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### The Conundrum of Zealous Representation (book review)

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# The Conundrum of Zealous Representation

Scott E. Sundby\*

SHARON DAVIES, *RISING ROAD: A TRUE TALE OF LOVE, RACE, AND RELIGION IN AMERICA* (Oxford University Press 2010)

## I.

I have two types of books in my life. One type is the book I read as part of my work and that resides on my desk. Make no mistake, I find many books in this category highly interesting and informative, but when I close my office door at the end of the day the book sits next to the coffee cup until the next morning.

The other type of book is the one that I keep on my bedside table and read in the quiet of the night's end. Usually, and quite deliberately, this book, whether fiction or non-fiction, has nothing to do with the law. These are the books that bring the day to an end by allowing me to escape into a world different from the one I see on an everyday basis. These are the books I hold out to myself as a reward for working late at night with the anticipation of finding out what happens in the next chapter.

On rare instances, a book will make the crossover from a daytime book to one that rests on my nightstand. Within my limited world, this is among the highest praise I can give, because it means that the author has written a book that is relevant to my work in the law, but is compelling enough to make me anticipate the next time I can pick it up. Sharon Davies' *Rising Road: A True Tale of Love, Race, and Religion in America* is such a book.

*Rising Road* tells the story of a murder that took place in Birmingham, Alabama in 1921. On the fateful day, a Methodist minister, Edwin Stephenson, murdered a Catholic priest, James Coyle, during a time when anti-Catholic fervor was sweeping across the South. Because a number of individuals had witnessed the killing, the case was not a "who-dunnit," but a question of why Stephenson had shot Coyle. And while most readers will not have heard of the murder before reading the book, at the time the case commanded national media attention because of the rather sensational tagline of a minister murdering a priest.<sup>1</sup>

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<sup>1</sup> See *Preacher Kills Catholic Priest: Marriage of Methodist's Daughter by Father Coyle Cause of Alabama Shooting*, N.Y. TIMES, Aug. 12, 1921. I had not heard of the case prior to *Rising Road*, which added to the book's suspense as Davies carefully shields the reader from the final outcome until the jury announces the verdict.

*Rising Road* succeeds admirably both as an intriguing story and as a piece of legal scholarship. The story itself involves a number of different plot lines that weave in and out in a manner that Davies must have considered a gift to her as a writer. While the murder takes place against a backdrop of a rising wave of anti-Catholicism, the conflict between Stephenson and Coyle also has an intensely personal twist. Not only has Stephenson's daughter, Ruth, converted to Catholicism against her parents' strong disapproval, but on the day of the shooting Father Coyle had married her to a Catholic man without her parents' knowledge. Throw in that Ruth's husband is a "foreigner" (he is Puerto Rican), and the stage is set for a riveting courtroom drama full of family conflict, religious prejudice, and racism. But just in case that volatile mix is not sufficient to pique the reader's interest, who is Stephenson's defense attorney? None other than Hugo Black, a rising star in the Alabama bar with a personal grudge against the district attorney.

Davies spends the first quarter of the book setting the stage. The reader starts to develop a sense of the different individuals involved, and while the author's sympathies clearly lie with Father Coyle, her portrayals of the other individuals are not caricatures. Reverend Stephenson, for example, does not come across as a particularly likeable individual; at the same time, Davies lets the reader sense his turmoil as a father whose only child, just turned eighteen, after a number of religious run-ins with her parents has finally fully repudiated their religion and run off to be married to a considerably older Catholic man. The story is thus made all the more intriguing because this is not a simple hate crime, but an act made complex by the whole realm of human emotion that would attach to a father who feels deeply betrayed by his daughter. The first part of the book also gives a vivid feel for Birmingham in the 1920's with its Jim Crow laws and the growing hostility towards Catholics that draws from a larger anti-Catholicism sentiment moving across the country.

Where *Rising Road* really starts to pick up steam (and when the book moved from my office to the nightstand) is once the killing has occurred and the legal system must respond. The prosecutor appears uncertain at first about how to handle the case and his situation is complicated by the evident sympathy held by much of the police force for Stephenson. Once Hugo Black enters the case, the prosecutor's task becomes even more daunting as popular sympathy and the local media lines up firmly behind Stephenson. Because of his early missteps, the prosecutor ends up lucky to have second-degree murder charges emerge from the grand jury, as it had begun to appear that the grand jury might not indict at all. The possibility that Stephenson's grand jury almost did not return a "true bill" is especially fascinating because the grand jury was doing what the courts often herald as the role of grand juries—acting in an independently inquisitive fashion and as a bulwark against the prosecutor<sup>2</sup>—rather than simply being willing, as the

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<sup>2</sup> See, e.g., *United States v. Williams*, 504 U.S. 36, 47–50 (1992); *United States v. Calandra*, 414 U.S. 338, 343 (1974); *Wood v. Georgia*, 370 U.S. 375, 390 (1962) (discussing that one of the traditional functions of grand juries is to stand as a shield between the accuser and the accused).

criticism is often stated, to indict a ham sandwich.<sup>3</sup> The catch, however, is that in Stephenson's case this does not seem like much of a majestic triumph of procedure since the grand jury appears to be assuming its independent role primarily for reasons of bias and prejudice.

