

Critical Race Theory and the American Justice System

Critical Race Theory and the American Justice System:

*How Juries Wrestle
with Racial Prejudice*

By

Paul J. Zwier II

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CHAPTER ONE

EXAMINING ISSUES OF RACE AND TRIAL ADVOCACY FROM OJ TO AHMAUD ARBERY: LESSONS IN EVIDENCE, EMPATHY, AND ETHICAL PERSUASION¹

On November 24, 2021, when Linda Dunikowski stood to face the jury in her closing argument for the prosecution in its case against the defendants for the killing of Ahmaud Arbery, she may have been sorely tempted to play the race card. Should she argue that Travis and Gregory McMichael and “Roddie” William Bryant were racially motivated when they killed Arbery? She had some proof of their past attitudes, expressed on various forums,² of insensitive racist behavior and language. She was in the southern state of Georgia, the rural county Glynn in the city of Brunswick, a place with a legacy of lynching.³ In addition, Kevin Gough, attorney for Bryant, had loudly asserted in the presence of the jury that the court did not need the attendance of any more “Black preachers.” He put squarely before the court

¹ A version of this chapter was prepared as an essay for Advocacy Prize sponsored by Stetson Law School. The author is currently on the faculty at Emory Law School where he teaches evidence. Until 2017 he was director of Emory’s Kessler Eidson Trial Techniques Program and director of its Center for Advocacy and Dispute Resolution.

² This evidence may still be offered in the federal hate crimes case filed by federal prosecutors in May 2021. See Russ Bynum, “Men Plead Not Guilty to Hate Crimes in Ahmaud Arbery Death.” <https://apnews.com/article/ahmaud-arbery-shootings-race-and-ethnicity-courts-57a8144b9534af4f69dc4228eea8d594> Prosecutors have asked the judge to allow jurors to see text messages and social media posts that they contend show a lack of “racial goodwill” by all three defendants. They include a text message exchange from 2019 in which Travis McMichael twice uses a racist slur for Black people.

³ Jennifer Rae Taylor and Kayla Vinson, “Ahmaud Arbery and the Local Legacy of Lynching,” The Marshall Project, May 21, 2020, <https://www.themarshallproject.org/2020/05/21/ahmaud-arbery-and-the-local-legacy-of-lynching>.

in the hearing of the jury that racism of an anti-white sort was at work in the prosecution's case. Should Dunikowski fight fire with fire, ascribing racial intent to the defendant's actions? The jury was overwhelmingly white (eleven white and one Black). How else would she move the jury against the defendants? Even though she was not trying the defendants for a hate crime (an issue that may have been left to federal prosecutors in subsequent trials), Ms. Dunikowski may have been tempted to argue that the defendant's racism provided evidence of a "cold and malignant heart" necessary for proving they had the requisite intent for murder.

Yet perhaps Ms. Dunikowski felt that appeals to racist motives would be counter effective, especially this jury. Or she may have thought it would be against evidence law to make an appeal to racial attitudes of the defendants in her case, as appeals to inadmissible "character evidence" were prohibited.⁴ Or she may not have been comfortable ethically⁵ making an appeal to prejudice, something jurors were admonished about in jury selection and would be again told in jury instructions not to use in their deliberations. In addition, "that ship may have already sailed," as she had not been able to offer proof of racist motives during the trial.

Whatever her exact thinking, her case strategy was notable because instead of making appeals to the likely racist motives of the defendants, she instead appealed to the vulnerabilities of anyone in Arbery's situation. She had a video backed by a timeline. She had strong facts showing how Arbery had been hunted and, regardless of race, was pursued, trapped, pursued again, run off the road in a ditch, and pinned between trucks until he tried to get away once more, only for one of the defendants to shoot him at close range with a shotgun. The video showed that Arbery was shot in the stomach. He bled out and died as the defendants turned their backs and walked away. She may have reasoned that when you have the facts, the prosecutor does not need to overstate her case or make promises that she cannot deliver on. To accuse the defendants of racism would arm the defense with righteous indignation. They might argue that the prosecutor was playing the race card of political correctness against Caucasians, making unwarranted assumptions that all white people were racists.

The rhetoric and arguments she instead chose were lessons in effective advocacy, grounded in vulnerability theory, and not of the toxic or petulant vulnerability type.⁶ Ms. Dunikowski instead seemed to be channeling the

⁴ FRE 404.

⁵ M.R 3.3 a)1).

⁶ Alex McElroy, "This Isn't Your Old Toxic Masculinity. It Has Taken an Insidious New Form." *New York Times*, January 13, 2022,

ideas and vulnerability theory of Martha Fineman, which we will explore in more detail in the next chapter.⁷ For now it is important to know that Fineman grounds the law in the *embodiment* of all persons. We all have bodies. We are born, we need care, we live, we need work, we need food, we need to have purpose, we care for others, we get sick, we die. With embodiment comes vulnerabilities that we share with all humans.

Fineman worries that identity politics as a rhetorical device to ground the law ends in divides, turning each party into victims, struggling in zero-sum games for justice and resources. Dunikowski's argument was that our common vulnerabilities are a better basis for law: any one of us could have been vulnerable to a suspicious, vigilante mind. It became a theme for her case.

<https://www.nytimes.com/2022/01/13/opinion/toxic-masculinity.html>. The petulant or toxic type was used by Rittenhouse during his testimony. McElroy thinks it was also used by Justice Kavanaugh during his confirmation hearings. McElroy describes it as operating where a witness becomes angry and emotional at the suggestion they may have had improper motives for their conduct, presenting themselves as victims instead of perpetrators.

⁷ American Bar Foundation, Outstanding Scholar of Year. Professor Fineman, who heads the Feminist Legal Theory Project at Emory University, prefers to ground law and legal institutions in common vulnerabilities that everyone faces rather than promoting victimization and animosity by emphasizing differences in treatment based on race and other minority status. See Martha Albertson Fineman, "Beyond Identities: The Limits of an Antidiscrimination Approach to Equality," *Boston University Law Review* 92, no. 6, (2012): 1713, 1718–19, where she argues that the difference between the conception of equality in the United States of America and the conception of equality in other democracies arises from differing perceptions of human need and vulnerability); Martha Albertson Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition," *Yale Journal of Law & Feminism* 20, no. 1 (2008): 9, where she emphasizes that embodiment creates vulnerability; Martha Albertson Fineman, "The Vulnerable Subject and the Responsive State," *Emory Law Journal* 60, no. 2 (2010): 251, 267–70, where she highlights that vulnerability is a shared human condition. For further examples of vulnerability theory, see generally "Vulnerability and the Human Condition Publications," Emory University, <http://web.gs.emory.edu/vulnerability/resources/Publications.html> (last visited Feb. 27, 2015), which collects resources regarding vulnerability theory. See also Frank Rudy Cooper, "Always Already Suspect: Revising Vulnerability Theory" (Scholarly Works, 2015), 1114, <https://scholars.law.unlv.edu/facpub/1114>. Cooper argues that an overemphasis on vulnerability theory may blind us to the racial profiling that takes place in policing practices in the US. Cooper recommends close monitoring of policing practices to root out racial profiling.

