice are required to understand and to reproduce these presumptions. To understand this opinion, I must read through the lens of patriarchal white supremacy. To understand and obey the law that it announces, I must engage in racist practice.

United States v. Uwaezhoke

In *United States v. Uwaezhoke*, the United States Court of Appeals for the Third Circuit held that raced reasoning, similar to that in *Wassell*, is unobjectionable in jury selection.[62] The defendant, Mr. Uwaezhoke, a black man, was charged with heroin importation and related conspiracies. The prosecutors used a peremptory challenge to strike Kim Lucas, a black woman, from the jury. In voir dire, Lucas provided the following information:

> [I have lived at my present residence for] five years. I'm a postal employee. I've been there four years. Not married. Single parent, two small children at home. I rent, [do] aerobics, I cut hair, and I take tennis lessons. [I graduated from] High School. I have a license in cosmetology and I go to college.[63]

She answered further that she had never been the victim of a crime or participated as a witness in a criminal trial, that she had never had any problem with drugs, and that neither she nor anyone close to her had ever been addicted to drugs.

The prosecutor sought to have Lucas excused, and the defense attorney objected that the challenge was racially motivated in violation of *Batson v. Kentucky*.[64] The prosecution responded:

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61. *Id.* at 855 ("Everyone, or at least the average person, knows better than to open his or her door to a stranger in the middle of the night.").

62. 995 F.2d 388 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 920 (1994).

63. *Id.* at 390.

64. 476 U.S. 79 (1986). The Supreme Court has articulated a three-step analysis under *Batson*: first, objector must present prima facie evidence that the peremptory challenge was made on the basis of race; second, the attorney exercising the peremptory challenge must offer a race-neutral explanation for striking the juror; and third, the trial court must determine if the