From the defense's use of pretrial publicity on through closing arguments, the trial is mesmerizing. Hugo Black bases Stephenson's defense in part on a rather shaky claim of self defense, his hand forced by statements that Stephenson made upon his arrest. Black, however, then also boldly fashions a claim of temporary insanity off the idea that his client had lost his faculties upon learning that against his wishes the priest had married his daughter to a Catholic who might also even be a "Negro." Davies uses excerpts from the trial transcript and newspaper accounts to make the reader feel as if he or she is in the courtroom. Not knowing whether Stephenson will be convicted creates a wonderful suspense on par with a mystery novel and alone makes the book worth reading. As with any great book, however, *Rising Road* offers more than a riveting tale, but also causes the reader to reflect on broader issues.

## II.

While the book offers up a number of intriguing questions to ponder, I found myself repeatedly coming back to the question of whether Hugo Black's representation should be viewed with admiration or disdain. The book does an excellent job of creating the tension of wanting on a gut level to see Stephenson convicted while watching with fascination as Black engages in a series of strategic moves that capitalize on the volatile atmosphere surrounding the trial. Black himself appears later in life to have felt some ambivalence over his role in representing Stephenson, stating many years afterwards that when he had been asked to defend Stephenson, he had thought it was a different minister. (P. 283.) Black also may have been motivated to undertake Stephenson's representation in part because four years earlier he had been on the losing end of a political battle with the prosecutor in the Stephenson case, a time that Black recalled as "'the worst political turmoil' of his life." (P. 282.)

Whatever Black's personal motivation in representing Stephenson, his actions provide a rich and provocative basis for debating the proper role of the criminal defense attorney.<sup>4</sup> This is especially true at the trial where Black's representation

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<sup>3</sup> See Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 29–30 (2004); Andrew D. Leipold, *Why Grand Juries Do Not (And Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 263–64 (1995); Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2352 n.99 (2008). I have xeroxed the pages describing the grand jury and preliminary examination episodes and put them in my teaching file on indictments. They provide nice illustrations for students of how a prosecutor might make strategic choices based on the different procedures used for the preliminary examination compared to the grand jury.

<sup>4</sup> For an overview on the debate about the defense attorney's role, see Roberta K. Flowers, *The Role of the Defense Attorney: Not Just an Advocate*, 7 OHIO ST. J. CRIM. L. 647, 648–52 (2010);

can be seen as encompassing three levels of increasing intensity in presenting Stephenson's defense: (1) cross-examination on the facts; (2) impugning a witness's credibility based solely on a characteristic, especially a shared characteristic with the victim or defendant; and (3) using tactics that ostensibly support a defense but have the potential to inflame the jury. This review will use these three levels of increasing intensity as a way of thinking about the defense lawyer's duty of zealous representation.

Most lawyers likely will be accepting of Black's aggressive use of cross-examination as he takes small inconsistencies or lapses in a witness's testimony and uses them to undermine the witness's credibility. Consider, for example, Davies' description of Black's cross-examination of Mr. Chiles, one of the eyewitnesses to the shooting that occurred in the late afternoon:

Hugo Black . . . fir[ed] a series of questions at Chiles about the day of the shooting. What had he and [a companion] done that day? Where had they been? What were they doing in the city on a workday, instead of being at work? . . . "Did you work that day?" "No, I didn't work that day." "Where were you that morning?" Chiles said he couldn't recall. "Were you at home?" "I might have been home for a while." "What time did you leave home?" "I don't know." "Where did you go?" "I come to town." "When? In the morning or afternoon?" "Sometime in the afternoon." "Where were you in the morning?" "I don't remember where I was at in the morning," Chiles shot back.

"Were you sober?" Hugo Black "fairly bellowed" the question, one reporter remembered later, causing the witness to redden.

"I reckon I was," Chiles replied, icily.

"Can't you tell the jury *something* about where you were that morning?" "Walking around town here," Chiles answered, plainly growing exasperated. "You are sure about that now?" "I wouldn't say for sure, but I was around town." "All you really know about it is you were *living* somewhere that morning?" Hugo Black asked, sarcastically. "I wasn't dead," Chiles fired back. "Were you asleep?" "No, I had one eye open any how." Well, "what place in Jefferson County was that eye looking at?" taunted the lawyer. "A ripple of laughter ran through the courtroom" as Judge Fort gaveled for quiet. (P. 224.)