In service of that theme, Dunikowski masterfully used the order and structure of her persuasion. She invited the jury to make the right decision in the case based on analogies to common situations that the law was designed to address. Her argument showed the jury that Arbery could have just as well have been one of them, curious about a house construction site, who could have been pursued and shot. Her arguments allowed room for the jurors to experience how wrong it would be for anyone, regardless of race, to be subjected to defendants' actions.

At stake in looking at Dunikowski's choice for prosecutors⁸ is what forms the basis for their rule of law and fairness appeals to the jury. By forgoing making an appeal to the likely racial motivations, are they contributing to an institutional bias against Black people in the way they argue and present their cases? Or, in forgoing attacking defendant's motivations, will they call the jury to their better selves in protecting everyone from criminal violence?

We look at the choices Dunikowski made and highlight both the theoretical legal issues imbedded in her advocacy but also point out some persuasive techniques she used during her closing argument that reinforced the theoretical choices she made. Her argument—and those of prosecutors in the George Floyd case—may serve prosecutors seeking to secure convictions in future murder cases where white people have killed unarmed Black people and show best how they should use jury *voir dire* and their trial strategies to persuade the jury to do what is right and fair under law and skirt engaging in prohibited appeals to prejudice.⁹ In so doing, they can yet

⁸ It is important to be careful, here, to not be naïve or Pollyanna-like and make too broad a claim. This essay does not make easy claims on how counsel for Black defendants, especially in capital murder cases, should argue self-defense in cases where the defendant has killed a police officer. Where the defense has a good argument for innocence of the underlying investigation, and the police seemingly confront the defendant, in part, because of the defendant's race, often involving a mistaken cross-race identification and where the defendant uses force in defending themselves from the false arrest, counsel may have a different strategy for using race during their case and closing.

⁹ In so doing they will seek to follow the hope expressed by Martin Luther King, to work case-by-case "because the arch of the moral universe is long, yet it bends toward justice." Some trial lawyers use jury selection to not only exclude jurors for cause but to teach empathy. Take the example of a Tennessee lawyer for a Black defendant in a criminal case in 2002, where the defendant's lawyer asked, "Look with me around this courtroom. What if you were the defendant, and you saw that the lawyers, the judges, and the jury were all of a different race than you were? What would you think? What would you hope for in a juror trying your case? So, I need to ask you about race and ask whether you can commit to putting racial prejudice

enliven and enable the rule of law, law that is to be applied to everyone, regardless of race.

To understand more fully the choices Dunikowski made, both strategically as a matter of evidence law and ethically,¹⁰ we need to engage in an analysis of selected cases where race has played a significant role since the 1990s. These famous cases are often at the heart of what trial lawyers draw on in structuring their advocacy.¹¹ Trial lawyers live in an admittedly fast changing cultural environment and need to learn what works from both their own experiences, and from other similar cases. As a result, it has been part of the “art of advocacy” as taught by Irving Younger, Jim Jeans, and James McElhaney¹² to use cases as the foundational experiences to ground “commandments” and craft practical lessons of advocacy.

First, we look back at how Johnnie Cochran played the race card in the OJ Simpson case. We will also look at Prosecutor Darden’s reaction to Cochran’s arguments as highlighted at the time.

I. Playing the Race Card in the OJ Simpson Case

After the OJ Simpson trial in October 1995, there was much discussion in the trial advocacy community concerning the way the “Dream Team”

aside in trying this case?” And then he added, “Have any of you from Tennessee ever took a road trip and traveled north, and went into a gas station or picked up a snack, only to be snickered at because of your accent?” How did that make you feel? Is that fair to make judgments about someone because of an accent, or something they had no choice over?”

¹⁰ By ethics, I mean, the open, listening sympathetic method described by Dr. Tom Rusk in his book *The Power of Ethical Persuasion* (New York: Viking, 1993).

¹¹ Many of these cases have served the trial advocacy educators, especially at the National Institute for Trial Advocacy, in teaching the generations of trial lawyers. Even though highly anecdotal and unscientific, this method has merit in helping advocates examine if they are having any blind spots. It is used by many in trial advocacy education that trial lawyers should learn from the successes in failures of other famous trials, reading with care the rhetoric they used and results of the rhetoric from the reaction of jury and public alike. See “10 Commandments of Cross Examination,” where Judge Irving Younger argues that reading about famous trials in the equivalent of gaining trial experience for lawyers who are not routinely in the courtroom in front of juries. Irving Younger, “10 Commandments of Cross Examination,” YouTube, <https://www.youtube.com/watch?v=dBP2if0l-a8>.

¹² Younger, “10 Commandments of Cross Examination”; James W. Jeans, *Mastering the Craft of Trial Advocacy* (1985); James W. McElhaney, *Trial Notebook* (2005).

(especially Johnnie Cochran and Robert Shapiro), played the race card.¹³ Still known today for the defense counsel's urging the jury "if it doesn't fit, you must acquit", the case was examined by many in the trial advocacy community for an emerging rhetorical technique. The defense used a thematic statement woven through the trial and during closing to give persuasive unity to the case. The defense, in fact, paired two themes during trial, starting with a rush to judgment theme, but providing the jury with an emerging theme as the case progressed: that race had motivated the police to plant evidence in their desire to quickly convict a black defendant. What emerged, they argued, from a series of questions during the police investigation (e.g., not investigating others, not securing evidence, gaps in evidence of how the DNA was handled) was that several pieces of evidence "did not fit," and if "it didn't fit" (because racist cops had planted it), "you must acquit."

Defense counsel would argue where the evidence did not fit, the jury could use race to suggest why there were gaps or questions. Their rush to judgment theme was combined with a general attack on the LA police and its past racist activities. The excuse to argue race more broadly came from the prior bad acts of one of the investigators. The worst culprit, according to the defense, was Mark Furman.