And so Black's cross-examination of Chiles continued on with bulldog determination, as did his relentless and frequently sarcastic cross-examination of

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Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); Stephen Gillers, *Monroe Freedman's Solution to the Criminal Defense Lawyer's Trilemma Is Wrong as a Matter of Policy and Constitutional Law*, 34 HOFSTRA L. REV. 821 (2006); Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL'Y 83 (2003).

other witnesses. (Trial lawyers will take comfort that even Black made the blunder of asking Chiles a question to which he did not know the answer, and the witness's answer did indeed backfire on Black. (P. 225.))

Although watching such antagonistic questioning may at times make us squirm uncomfortably over the possibility that a lawyer through cross-examination can take 'innocent' facts and make them look nefarious, on balance the justice system is inclined to accept aggressive cross-examination because we also know that many witnesses have layers to their testimony that only deep probing will reveal. Thus, while Wigmore's claim that "[c]ross-examination . . . is beyond any doubt the greatest legal engine ever invented for the discovery of truth"<sup>5</sup> might tend towards hyperbole, a thorough testing in the public forum of a witness's account still seems the best way to fully evaluate a witness's testimony. An eyewitness, for example, may herself be unaware that a process (say a suggestive line-up or police questioning) has influenced her, and only skillful cross-examination can reveal the weaknesses in her identification.

Before moving on to examine the next level of intensity in Black's representation, it is worthwhile to also use Black's cross-examination of Chiles as a basic reminder of just how different a trial is as a means of chronicling an event when compared to a book or article. As litigators can readily attest, trials are a very messy way of telling a story—witnesses do not always say what the lawyer expects and cross-examination can quickly undermine what a witness was expected to contribute. Thus a witness's statement that can readily be explained if given the journalist's opportunity to investigate and do fact checking can be made to sound dubious when exposed to the heat and emotion of cross-examination. Likewise, while the writer has the luxury of looking at the entire trial with narrative retrospection to see how all of the different parts and roles fit together, the trial attorney has to react in real time to a script that is constantly changing and providing surprises even when the lawyer has engaged in intensive pre-trial preparation. A witness like Chiles, for instance, may become angry or defensive even if telling the truth (cross-examination, after all, generally is not a pleasant experience; we call our system "adversarial" with good reason), but the jury is going to see that emotional reaction and possibly let it color their view of the witness. Indeed, in reading Davies' account of Stephenson's trial, I was reminded once again of how a criminal trial often resembles a Turkish bazaar in seeking a verdict amid the din and bustle of cross-examination and conflicting evidence and testimony—each lawyer constantly bargaining with the jury over what version of the "truth" they should buy, haggling over the value of different witnesses' stories, trumpeting their evidence as being of the finest quality while dismissing their opponent's as a second-rate imitation, continually shifting and adjusting their pitch in response to the latest piece of evidence or testimony the jury has heard. This rather untidy give-and-take, full of the surprises that keep trial lawyers awake at

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<sup>5</sup> Ford v. Wainwright, 477 U.S. 399, 415 (1986) (quoting JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (James H. Chadbourn rev. 1974)).

night, can give a great advantage to lawyers like Black who are quick on their feet and able to create and seize openings as they appear.

Such messiness, however, is the price we pay for having trials where a defendant is given wide berth in challenging the prosecution's case, and it seems a fair price to ensure that the state does not have a monopoly in presenting the facts. It is with Black's next level of intensity in questioning, however, that many may start to feel that a line was crossed. With several witnesses, Black raised on cross-examination that they were Catholic or had familial ties to Catholics. With Chiles, for instance, Davies recounts how Black at one point asked:

"Your brother-in-law is Edward McGinty?" "That is correct." . . . "Mr. Edward McGinty was standing there with you [at the scene of the shooting]?" "Yes, sir." "Did you marry his sister?" "I certainly did," Chiles replied, his tone slightly defiant, as if sensing what was coming. "Do you belong to the Catholic Church?" "I do not." "She does?" "Yes, sir." "Does *Mr. Edward McGinty* belong to it?" "Yes, sir."

Hugo Black let the man's answers speak for themselves. Chiles may not have been Catholic himself, but he had *married* one. How credible could he or "*Mr. Edward McGinty*" be? Whose side in the case could the jurors expect Chiles to take, when he had done the same thing Ruth Stephenson had done—married outside of her faith; married a Catholic? (Pp. 223–24.)