The prosecution was not focused on race *per se* in their presentation of the case. They had OJ's flight—him driving his Bronco, followed on a LA freeway by the police—caught on video. The prosecution thought they also had science on their side. They had evidence of a cut on his hand. They had

¹³ Since the 1990s through to 2005, the author was director of the National Institute of Trial Advocacy's Public Programs, Inhouse Programs, and led international programs. He helped lead and direct NITA's national trial programs as well as public programs in Berkeley, Seattle, North Carolina, and University of Florida. Also, from 2003–2017, he directed the Emory Kessler Eidson Trial Techniques program, assembling teams of trial judges, lawyers, and advocacy teachers to teach up to 300 law students each year. In these roles with NITA and Emory, he was privileged to be a part of faculty discussions involving some of the finest trial lawyers, judges, and advocacy teachers in the country, including Irving Younger, Hon. Ann Claire Williams, Charles Becton, Jamie Ferguson, Jim Jeans, Jim Bresnahan, Frank Rothschild, Deanne Siemer, Ken Broun, M.J. Tocci, Eddie Ohlbaum, Joanne Epps, Lou Nitali, Janine Kerper, Maude Pervere, Tony Bocchino, Don Beskind, Sandra Johnson, Brian Johnson, Jean Cary, Adrienne Fox, David Malone, Anthony Bocchino, Abe Ordovery, Frank Rothschild, Ed Stein, Mike Ginsberg, William Hunt, Bradford Kessler, Matthew McCoyd, Cynthia Stephens, Robert Vanderlaan, Roosevelt Thomas, Mike Washington, Ben Rubinowitz, Mike Kelly, Jim Schoenberger, Doris Cheng, Tom Geraghty, Zelda Harris, Fred Bartlett, Bob Burns, Steven Lubet, Emily Nicklin, Steve McCormick, and many more.

DNA evidence of both OJ and Nicole's blood in the blood samples they had from OJ's home, carpet, and car. They had expert witnesses linking the blood samples to the suspect and victims. It seemed clear that the blood linked OJ to having been at the crime scene and having committed the crime. Still, the jury would learn the officers who handled the blood had not accounted for it as they should have. Did they tamper with it to force the conviction of someone they had already determined was guilty? Were they in a "rush to judgment?" And if the "glove doesn't fit, you must acquit" became the jurors' justification for the verdict.

In the end, the jury had reasonable doubt, and OJ was found not guilty.

As a result, for trial advocacy teachers "if it doesn't fit you must acquit" became an example of effective advocacy. The case led to teaching trial lawyers to think on a new level about their cases. Trial lawyers were not only taught to look for legal theories and factual theories but also to seek out unifying, memorable, sticky persuasive theories. These persuasive theories, or themes, were meant to speak to what Aristotle called "enthymemes." It turns out the ancient Greeks understood that appealing to the heart or intuitions of justness and rightness were necessary components of effective rhetoric.¹⁴ Themes could capture, by alliteration, poetry, or in an old saying or rhyme, what the head often missed. What the head missed, the heart knew deeply, and appeals to the heart could help the jury see its way to a "just" and "fair" verdict.¹⁵

Still, there were some troubling issues in the way the defense presented its case. The prosecution's case provided the defense with an opening to play the race card because one of the main on-the-scene investigators was Officer Mark Furman who had repeatedly used the "n-word" in the past, denied its use and was then, as argued by the dream team, a racist. The defense argued Furman was not only less credible because he lied about using the word, but he was also more likely to have planted evidence (blood and a glove) to frame OJ Simpson for the death of his wife, Nicole Simpson. The logic was that if he was willing to lie about his language use under oath, he was more likely to have planted evidence.¹⁶

¹⁴ Jim Jeans, in his lectures at the NITA national program. Aristotle, "A Treatise on Rhetoric," 2.3

¹⁵ Such Aristotelian rhetoric appealing to the heart, soul, or intuition (image of God in human beings) may also be recognizable to those schooled in the theology of John Calvin.

¹⁶ Cochran appeals to jurors' common sense to use an officer's denial of racist motives as clear evidence that he was lying, that obviously a white police officer is more suspicious of Black people, and for him to deny it is evidence that he is lying

Realizing that an attack on Furman's racism would not be enough because he would have had to have been assisted in planting the evidence, the defense argued the likelihood of help from other potentially racist police officers. According to Cochran, the strategy was to tap into Black jurors' likely experience with the racism of LA police. Detective Philip Vannatter, who initially interviewed OJ, needed to also be cast as a racist. But the defense had much less to go on regarding Vannatter.¹⁷

Two parts of Cochran's closing argument warrant attention. The first is how Cochran maneuvered Furman into conceding that if he was lying about his never having used the "n-word," then he not only had lied or committed perjury, but he was indeed a "liar." While evidence law prohibits the use of individual acts of dishonesty to be used as character evidence to show that a witness has the propensity to lie generally, and therefore about specific parts of their testimony, it can be offered to attack the witness's credibility.¹⁸ Judge Ito let Cochran use two examples of Furman's use of the n-word in a racially derogatory way (down from the forty-one recorded instances the defense had in their possession).¹⁹ While this was extrinsic evidence of an inconsistent statement, if collateral is generally barred, Cochran argued his admission of being caught meant he was a "liar," which made the matter non-collateral²⁰ and thus opened the door to counsel offering the recordings of his use of the word. (In trial advocacy circles, the recording might also be used as an exhibit to support the jurors' understanding of the inconsistency without offering the recording into evidence. This was the thinking behind Ito allowing the jury to hear the recordings. The difference

and is racist. Gerald F. Ulemen, "Recipe for a Great Closing Argument," YouTube, <https://www.youtube.com/watch?v=27waHzvi8w0>.

¹⁷ "OJ Simpson Case Study,"

<https://static1.squarespace.com/static/55dfd21ee4b0718764fb34cc/t/55f11606e4b0d3922cc3b8ac/1441863174718/OJ+Simpson+Case+Study.pdf>

¹⁸ *Michelson v. United States*, 335 U.S. 469 (1948)

¹⁹ "Excerpts from the Ruling on the Fuhrman Tapes," *New York Times*, Sept. 1, 1995, A16, reprinted with permission in George Fisher, *Evidence*, 3rd edition, (Foundation Press), 57–58. As a trigger warning, please note that the fully articulated n-word appears in quotations in Fisher's quoted excerpts. *New York Times* continues to follow that practice of using the fully articulated n-word in quotes, despite protests in some circles. See Paul Krugman, *Racism Comes Out of the Closet*, *New York Times*, opinion, July 15, 2019,

<https://www.nytimes.com/2019/07/15/opinion/trump-twitter-racist.html>, and John McWhorter, *How the N-word Became Unsayable*, *New York Times*, opinion, April 30, 2021, <https://www.nytimes.com/2021/04/30/opinion/john-mcwhorter-n-word-unsayable.html>.

²⁰ FRE 608(b).

is in whether the evidence can be reviewed by the jury during their deliberations. In any event, the jury heard the recording of Furman using the n-word.)