Similarly, Black's very last question of McGinty, which Davies describes as having been "flung . . . at [him] like a knife" was: "'You are a Catholic, aren't you, Mr. McGinty?'" . . . "McGinty did not flinch: "'Yes, sir.'" (P. 228.)

Now, assuredly a witness's potential bias is fair game, whether it is because they are a family member or a friend of one of the parties, or because they have a score to settle against someone involved, or because they hold a particular viewpoint that might color how they see a situation. Often the only way to explain how two individuals can see the same event and come to diametrically opposed understandings is to take into account their different worldviews and sympathies.<sup>6</sup> But were Black's questions within this realm of legitimately bringing out bias or did they go into evidentiary territory that should be forbidden?

Certainly if Chiles' wife or McGinty had been a member of Father Doyle's church, their Catholicism would have been relevant because of their direct ties to Doyle. Or if some specific reason existed to believe that witnesses' Catholicism

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<sup>6</sup> See generally Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729 (2010) (examining the tendency of individuals to conform to predisposed perceptions in a controversial acquaintance-rape case); Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009) (using the varied responses to the online video posted in *Scott v. Harris*, 550 U.S. 372 (2007) to demonstrate that people are psychologically inclined to interpret facts in a manner consistent with their group identity).

might be influencing their view—for example, pressure was being exerted from the Catholic community on the witnesses—then a probing of the witnesses’ religion and whether it was affecting their testimony would be warranted.<sup>7</sup> Black’s questioning raises discomfort, however, because its manner can be seen as aimed at playing to popular prejudices at a time when vitriolic statements were circulating about Catholics, especially in the South, rather than as any legitimate exploration of witness bias.<sup>8</sup> Not only did Black’s questioning curiously stop after raising the witness’s Catholic ties, but it was arguably framed in a way and within a context suggesting that, even if the case had nothing to do with the murder of a priest, the witness’s Catholicism would be sufficient reason to doubt them.<sup>9</sup> (A parallel example today might be if an attorney asked an eyewitness in a trial soon after 9/11 if she was a Muslim, using as the opening that the victim happened to be a Muslim, even though the witness’s religion did not have any clear tie to what she saw).

The difficulty, of course, in condemning Black as indisputably beyond the ethical pale for raising the witness’s religion is that religious conflict was at the very heart of the case. It would not have been irrational for one to wonder whether a witness with strong Catholic ties might not see the conviction of Stephenson as a critical vindication of the Catholics’ right to live peacefully and without discrimination. And if so, might not that belief cause someone, perhaps even unconsciously, to filter his or her perception of events in a particular way favoring their viewpoint?<sup>10</sup> If this were true, one could argue that Black had the right as Stephenson’s lawyer—and perhaps even the ethical duty as a zealous advocate—to put the issue before the jury. Or to raise the question more broadly: when should a shared characteristic with a key actor make that characteristic relevant for cross-examination?

The question raises a situation where the balance must be struck between any additional insight that the jury would gain from the information and the possibility that the jury will misuse the characteristic as a proxy and that its admission will add to prejudicial stereotypes. And, on balance, even given a defendant’s extremely strong interest in challenging a witness’s credibility, this would seem to

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<sup>7</sup> These examples would still be relevant under Federal Rule of Evidence 610 which bars questioning about a witness’s religion, see *infra* note 11, as the Notes to that rule make an exception to the prohibition if it is an “inquiry for the purpose of showing interest or bias.” FED. R. EVID. 610 advisory committee’s note.

<sup>8</sup> We do not know if the jury had any Catholic members, only that it was all-male and all-white. If Catholics were on the jury, one might assume it less likely that Black was raising Catholicism in this manner.

<sup>9</sup> Davies appears to view Black as using his questions on cross-examination about Catholicism in this way. She notes, for example, that Black’s question to McGinty about his Catholicism came immediately on the heels of asking McGinty a second time if he had been drinking, which Davies suggests had the effect of suggesting that it was “[a]s if being Catholic and drinking in the middle of a work day went together.” (P. 228.)

<sup>10</sup> See generally Kahan, *supra* note 6; Kahan et al., *supra* note 6.

be a situation where the defense should have to present some credible reason beyond the shared characteristic to justify its infusion into the case. The risk, otherwise, is that the jury will understand the court and criminal justice system as in some way condoning the use of religion (or other memberships) to question one's integrity and credibility based solely on that characteristic. As Davies describes Black's questioning, this seems to have been the primary purpose of his cross-examination and, without more, simply created too great a risk that Stephenson's jury would have downgraded the witnesses' testimony based solely on their Catholic ties rather than on any credible reason to believe that they were slanting their testimony. Indeed, this is the balance that Federal Rule of Evidence 610 has adopted in categorically barring questions based on religion solely to impugn a witness's credibility (thus Black's questions would not be allowed today),<sup>11</sup> and also would seem to be the appropriate approach under Rule 403 more generally for characteristics that are not categorically barred by the Rules.<sup>12</sup>

The question of where to draw the line between defense counsel's zealous representation and countervailing societal interests comes to full boil with Black's third level of defense, a tactic that Davies calls, perhaps with understatement, "extraordinary." (P. 243.) Black's "extraordinary" action came during Stephenson's testimony after he had just testified that his "heart broke" upon hearing Father Coyle say that he had married his daughter "[t]o Pedro Gussman, a Catholic." (Pp. 243, 242.) Stephenson then added that his last words to the priest were, "You have ruined my home! That man is a Negro." (P. 243.)<sup>13</sup> And it is

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<sup>11</sup> "Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced." FED. R. EVID. 610. Questioning about religion is allowed only if it is an "inquiry for the purpose of showing interest or bias." FED. R. EVID. 610 advisory committee's note. Alabama has adopted Rule 610 as part of its evidentiary rules. See ALA. R. EVID. 610.

If a judge for some reason did not bar the questioning despite Rule 610, then a similar question would arise to that addressed at the "third level" of questioning, i.e. whether Black as a lawyer had an ethical obligation to not play the "religion card." See *infra* notes 23–27 and accompanying text.

<sup>12</sup> See FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."). I would suggest that in deciding the prejudicial nature of the evidence, part of the consideration should be the larger impact on the criminal justice system and societal views if a shared characteristic or affiliation standing alone is seen as sufficient to raise bias. It must be acknowledged, of course, that where the shared characteristic is race or ethnicity, the jury will likely be aware of the characteristic even without any questioning; this possibility makes it all the more important that juries be racially representative to help ensure that any efforts to downgrade a witness's credibility based on race can be diluted by the presence of jurors of the same race on the jury. Cf. *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that potential jurors cannot be excluded from the jury through the use of peremptory challenges based on race).

<sup>13</sup> Stephenson's testimony that he partly had become unhinged because he thought Gussman was a Negro took the prosecution by surprise, as Stephenson's focus had always been on Gussman's religion. (P. 243.) But while Stephenson's suggestion that he thought Gussman was a Negro came as a shock to the prosecution, the question of Gussman's race had been a matter of public speculation. (Pp. 193–97.) Prior to the trial, speculation had risen to the point that Gussman had felt compelled to

at this point that Black dramatically called Gussman as a witness solely for the purpose of having him stand before the all-white jury so that they could see his dark skin; Black even had the window shades lowered to accentuate the darkness of Gussman's skin. (P. 244.) As Davies characterizes it, "Finally, Hugo Black was satisfied that the jurors had seen enough. 'I just wanted you to see the man,' he told them, his meaning clear. . . . The dull light [had] accentuated the dark tones of Pedro's tanned skin, subliminally buttressing the defense's insinuation that the [murdered] priest had married Stephenson's daughter not only to a Catholic, but a Negro." (P. 244.)<sup>14</sup>

At first blush, Black playing the "race card" in such a blatant manner would seem easy to condemn. The answer when viewed through the defense's eyes, however, is not so starkly obvious. Recall that the judge was allowing Black to pursue a "temporary insanity" plea off the idea that Stephenson had been so shocked upon learning that Doyle had married his daughter to a Catholic and a "Negro" that Stephenson had lost his faculties. If this was the basis of his defense, might not Black have a plausible claim that it was critical for the defense to establish to the jury that Stephenson could realistically have perceived Gussman as being a "Negro" given that the jury had not seen Gussman?<sup>15</sup>

That Black could even make such a claim highlights several important aspects about our criminal justice system. First, it shows that how we define culpability reflects not only notions of individual responsibility, but also tells us much about how society values certain classes of victims. Stephenson's "temporary insanity" defense was roughly parallel to the provocation defense used in heat of passion cases and it tells us much about Alabama in 1921 that a judge could accept the idea that a father upon learning that his daughter had married a Catholic and a "Negro" might lose his faculties to such an extent he should not be held responsible for the killing. Much like the question of whether the heat of passion defense should recognize as adequate provocation a homosexual advance<sup>16</sup> or catching one's spouse in the act of adultery,<sup>17</sup> what Stephenson's trial illustrates is that the recognition (or non-recognition) of a defense as a reasonable or understandable

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protest to the press: "[N]o one has ever questioned my color until I became mixed up in this case. I am not a negro and have no negro blood in my veins." (P. 197.)

<sup>14</sup> The implication that Gussman might be a "Negro" was a powerful one, and not only because of the potential to inflame the prejudices of the jurors. The Jim Crow laws of the time in Alabama would have made it a crime for a Negro to have married a white and also for anyone like Father Doyle who helped them get married. (P. 5.)