The second part was how Cochran tried to spread the racism to Furman's partner, Vannatter, and thereby to the entire investigating team. Cochran argued on closing that the jurors were free to judge the credibility of the witnesses using their common sense. Cochran called out Vannatter's statement on the witness stand that while he was investigating the case²¹ he had not prejudged OJ's guilt but that "he considered OJ no more guilty than he considered Defense Counsel Shapiro." Cochran asked the jury to use their common sense to judge whether Vannatter's statement was true. (Cochran made a misstatement, apparently innocent, of who Vannatter said he was comparing his belief about OJ to, whether he thought him as a guilty as Cochran, another Black man. But then he quickly inserted Shapiro, his white co-counsel back into the quote from the examination). He argued Vannatter was simply not credible and indeed was lying. Cochran, in a sense, argued to the jurors that they knew as a matter of common sense that white officers considered Black people much more likely to be guilty over Caucasians and that to deny this was an outright and obvious lie. In other words, in today's parlance, everyone knows white police are racist, and for them to deny it is itself a showing of their lack of "wokeness" to their own racism.²²

Regardless of how clever the defense theme was in the case, some trial lawyers were critical of how the race card was used by the defense.²³ Many on the National Institute for Trial Advocacy (NITA) faculty also worried

²¹ FRE 608(b).

²² Much could be said, today, about the potentially racist implications of an antiracist argument. White people, whiteness, and by that is meant either all White people, or most, are inevitably racists as evidence by their denial that they are racist. See Daniel Bergner, "White Fragility Training Is Everywhere, But Does Antiracism Training Work?" *New York Times*, August 6, 2021, <https://www.nytimes.com/2020/07/15/magazine/white-fragility-robin-diangelo.html>. Such arguments fall into the category of what it means to be antiracist—that it is not enough to not be racist; instead White people need to be *antiracist*; that is, to acknowledge their own racism as a first step to being able to change their behavior. This argument is a provocative one and engenders in many White people, a very defensive reaction. *Id.* A White juror may be offended if Black counsel makes this kind of appeal to a universal racism imbedded in all White people that they universally act on in their dealings with others.

²³ "Lawyers Bitterly Debate Race in Simpson Case," *Los Angeles Times*, January 14, 1995, <https://www.latimes.com/archives/la-xpm-1995-01-14-mn-19911-story.html>.

about the ethics of playing the race card.²⁴ They argued it required the jury²⁵ to engage in the use of stereotyping of white police as racist and consider all the times that white LA police likely engaged in discriminatory behavior toward Black defendants. The race card distracted the jury from the unlikelihood that Furman could have had the time to orchestrate an elaborate planting of blood (Nicole's DNA) evidence both in OJ's car and his glove on the sidewalk, and then scattering Nicole's blood in OJ's home before the forensic police arrived at the scene.²⁶

²⁴ The author was associate director of public programming for NITA during the 1990s and oversaw many of NITA's fifteen regional trial advocacy programs during this time. The race card was widely discussed by students and faculty.

²⁵ The jury consisted of eight Black people, two Hispanic people, one Mixed Race person, and one Caucasian female. "The O.J. Simpson Trial: The Jury," <http://law2.umkc.edu/faculty/projects/ftrials/Simpson/Jurypage.html>. At the time of the OJ Simpson case the issue of race could not be confronted directly in jury questions. The preceding web page is a great place for a student of trial advocacy to go to sample jury questions used in the case designed to get at safe places where racial bias can likely sit in a juror's experience: where they are born, school, biracial dating, interracial marriage, etc. At the time that was as close as a prosecutor might get to raising juror attitudes toward race as a relevant factor in both exercising challenges for cause and peremptories. Judges and/or opposing counsel could cure challenges for cause with a follow-up question asking the jury whether they could put away their experiences and try the case based on the evidence presented.

²⁶ Jason M. Murray, then a young Black commercial lawyer, is now partner specializing in commercial and franchise law, at K&L Gates, LLP, in an outstanding article for the *ABA Journal*, wrestled with the difficulty of appealing to prejudice to link general racist acts of LA police officers in the past to specific acts of planting evidence in the case. Jason M. Murray, "White Ritual & Black Magic: Playing the Race Card," *Litigation* 31, no. 1 (Fall 2004): 13–20, <https://www.jstor.org/stable/29760457>. He recalls the setting of a barbershop defense he gave to other Black patrons of the barber, who asked him whether it was okay for Cochran to play the race card in the face of Darden and Black prosecutors arguing that race played no role in the case. He recalled,

I gave my assessment of the defense's impeachment evidence for Fuhrman. I told them that long before race was ever raised as an issue in the Simpson case, the defense claimed that the police and the prosecution had made a "rush to judgment." The defense had to show that the police did not conduct a thorough and complete investigation designed to lead them to the killer(s) but rather looked only for evidence to support its early theory or judgment that Simpson had committed the murders. I expressed that it was perfectly appropriate for the defense to impeach a key prosecution witness who had conducted the investigation by establishing that he had lied under oath. The evidence greatly supported the defense's position that the police don't always

Public interviews Darden had given showed Darden thought his presence as a Black prosecutor was evidence enough for the jury that the LA criminal justice system was not racist.²⁷ After the trial, Darden would admit he was wrong in his thinking. Yet he was also critical of Cochran for arguing the LA police were racist in their motivations toward OJ during their investigation of OJ's case. Darden was convinced that in arguing racism, Cochran "had blinded the jury" to the real questions of justice in the case against OJ Simpson.²⁸

Others disagreed with Darden that prosecutors should not argue racism as a motivation for police, especially in cases where they used force during the arrest of a Black suspect. In a University of Michigan law review, Professor Russell²⁹ had argued that for a Black prosecutor to not argue racist motivation in prosecutions of white police officers denied to the prosecutor the likely existence of race as a factor in the decision making of white

tell the truth. The fact that the evidence established that Fuhrman was a racist was an added bonus for the defense.

Please note the follow trigger warning, that Murray, a self-identified Black, uses the fully articulated n-word in his article in the *ABA Journal* on two occasions. If you may be offended by his use of the word you should forgo reading the article.

²⁷ Murray, "White Ritual & Black Magic," #.

²⁸ Murray, "White Ritual & Black Magic," #. Murray also noted that as a Black attorney in Miami he was well aware of a history of White racism in American policing. He cited the cases of Emmett Till and the chilling murder in Miami of Arthur McDuffie, a young, unarmed, Black, thirty-year-old former marine, father of three by White Dade County police officers in 1980. Murray notes that Despite Janet Reno's best attempts, defense attorneys played their own race card, excluding Black jurors and securing an exclusively white jury, which then produced a not guilty verdict, despite the defendant's attempts to cover up the killing.

Reading Murray's article today shows how prophetic his analysis was then of the dilemma prosecutors would face in advocating the guilt of White police in killing Black unarmed suspects. Where the prosecutor is Black, Murray argued, if they don't argue the existence of race as a motivation in the actions of the White police officers, Black members of juries may feel that the Black prosecutor is an "Uncle Tom" or a sellout. Where Black prosecutors argue racist motives, they risk alienating white jurors who feel the Black prosecutor is playing the race card. He concludes that while *Batson*, a US Supreme Court case that prohibits excluding jurors on the basis of their race, is often ineffective in creating racial balance on a jury, that racial balance on a jury is the best hope for fair adjudication of cases involving white police officers who kill Black suspects. See *supra*, Chapter 8, for a full discussion of jury selection.