<sup>15</sup> See *supra* note 13 (noting that Gussman's race had been a matter of public speculation).

<sup>16</sup> See generally Joshua Dressler, *When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726 (1995).

<sup>17</sup> See generally Adrian Howe, *More Folk Provoke Their Own Demise*, 19 SYDNEY L. REV. 336 (1997) (arguing against recognizing provocation in domestic homicide cases in which men kill women and then claim provocation); Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331 (1997).

reaction is often a value judgment on how a class of victims is viewed. California's effort to abolish "panic strategies" as a way to keep bias from entering into juries' decisions is one effort to try and confront the idea that what a jury is allowed to find as a defense can be as much a statement about how society views the victim as it is about the defendant.<sup>18</sup> (A very different question is presented, of course, where the defendant puts forward a true insanity plea based on a mental illness—for example, that he suffered from a schizophrenic-paranoid delusion that made him believe members of another race were out to kill him—because then the question no longer is whether a "reasonable" person in the defendant's shoes would have reacted similarly.)

The third level of intensity in Black's representation pointedly returns us to the question of how we should view "zealous representation." Black's calling of Gussman as a "live physical exhibit" (p. 243) before an all-white Birmingham jury in the 1920s could be seen as a "smart" tactical move in the sense of enhancing the chances that the jurors would acquit. But was such a tactic ethical? Proper? In other words, was Hugo Black simply carrying out his duty to zealously defend his client using all of the tools and arguments available to him at the time, including the suggestion that his client had been temporarily insane because the priest he killed had just married his daughter to a "Negro" of a religion he despised? Or was this strategy, especially the calling of Pedro Gussman for what appears primarily to have been an attempt to inflame the jury's racial prejudices, beyond what our adversarial system of justice should tolerate even for "zealous" representation?<sup>19</sup>

It is important at this point to distinguish between the defense lawyer's role and that of the judge and legislature. The real villain in this scenario is the law of Alabama at the time that allowed a defense of "temporary insanity" to go forward based on a defendant's emotional reaction to his daughter marrying a Catholic and "Negro."<sup>20</sup> As noted earlier, the law's recognition (or non-recognition) of a defense speaks to how society views different classes of individuals. The frontline problem, therefore, is that Stephenson's reaction upon hearing of his daughter's marriage, even if genuine, simply should not have been recognized as a basis for acquittal or even partial-acquittal (again, I would distinguish the case where the reaction is because of a mental disease like schizophrenia). Without the temporary insanity defense as a foothold, Black's calling of Gussman would have been a pure play to the jury's prejudices and easily condemned.

But the judge in Stephenson's case was allowing the defense to go forward, and so Black's calling of Gussman had an ostensible evidentiary purpose. And

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<sup>18</sup> See CAL. PENAL CODE § 1127h (West 2004 & Supp. 2010) (enacted as the Gwen Araujo Justice for Victims Act).

<sup>19</sup> See generally Debra Baker, *Shredding the Truth*, 85 A.B.A. J. 40 (1999) (examining the ethical boundaries of a defense lawyer's use of controversial tactics).

<sup>20</sup> The book does not detail the basis for the "temporary insanity" defense in Alabama law, i.e. whether it was the judge's ruling that such a defense was recognized, whether the defense had a basis in prior case law, or whether the defense was codified in some manner.

while one might wonder why the prosecution and judge allowed the “live physical exhibit” to proceed without objection, caution ought to be used before censuring a defense lawyer for aggressively pursuing every avenue of defense under the law. Would we be comfortable with a defense lawyer who said, “I realize that legally I could have pursued a certain line of cross-examination that might have helped my client gain an acquittal but such questioning would have violated my personal sense of right and wrong”? To condone the defense lawyer foregoing a defense for personal ethical reasons, rather than for sound strategic reasons,<sup>21</sup> would seem to go down a dangerous avenue of allowing the lawyer’s personal morality to trump the defendant’s Sixth Amendment right to effective representation. The situation would be different, of course, if the line of questioning or “shredding” of a witness had no basis in fact and was therefore merely designed to inflame the jury.<sup>22</sup> In Black’s situation, though, whether Stephenson thought Gussman was a “Negro” was relevant to his defense, as distasteful as the defense might have been.