²⁹ Member of the faculty of the University of Santa Clara law school since and frequent commentator on trials involving issues of race.

officers.³⁰ Russell argued that Black attorneys who raised the issue of race faced criticism of two sorts: one, that they had the foundation or expertise to impute racism to police officers, and two, that they could be fair in their arguments that racism played a role in the officer's actions. She argued that Black prosecutors could be disadvantaged from not being able to make explicit appeals to the likely racism of white police. She nevertheless argued that without raising the possibility of racial motivation, the jury would be blinded to the way it could bias the police in examining the reasonableness of their decision to use force. Were they justified in their fear of the suspect in this case? Russell was frustrated by the straitjacket of practice that prohibited attorneys, particularly Black ones, from suggesting race as a motivating factor in police conduct cases. She was not hopeful that jury selection could disinfect the white jurors from their racist assumptions about Black suspects.

History has not been kind to the hope widely expressed at the time that, with Black people as jurors, the race issue would sort itself out during jury deliberations. Up until these past few years, the record of not guilty verdicts in cases brought against white police was appalling, with a new one seeming to occur on almost a monthly basis. One website tells of the tragedy of jury verdicts in not guilty cases where police are accused of murder in killing unarmed Black people.³¹ *The Washington Post* has also set up websites to try to sort out the racism that may be imbedded in the juries and grand juries that decide these cases.³²

³⁰ See, Margaret M. Russell, "Beyond 'Sellouts' and 'Race Cards': Black Attorneys and the Straight Jacket of Legal Practice," *Michigan L. Review* 95, (1997): 766, 771. She describes the "Darden Dillema" for a Black prosecutor, that if they argue race as a factor, they are accused of not treating the law as color blind, but if they don't, they are seen by Black jurors as "Uncle Toms."

³¹ Renée Ater, "In Memoriam: I Can't Breathe," On Monuments blog, May 29, 2020, <https://www.reneeater.com/on-monuments-blog/tag/list+of+unarmed+black+people+killed+by+police>.

³² "Fatal Force," *Washington Post*, updated Nov. 21, 2022, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/>. Even in face of these statistics, evidence of racism as a factor or the primary motivating factor in these deaths is complicated by the exact circumstances of the case. Take, for example, the case of Breonna Taylor. Police themselves say they announced themselves on a valid warrant and encountered gunfire. The police themselves said they were justified in using force. They needed to use overwhelming gunfire to subdue a suspect using a gun directed at police. The criticism that followed was in not anticipating that other innocent persons could be in the place they entered and taking so long to provide ambulance backup to anyone shot at the scene. Richard A. Oppel, Jr., Derrick Bryson Taylor, and Nicholas Bogul-Bourroughs, "What to

Does this history justify a prosecutor's playing the race card, especially when seeking the conviction of a white officer for the killing of a Black man? Should the prosecutor appeal to the likely racism present in the officer's thinking at the time of the violence?

II. Rodney King³³

In the Rodney King case, the defendant's counsel invoked the fear some police have of Black suspects through a three-part strategy—using expert testimony, suspicions of drug use, and past experiences with violence—to explain their use of extreme force to subdue a suspect. This is a particularly troubling case because it seemed to use expert testimony subversively to draw on white prejudice against Black suspects as potentially dangerous, requiring police to use deadly force to subdue them.³⁴ Of course, the

Know About Breonna Taylor's Death," *New York Times*, April 26, 2021, <https://www.nytimes.com/article/breonna-taylor-police.html>. The Louisville Police paid a settlement to Breonna's family of \$12 million. In any event, the argument that the police involved were motivated by race in Breonna's tragic killing is not self-evident.

³³ Anjali Sastry Krbechek and Karen Grigsby Gates, "When LA Erupted in Anger," National Public Radio (NPR), <https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots>.

³⁴ Doug Linder, "The Trials of Los Angeles Police Officers in Connection with the Beating of Rodney King," 2001, <http://law2.umkc.edu/faculty/projects/ftrials/lapd/lapdaccount.html>. Linder writes:

Stacey Koon was one of three defendants to take the stand. He proved to be an impressive witness. Koon testified that he had quickly identified King as dangerous, believing him to be an ex-con on PCP. He said he was "concerned" and "a little frightened" by King. He described the use of escalating force--verbal commands, swarming, use of the electric stun guns, and finally metal batons--and how they were used on the night of March 3, 1991. Koon seemed to sincerely believe that the use of force against King had been appropriate and controlled. The most effective moment in his testimony came when he was asked by Mounger, what he was "thinking at the time you saw Melanie Singer approaching with a gun in her hand?" Koon fought back tears as he answered: "They show you a picture when you are in the Academy [taken] at the morgue, and it is four [highway patrol] officers in full uniform that are on a slab and they are dead, and it is the Newhall shooting."

In a frame-by-frame analysis of the videotape, expert witness Sergeant Charles Duke backed up Koon's contention that only reasonable force was used against King. Duke, a critic of LAPD policy banning use of chokeholds, suggested that the King incident showed the inevitable result of a policy that

subsequent riots in Los Angeles spoke loudly to how many in the public viewed the racist implications of the verdict on policing involving Black suspects.³⁵

For those teaching trial advocacy both in law schools and to the bar, the evidence that jurors seemed to be blinded to white police racism was very troubling and yet anecdotal. Saying it was anecdotal does not mean trial lawyers did not take the issue seriously, as they were often forced by their circumstances to worry more about juror perceptions of what is going on in society than science-based facts. The level of jury bias based on fear of a Black suspect was evident in the much-discussed the *State of California v. Rodney King* case. Ironically, it also became a case study in effective advocacy. After all, the verdict of not guilty in the face of overwhelming video evidence was quite a feat for the defendant trial lawyers. It warranted close consideration, especially for the rhetoric that was used during the trial. Here is a summary of the case as it appeared at the time in the *LA Times*:

In March 1991, King—who was on parole for robbery—had led police on a high-speed chase through Los Angeles; later, he was charged with driving under the influence. When police finally stopped him, King was ordered out of the car. Los Angeles Police Department officers then kicked him repeatedly and beat him with batons for a reported 15 minutes. The video showed that more than a dozen police stood by, watching, and commenting on the beating.

King's injuries resulted in skull fractures, broken bones and teeth, and permanent brain damage. Ultimately, four officers were charged with excessive use of force. A year later, on April 29, 1992, a jury consisting of 12 residents from the distant suburbs of Ventura County—nine White, one Latino, one Biracial, one Asian—found the four officers not guilty.³⁶

Trial lawyers remember that the verdict was attributed in part to defense counsel's use of a simple theme: "King was in control." Repeated by various defense experts reviewing the video in court (and then woven by defense counsel during closing), it was also echoed by jurors in interviews defending their verdict following the trial. They pointed out that King was not following police commands to lie flat on the ground so they could cuff him. To these jurors who voted not guilty, because the LAPD had restricted its

left the police with few viable options short of deadly force. Duke said it was sometimes necessary "to break a bone" and that every one of the fifty-six baton swings shown on the videotape was justified.

³⁵ Krbechek and Gates, "When LA Erupted in Anger," NPR.

³⁶ Krbechek and Gates, "When LA Erupted in Anger," NPR.

officers from using choke holds, the officers had little choice. One of the defense experts had given this opinion, and jurors agreed.

The repeated showing of the video may have caused the jury to become inoculated to the brutality of the beatings.³⁷ Defense lawyers would thereafter use the theme that King was in control to overcome and explain the jurors' initial horror in seeing the video evidence. As the experts went over it frame by frame, the jurors became desensitized to what they were seeing. Instead of arguing a more legal-sounding theme that police had a right to use force to protect themselves and others from injury, the defense focused the case as one that put the responsibility for the beating on the choices that King himself had made. The use of alliteration in "King was in control" made the theme stick in the minds of the jury, and effective.³⁸

At the time, the Black prosecutor who brought the civil rights case for police brutality did not attempt to frame the case as being racially motivated. He simply did not think of the case that way³⁹ but saw it as a case of excessive force used during the arrest of a suspect who had behaved very erratically and fought off any efforts to complete his arrest. He presented evidence that one of the officers had described what happened in the

³⁷ Famous trial lawyer Gerry Spence was an advocate in teaching trial lawyers how to front or inoculate the jury to bad facts in a case by telling them about it in jury selection and then asking them for a promise not to prejudge the case till they heard all the evidence in case. His technique is described by Joane Garcia-Colson, "Jury Voir Dire: The Right Preparation Allows You to Be 'in the Moment' with Jurors," *Plaintiff Magazine*, Oct. 2007 <https://www.plaintiffmagazine.com/recent-issues/item/voir-dire-the-right-preparation-allows-you-to-be-in-the-moment-with-jurors>.

³⁸ Salvatore Arena, "Why the Jurors Acquitted the Cops in the Rodney King Case," May 1, 1992, republished, April 28, 2015, *New York Daily News*, <https://www.nydailynews.com/news/national/jurors-rodney-king-tape-article-1.2201822>.

³⁹ Jim Newton, "Defense Says Use of Force on King Reasonable," *Los Angeles Times*, Jan. 20, 1993, <https://www.latimes.com/archives/la-xpm-1993-01-20-me-1485-story.html>. Newton writes:

Prosecutors already have indicated that they are not prepared to prove that the March 3, 1991, beating was racially motivated. They argue, citing numerous legal precedents, that they must only show that the beating was an intentional use of unreasonable force and therefore that it violated King's constitutional right to be secure in his person.

See also Lawrence Vogelmann, "The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom," *Fordham Urban Law Journal* 20 (1993): 571, <https://ir.lawnet.fordham.edu/ulj/vol20/iss3/13>. Vogelmann argues it was ethical for defense counsel to allude to racial fears as a motivation for the police officer's use of force.

emergency room afterward as being caused by officers playing “hardball,” and that he had “hit a number of home runs on the skull of Rodney King.” Still, the jury determined that officer and others did not have the malice required by the law and had not violated King’s civil rights.

Obviously, many Black people saw the case differently, and they rioted after the verdict was announced. There was apparent widespread anger in the Black community over what it saw as police racism in the apprehension of Black suspects.⁴⁰ Why did the jury not agree?

In defense, police experts testified about the danger confronted by police from erratic and dangerous conduct by suspects during police stops. For trial advocacy purposes, what was uncertain was whether police fears during traffic stops are reasonable or how to segregate jury thinking towards how historical prejudice may be baked into police training. Anecdotal evidence thrives in the police community and in the training videos of the dangers police confront even in routine traffic stops. Tales of shootings by drivers who do not comply with police commands abound. Koons, one of the defendants, took the stand and testified that he had been trained to use force or he might end up dead or responsible for the death of his fellow officers. He recalled having been shown pictures during training of officers’ bodies laid out on a slab to bring home the horrors of killings by suspects of crimes and the need to take forceful steps to prevent an escalation of violence.

Many police training efforts try to identify racial biases and sensitize new police trainees to their need to treat each person they arrest with respect. Trial counsel had to decide in the preparation and cross-examination whether police training about how to use force was itself biased against Black suspects. If police operated in a high-crime inner-city area in a context of gangs, drugs, and a propensity for suspects to use deadly force when confronted by police, it would be hard for experts to disassociate race and experience with race from justifications to use force.⁴¹

At the time, the Justice Department was not blind to the problems, but following the King verdict, it escalated its training efforts. Police would

⁴⁰ Krbechek and Gates, “When LA Erupted in Anger,” NPR.

⁴¹ The Justice department wasn’t blind to the problems. Police would need to undergo “sensitivity training.” See US Department of Justice, Office of Public Affairs, “Department of Justice Announces New Department-Wide Implicit Bias Training for Personnel,” June 27, 2016, <https://www.justice.gov/opa/pr/departement-justice-announces-new-department-wide-implicit-bias-training-personnel>; Martin Kaste, “NYPD Study: Implicit Bias Training Changes Minds, Not Necessarily Behavior,” NPR, Sept. 10, 2020, <https://www.npr.org/2020/09/10/909380525/nypd-study-implicit-bias-training-changes-minds-not-necessarily-behavior>.

need to undergo sensitivity training along with their training for procedures they needed to follow in whether and how they used deadly force. In Chapter 3, we will detail efforts to conduct this training reinstated by Eric Holder during his time as the US attorney general during the Obama administration. The use of examples and data of racial practices by other officers historically cuts two ways. It is potentially prejudicial as a justification for officers to use force that was not warranted by anything the Black suspect had done. At the same time, such historical evidence is also prejudicial if the evidence shows racial motivation by the police in subduing the victim. The prejudice in both cases is that it takes the actions of other police not similarly situated with the subjected officers and other Black defendants not similarly situated with the Black defendant in this particular instance and imputes that experience to justify their positions.

Other killings of either Black victims or of white officers are not relevant (deemed overly prejudicial) to be used in court to suggest that a particular Black victim or white officer was motivated by race.⁴² Still, as the King case and other cases show, counsel for white police officers can introduce backdoor evidence of police killings by members of a particular

⁴² To make the point, white police officers might otherwise offer evidence of Black suspects found guilty of killing police officers over the same period. Such a litany is also both of little relevancy (because so dissimilar), but anecdotally powerful. If the white police officer is aware of other police officers, white or Black, killed by Black suspects, they might argue the reasonableness of their fear of Black suspects in some neighborhoods and some situations.