We should not let Black off the hook quite yet, though, because arguably he used the issue of Gussman’s race as essentially a Trojan Horse to engage in an inflammatory action before the jury. Again, the easy answer should have come from the judge who as the evidentiary gatekeeper could have required Black to undertake a less “extraordinary” and inflammatory means of proof.<sup>23</sup> The harder question is whether, since no judicial brakes were applied, Black went from “zealous” to “overzealous” when he used the legitimate evidentiary issue (could Stephenson have perceived Gussman as a “Negro”?) as a justification for engaging in a tactic that played to the jury’s prejudices. While no doubt opinions will differ, I would argue that if less inflammatory means were available, then Black did cross an ethical line. The Sixth Amendment right to effective assistance of counsel should require counsel to pursue all strategically sound lines of defense, even those she might find highly distasteful, but should not require her to use a tactic that might increase the chances of acquittal only because of its illegitimate appeal rather than because of the facts (assuming that other less inflammatory means of proof are available).<sup>24</sup>

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<sup>21</sup> In some situations an overly aggressive or distasteful defense may be strategically unsound. See Baker, *supra* note 19, at 41–44 (describing situations where aggressive defense tactics arguably backfired). In Stephenson’s case, Black’s presentation of Gussman to the jury would not have been likely to cause the jury offense in a way that would backfire.

<sup>22</sup> See MODEL RULES OF PROF’L CONDUCT R. 3.1 (2010) (stating that lawyer cannot assert or controvert an issue unless a non-frivolous basis exists). The rule includes an exception in a criminal case that the defense lawyer “may nevertheless so defend the proceeding as to require that every element of the case be established.”

<sup>23</sup> Assuming, that is, that Alabama at the time had some evidentiary equivalent to Federal Rule of Evidence 403. See *supra* note 12.

<sup>24</sup> Thus, under this view, while as a defense attorney I might not personally agree that a homosexual advance should be a legally recognized provocation under the heat of passion doctrine, I would be obligated to fully present my client’s claim if the law allowed it. I would not, however, be ethically obligated to cross-examine a witness on matters that might inflame a jury’s bias against homosexuals (and thus increase the chance of a partial acquittal) if the legitimate evidentiary point

Ideally, if judges are not fast asleep at the evidentiary wheel and are enforcing Rule 403, it will be the rare situation where defense counsel is making the final decision of whether a tactic's inflammatory nature is justified. And legitimate concerns can be raised that such an ethical rule poses its own perils. A danger exists that a portal is opened up for defense attorneys to forego a line of defense where they find a defense or client unappealing on the rationale that they believed another line of defense could be effectively presented without inflaming the jury (much like the dangers that attach to allowing defense counsel to pose barriers to a client testifying because they believe he will commit perjury).<sup>25</sup> Moreover, we should be greatly concerned about chilling the defense bar in pursuing controversial defenses if courts or disciplinary committees start deciding whether an attorney followed a certain defense strategy for its inflammatory effect rather than legitimate evidentiary purposes; as the Stephenson trial well illustrates, trying to untangle legitimate from illegitimate purposes can be far more difficult than first appears. Realistically, this means that rather than implementing any formal ethical rule, such an ethical standard would require defense attorneys to engage in their own assessment of whether a tactic that has inflammatory potential is necessary given the other possible means of presenting the defense.<sup>26</sup>

So what should our answer be when we return to the question we began with—should Black's representation be viewed with admiration or disdain? The flippant though somewhat accurate "short answer" may simply be that the choices Black was faced with show that a criminal defense attorney's ethical lot is often a hard one.<sup>27</sup> The more thoughtful but still evasive answer is that his actions illustrate well the uneasy relationship between a defense attorney's obligation to provide zealous representation in an adversarial system and the desire to use the legal system as a means of promoting larger societal values. If one were to simply describe Black's tactics in the abstract, most of us would recoil at what would seem an open use of racial and religious prejudice. In the context of the case, however, and especially viewed through the defendant's eyes, we might conclude that even if the tactics ultimately should not have been allowed by the judge, the

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could be made in a less inflammatory manner; indeed, under the view I am advocating, my ethical obligation would run the other direction.

<sup>25</sup> See *Nix v. Whiteside*, 475 U.S. 157, 189 (1986) (Blackmun, J., concurring in judgment) ("Except in the rarest of cases, attorneys who adopt 'the role of the judge or jury to determine the facts' pose a danger of depriving their clients of the zealous and loyal advocacy required by the Sixth Amendment.") (citation omitted).

<sup>26</sup> Although asking defense attorneys to police themselves may seem Pollyannish, the enforcement of prosecutors' obligations to disclose exculpatory evidence has largely been left to the prosecutors themselves. See Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643 (2002) (examining, *inter alia*, how the Supreme Court has largely left the question of what is "material" evidence under *Brady* in the hands of the prosecution).