The relationships between race and police encounters with Black people, especially as it relates to the motives of police, is complicated. From a Black perspective, stops and searches of Black people are often based on race and pretextual. Being stopped for “driving while black” is widely decried and has been cited as contributing to the incarceration problem of young Black people in various communities.

In some policing communities, profiling was used for a time on the theory that something needed to be done about the number of deaths of young Black people due to guns and drugs. Jim Comey, in his book, *Saving Justice*, notes the use of such a theory in his work in Richmond, Virginia, during the 1990s. Appalled at the number of Black people killed by other Black people, often in drug deals in the inner city, Richmond police were trained to stop young Black people driving expensive cars and figuring out a way to search the drivers and cars for guns. Their aim was to get guns out of the hands of young drug dealers. The message the police wanted to send was “Don’t bring a gun to a drug sale.” It seemed to work for a while as the number of killings of young Black people declined. Still, the profiling seemed to eventually make matters worse, especially because it racialized police stops and set up disparate treatment problems between Black people and whites while decriminalization of some drug sales was accelerating.

predominately Black community to the jury through expert opinions from other police. Experts often opine those police are justified in their use of tasers or other uses of dangerous force, considering a history of violence from some suspects fitting a particular profile (speeding, in a stolen car, dressed in a hoodie, and unresponsive to commands of police, then reaches suddenly into a bag, under the seat, or into the glove compartment). Race need not be mentioned at all. They simply describe the training as having been based on violence police experience by other victims high on PCP or other drugs or who are suspected drug dealers, and this training cautions police apprehending suspects who may be accustomed to using violence to defend turf and protect their trade. The experts say they are testifying based on evidence reasonably relied on by other experts in their field, based on their experience and training for certain kinds of interactions with certain suspects. As we will see, it will take the US Supreme Court to weigh in to help courts better examine the basis experts use in these cases. The courts need to sort out how to use race as a basis for giving an opinion about whether an officer was justified in using force. In the meantime, trial lawyers had to be on heightened alert for how race could be played by experts.⁴³

Insights from Critical Race Theory Since Rodney King

Let us examine the powerful insights from Professor Jasmine B. Gonzales Rose in her important and provocative article “Racial Character Evidence in Police Killing Cases” and look at cases for signs of institutional racism in the evidence law. She argues implicit bias impacts too many white jurors who use that bias to find not guilty verdicts for white defendants. These signs may be very important for combatting implicit bias at the preliminary petite and grand jury stages,⁴⁴ but also during jury selection.

⁴³ US Commission on Civil Rights, “Police Use of Force: An Examination of Modern Policing Practices” November 15, 2018,

<https://www.usccr.gov/files/pubs/2018/11-15-Police-Force.pdf>

⁴⁴ Jasmine B. Gonzales Rose, “Racial Character Evidence in Police Killing Cases,” *Wisconsin Law Review* 369 (2018). Gonzales Rose argues that CRT provides an important lens for examining the litany of not guilty verdicts or no prosecution decisions in these cases and revives the question for prosecutors about whether one effective way to combat racist biases of jurors is by raising the prospect that racism motivated the behavior of the white defendants in their actions in the case. Gonzales Rose concludes that the way to fix these biasing affects is for prosecutors to humanize and differentiate the victims from these stereotypes so the jury can see their individual humanity. She also warns the trial lawyer to be vigilant to attack

Gonzales Rose explains the way the racial character evidence likely finds its way into these cases.⁴⁵ She notes that, as of 2015, a disproportionate number of the victims of police shootings are Black and a disproportionate number of the police committing the shootings are white.⁴⁶ Her analysis of these cases leads her to believe that most officers never get prosecuted. The prosecution gets rejected at the grand jury stage of the proceedings, and then prosecutors use their discretion and do not bother bringing these cases at all. She argues that when they do get tried, these cases are evidentiary windows into the way that race infiltrates the thinking of the grand jury. Regardless of the racial makeup of these grand jurors she argues that they are affected by three racializing forces: the “big brute” stereotyping of Black suspects that leads jurors to stereotype a Black suspect’s propensity for violence,⁴⁷ the racializing of the credibility of victims in their accounts of what happened, and the impact of expert police testimony that is admitted which provides stereotyping evidence that the shootings were justified. According

police experts who may be relying on unwarranted character evidence foundations for their opinions that the defendants in question were justified in their use of force. Her article also encourages the trial lawyer to look to jury selection as an important tool for rooting out prejudice against Black suspects.

⁴⁵ Gonzales Rose, “Racial Character Evidence in Police Killing Cases.” Gonzales Rose argues the United States is facing a twofold crisis: police killings of people of color and unaccountability for these killings in the criminal justice system. In many instances, the officers’ use of deadly force is captured on video and often appears clearly unjustified, but grand and petit juries still fail to indict and convict, leaving many baffled. Gonzales Rose then provides an explanation for these failures: juror reliance on racial character evidence. Too often, jurors consider race as evidence in criminal trials, particularly in police killing cases where the victim was a person of color. Instead of focusing on admissible evidence, jurors rely on race to determine the defendant’s innocence, the victim’s propensity for violence, and the witnesses’ credibility. This article delineates the ways in which juror racial bias is utilized to take on evidentiary value at trial and constructs evidence law solutions to increase racial equality in the courtroom.

⁴⁶ “Thousands Dead, Few Prosecuted,” *Washington Post*, April 11, 2015, <https://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/>. This article reviews the findings of a 2015 Bowling Green study. The *Washington Post* thereafter set up a website to try to systematically report police shootings in America. Fatal Force, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/>

⁴⁷ Of course, the insidious nature of such statistical reasoning is how the jury is to take attitudes of some as evidence of attitudes of others of the same race. Certainly, the fact that more of one race as a percentage of the population is involved in the killing of white police should not be used as evidence of racial motives in cases involving defendant of that race in the killing of a particular White police officer.

to Gonzales Rose, the juror's likely reliance on inadmissible implicit biases restricts these cases from going forward.⁴⁸

Gonzales Rose frames the problem of race as a legal education and trial advocacy problem. She challenges legal educators to prepare future prosecutors and defense counsel to be aware of the ways racial character evidence can infiltrate a proceeding. Students need to be taught critical race theory (CRT) to see a history of the discrimination, disparate impact and violation of equal protection for Black people that emerges from an examination of police killing cases.

She challenges prosecutors to be on the ready for the ways lawyers representing white police can use code words to infiltrate jurors' thinking, triggering racialized use of character evidence. They need to object to use of code words that dehumanize Black suspect/victims and witnesses—that they are “illegals,” “less educated,” “prone to violence,” or “used to taking whatever they want.” The implication is that trial lawyers need to be readied to make their Federal Rules of Evidence (FRE) 403 arguments (prejudice substantially outweighs the phrase's probative value) and be on guard for lay opinions prohibited by FRE 701 (not reasonably based on fact).

⁴⁸ Rose, *supra*, note 44, at 375. She writes,

this Article demonstrates through the example of the role of racial character evidence in police deadly force cases, evidence rules—and perhaps, even more importantly, the principles and values behind these rules— are not applied or enforced equally along racial lines. Consequently, white parties and institutions collectively gain an unfair evidentiary advantage while people of color are disadvantaged by the role of racial character evidence.

Rose also cites to other critical race theorists in her footnote 2.

See also Montré D. Carodine, *Contemporary Issues in Critical Race Theory: The Implications of Race as Character Evidence in Recent High-Profile Cases*, 75 U. PITT. L. REV. 679, 687 (2014) (“[W]hen what we think of in a more traditional sense as evidence confirms any negative racial stereotypes (like Black people being dishonest or criminally inclined), it exacerbates the preexisting problem of race as character evidence.”); Chris Chambers Goodman, *The Color of Our Character: Confronting the Racial Character of Rule 404(b) Evidence*, 25 L. & INEQ. 1, 3 (2007).

Yet it is also important to recognize there is an inevitable racial stereotyping imbedded in the argument that because some White people may have prejudice or racialized fear of Black people, that other white people, the majority, those on grand juries sworn to make decisions based on evidence, will engage in prejudicial thinking. Is such prejudice inevitable? Can White people not engage in such thinking once its dangers and unfairness has been drawn to their attention? After all, the whole process of jury selection is designed to weed out those jurors who pre-decide cases based on race. Challenges for cause and preemptory challenges are designed to rid the jury of such thinking.

As the King case demonstrates, experts can be used in insidious ways to defend police killings. Gonzales urges advocates to be armed with Chief Justice Roberts's opinion:

The Supreme Court of the United States recently issued an opinion in *Buck v. Davis*.⁴⁹ Writing for the Court, Chief Justice Roberts rejected this expert opinion testimony of racial character evidence.⁵⁰ The Court observed that, according to Dr. Quijano, Buck's "immutable characteristic [of race] carried with it an 'increased probability' of future violence." The Court found that "[i]t would be patently unconstitutional for a state to argue that a defendant is liable to be a future danger because of his race."⁵¹ This reasoning should apply to bar the use of race as character evidence of propensity for violence against victims in police killing cases.⁵²

Gonzales Rose's solutions rely on classic evidence assumptions: if jurors do not hear evidence that evokes racial stereotypes, they will not use it.⁵³ In addition, she hopes courts will allow evidence of the positive

⁴⁹ *Buck v. Davis*, 137 S. Ct. 759 (2017).

⁵⁰ *Buck v. Davis*, 777.

⁵¹ *Buck v. Davis*, 775.

⁵² *Buck v. Davis*, 770. It should be noted that Dr. Quijano was not simply articulating a personal perspective, rather he was adopting the narrative of black dangerousness which has long been a popular philosophy used to justify black captivity. See "Brief for the National Black Law Students Association as Amicus Curiae Supporting Petitioner," 2-4, *Buck v. Davis*, 137 S. Ct. 759 (2017) (No. 158049), 2016 WL 4073688. Still, as easy as it is for the Court to say the expert can't use race, it will continue to be hard for experts to segregate issue of poverty, drugs, guns, gangs, antisocial personality disorders that develop before a person is 18, history of child abuse, domestic violence, and mental health in particular communities (experience with suicide by cop) from a particular policing environment. "Antisocial Personality Disorder," Cleveland Clinic, <https://my.clevelandclinic.org/health/diseases/9657-antisocial-personality-disorder>.

⁵³ Rose, *supra*, note 44. In Chapter 5 we will argue that even if the jury is protected from hearing the evidence, they may insert their own biases from their own experiences to fill in the gaps in the cases. Without more, like better jury selection techniques, the evidence prohibitions may not be enough.

The way judges try to supervise cases for ways that advocates might inflame the jurors is through careful attention to the words they use in light of FRE 403, that some words capture a lay opinion that may be without foundation or be overly prejudicial for its probative value. Rose Gonzales argues that use of some words, like *drug dealer*, *illegal*, or *suspect*, will trigger or signal permission for White people to engage in racist thinking. As a result of this sensitivity to words, even raising the possibility of violence or drugs is said to evoke special fears of Black people. The irony is that these arguments make assumptions about how all or some

peaceful character traits of the victim and use more explicit jury instructions beyond those that limit jurors' considerations to the facts presented in the courtroom. She argues giving jury instructions that more explicitly limit the jurors' considerations to the evidence presented and not using racial stereotyping, the jurors will follow such instructions and more just results will be reached.

Still, for those trial lawyers already inclined to see race as a factor, a major worry remains: that jurors will be encouraged to use racial character evidence in appeals from counsel to use their *common sense*. It is often unclear to the jury how to find the difference between making credibility judgments based on their day-to-day experience with others and prejudice.

Moreover, jurors are urged to judge the credibility of witnesses by examining the manner in which they testify as well as the consistency with which what they say comports with other facts, and so jurors are encouraged to consider speech, how articulate and consistent the witness is in their testimony, potentially sliding into racial stereotyping of the witnesses' credibility. The challenge will be to continue to examine these cases from a CRT perspective to see whether jurors are reaching unbiased results.

As a result, we may be back to an important CRT question: Is it permissible and/or advisable for Black prosecutors to fight racial stereotyping with racial stereotyping by looking for ways to infiltrate juror thinking that may invoke racial stereotyping of white racist behavior?

White people think or hear words. Assumptions about how White people use or hear words are also endanger of being racist. Where such arguments are their most pernicious is in situations where a White person uses the n-word. The argument goes that where a person uses the n-word, regardless of intent or context, they are signaling to other White people that it is okay to use the n-word by normalizing its use. Some point out that this argument denies to the hearer, whether White or Black, their ability to understand the context of its use, especially of a historical experience of racism or as teaching others to get past their revulsion to the word so as to confront the important legal or free speech implications of the use of the word. They stereotype its use, regardless of context or intent, and so may be implicitly racist in their thinking. See Randall Kennedy, Who Can say "N****r and Other Considerations, *The Journal of Black Education*, 1999/2000) (fully articulated N-word in the original title),

<https://www.bennington.edu/sites/default/files/sources/docs/DIVE%20IN%20Article%2012.11.19.pdf>. For courtroom judges, these issues are subsumed in their ruling of whether use of the word by a witness should be brought to the jurors' attention. The judge may decide that use of the word is necessary and not overly prejudicial to substantially outweigh its probative value. As a result, use of the word for some Black people may give them permission to engage in their own racialized biasing thinking.