<sup>27</sup> See Baker, *supra* note 19 (discussing difficulty of defense lawyers' ethical choices in pursuing defenses that may "shred" another person's reputation).

call from Black's viewpoint was not as easy as it first appears given the laws under which he was operating. Unless we are willing to say that a defense attorney should be allowed to let her own personal ethics override the defendant's Sixth Amendment right to effective assistance of counsel, defense attorneys must be given considerable, though not absolute, leeway in fashioning their defenses.

And, of course, part of what makes Black's representation so hard to classify (but also so intriguing) is that he himself is not easy to categorize. Was the Hugo Black representing Stephenson the person who later would become one of the most prominent voices on the Supreme Court for strengthening the constitutional right to counsel? When Justice Black wrote in *Gideon v. Wainwright* of how lawyers were "necessities, not luxuries" for those who are too poor to hire an attorney, perhaps he was thinking of his role in cases like Stephenson's.<sup>28</sup> After all, Black had managed in Stephenson's case to craft a viable defense for a client in a case that at first seemed to be an open-and-shut first-degree murder conviction.

Or when Black engaged in his tactics, especially the calling of Pedro Gussman for arguably no reason other than to try and inflame the jury's racial prejudices, was he acting more like the man who would become a member of the Klu Klux Klan two years after the trial rather than the zealous advocate trying to see justice done for his client?<sup>29</sup> Throw in the fact that Black had a personal grudge against the prosecutor and was eyeing political office, and Hugo Black may look less like the defender of the downtrodden and more like someone willing to play upon popular prejudices for the sake of personal gain. Indeed, the first ethical crossroads that Black faced was when he decided to accept a case where it likely was clear from the outset that the defense would draw momentum from religious and racial prejudice. Nor was this a case where if Black had passed on the case it posed a risk that Stephenson would not find adequate representation: a lawyer's decision to pass on a criminal case is likely to deprive the client of an effective defense only when the client, rather than the state, is going to be on the receiving end of popular ill-will or bias.<sup>30</sup>

In the end, we do not know Black's personal motivations for taking the case (as noted earlier, many years later he said that he had thought he was being asked

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<sup>28</sup> 372 U.S. 335, 344 (1963). For an examination of how Black's career as a criminal defense attorney later shaped his attitudes as a Supreme Court Justice, see STEVE SUITTS, *HUGO BLACK OF ALABAMA: HOW HIS ROOTS AND EARLY CAREER SHAPED THE GREAT CHAMPION OF THE CONSTITUTION* (2005).

<sup>29</sup> Black's former membership in the KKK came to light upon his nomination to the Supreme Court, but he was confirmed despite the revelation. (Pp. 283–84.)

<sup>30</sup> The defense attorney's decision of whether to accept a case is perhaps the place where she has the greatest latitude in making moral and ethical choices about what defenses she is willing to present on behalf of a client. Even public defenders can often avoid assignments if they believe that a particular line of defense will keep them from zealously representing a client, and private counsel certainly can. Granted, it may not always be obvious what a defense will entail when first meeting with a client, but the religious and racial overtones of Stephenson's actions almost certainly put his defense attorneys on notice of what was likely to be his defense.

to represent a different minister). But no matter how one might ultimately assess the ethics of Black's tactics and strategies in defending Stephenson, they certainly provide a wealth of examples that provocatively raise the question of just how far a defense attorney can or should go in defending a client.<sup>31</sup> The reader, though, will have to read *Rising Road* to see if Black's strategies succeeded or failed in securing an acquittal from the jury.

### III.

Sharon Davies has written a wonderful book with *Rising Road*. Every person interested in criminal justice and history should read it. The social themes raised by Edwin Stephenson's actions and his subsequent trial still ring (all too) true, especially the challenge of finding justice for victims and defendants when local passions and prejudices run hot. The book, however, also deserves to be on every reader's nightstand as a page turner whose story revolves around all of the classic elements of a great crime novel—love, betrayal, passion, family relationships gone awry, and lawyers walking ethical tightropes as they battle it out in the courtroom. And because Davies is careful to not give the ending away (nor will this review), one is riveted in watching the back-and-forth flow of the prosecution and defense's case, convinced at times that Stephenson will be convicted, certain at other points that Black's defense strategy will prevail. Whether one ends up feeling that justice has been served will have to await each reader finishing the book, but one ending is certain: the reader will put down the book with a satisfaction that his or her time has been well spent.

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<sup>31</sup> Rebecca West's fascinating account of the prosecution of a group of whites for a lynching in Greenville, South Carolina raises similar questions. She chronicles how the defense attorneys who were known generally as being fairly enlightened on race issues engaged in troubling behavior in defending their white defendants before an all-white jury. REBECCA WEST, *Opera in Greenville, in A TRAIN OF POWDER* 75, 94–103 (The Viking Press 1955) (1946).