The Briseno Dilemma

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Recommended Citation

The Briseno Dilemma, 12 Clinical L. Rev. 143 (2005)
THE BRISENO DILEMMA

TY ALPER AND SONYA RUDENSTINE

You know, the facts have a way of pursuing the lawyers, even prosecutors, throughout the case. They just can't seem to escape the facts, and of course they shouldn't be able to escape the facts. The facts should control the outcome and not the skill of the attorneys trying to put, you know, square pegs into round holes.

John Drummond Barnett, closing to the jury on behalf of Officer Briseno.508

At the end of his closing argument, prosecutor Terry White played the videotape of the beating one last time for the jurors and then asked, “Now, who are you going to believe, the defendants or your own eyes?”509 For White, the question was purely rhetorical. Not only had he presented what he saw as the only two options available to the jury, but he seemed confident that the videotape would convince the jurors to reject the defendants’ claim that they did not use excessive force. By framing the issue in this way, White betrayed his inability to conceive of a postmodern world in which a videotape that showed a cadre of officers repeatedly beating and kicking the recumbent Rodney King could fail to prove a case of excessive force.510

All was not necessarily lost for White, though, even if the jurors were inclined to believe the testimony of the defendant officers over the jurors’ own eyes. The testimony of one particular defendant, Officer Theodore Briseno, provided an alternative view of the facts that could have supported at least some of the convictions White was seeking.

In Briseno, White had a potentially powerful weapon against the defense witnesses who invoked the technical police jargon of “escalation and de-escalation of force” to portray the beating as a reasonable response to Rodney King’s purportedly aggressive actions.511 Briseno was a co-defendant and one of the many officers present throughout the beating. On the videotape, Briseno is seen initially attempting to stop the other officers from hitting King. Later in the tape, however, he is seen placing his foot on King’s head or neck and pressing or stamping down. That is the only potentially criminal act with which Briseno was charged, and the prosecution’s legal theory was that Briseno had used excessive force by “stomping” on King’s head.

508 Tr. vol. 77, 13921/12 - 18 (April 22, 1992).
509 Tr. vol. 75A, 13604/11 - 12 (April 20, 1992).
510 See the second chapter of this article, text at notes 163 - 338 supra.
511 See notes 276, 288 - 309, 461 - 474 supra and accompanying text.
Briseno’s attorney characterized the “stomp” as a protective measure designed to subdue King so that Briseno could safely handcuff him and stop the beating.

Briseno testified on direct examination that Officer Powell was “out of control,” that the other officers were “wrong” in their continued beating of Mr. King, and that Briseno later screamed to a colleague (a probationary officer whom Briseno was supervising that night) that “Sergeant should have handled this a lot different[,] . . . a lot better” and that “the officers should have their asses reamed.” These are damning indictments of his fellow officers. They have the ring of authenticity; they corroborate the images on the videotape that portray the beating as excessive; they are consistent with White’s persistent refrain that what the videotape shows is what actually happened. And coming from one of the four defendants, Briseno’s testimony threatened to undermine seriously the relatively united front that the defense had otherwise constructed.

Yet, White was paralyzed. Because he was prosecuting Briseno as well as the other three officers, he encountered a strategic dilemma, one that we will call the “Briseno Dilemma.” White wanted the jury to rely on Briseno’s outrage at his fellow officers as a basis for convicting them of using excessive force. At the same time, White also wanted the jury to convict Briseno of using excessive force himself when he stomped on King’s head. In other words, White wanted the jury to view Briseno as sufficiently decent and honest so that it could rely upon his testimony to convict others of brutality, and at the same time turn around and convict Briseno of committing the very same crime. White was aware of this dilemma. His strategy for resolving it appears in his rebuttal closing argument:

Ladies and Gentlemen, the force Mr. Briseno used was unreasonable. He may not have had an evil heart, he may not have had an evil mind. It was unreasonable and you have to judge it under the reasonable person standard of the instruction the court is going to give you.

White’s concession that Briseno may have lacked an “evil heart” and an “evil mind” was apparently a tactic designed to bolster Briseno’s testimony against his fellow officers. By distinguishing Briseno from the officers whose hearts and minds were unquestionable.

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512 Tr. vol 65, 10937/12 (April 3, 1992). This is Briseno’s explanation for his attempt to stop Officer Powell from hitting King: “[W]hat I recall was I didn’t see Mr. King moving and I thought Officer Powell – Officer Powell was out of control then.” Id. at 10937/10 - 12.
513 In response to Barnett’s question, “[D]id you think from what you had seen that what they were doing was wrong?,” Briseno answered, “Yes, sir.” Id. at 10941/20 - 23.
514 Id. at 10970/13 - 16.
515 Tr. vol. 77, 14030/2 - 7 (April 22, 1992).
bly "evil," White hoped to persuade the jury that Briseno was a reliable witness, albeit one who acted unreasonably in the line of duty. The flaw in this strategy is not a logical one — surely, one does not need to be inherently evil to act unreasonably — but rather a narrative one. What motivation accounts for Briseno's behavior? How does one who is not evil come to act so unreasonably as to stomp on another man's head when force of this kind is unnecessary? White's strategy for resolving the Briseno Dilemma had potential but was flawed in its execution. To make the strategy work, White had to offer the jury a narrative that explained how Briseno could at one moment be outraged at the brutality he witnessed, yet at the next moment engage in such brutality.

Perhaps White was trapped by the limits of his imagination and could not contemplate such a narrative. Perhaps as a prosecutor he was not finely attuned to the varying degrees of improper police behavior, and could only perceive a world of "good" cops and "evil" cops. Perhaps as a prosecutor he felt that the image of the LAPD he could present to the jury was limited; perhaps he did not want to admit that there are more than just two or three "bad apples" on the force — that there exists a whole range of officers who fall within a gray area of morality. Regardless of the reason why there emerged only two kinds of cops in White's narrative (the Melanie Singers, who do the "right" thing in a Rodney King situation,516 and the Officer Powells, who take advantage of such situations to live out their racist, rogue-cop fantasies), White was undone by this polarity when he tried to tell a story about Briseno. He could not characterize Briseno solely as a rogue cop because the jury would then likely dismiss Briseno's indictment of his co-defendants as merely the desperate act of a man willing to sell out his colleagues to protect himself. Briseno's defense — that he was trying to protect King — depended upon the depiction of the other officers' force as dangerous and excessive. In asking the jury to question Briseno's defense, White ran into the danger of having them question all of it, including his valuable assessment of the force used by the other officers. At the same time, however, White could not portray Briseno as a "good" cop, because such a characterization would undermine his condemnation of the stomp and weaken his chance to convict Briseno.

As a result, White was forced to walk a thin line between crediting Briseno's defense and discrediting his testimony against the other officers. As we develop below, White seems to have found no way to

516 White called Melanie Singer as a prosecution witness and elicited her testimony that the defendants' beating of Mr. King was indefensible. See notes 349 - 355 supra and accompanying text.
navigate this line adroitly. He began by gently coaxing Briseno into giving powerful testimony against the other defendants and ended by undermining that testimony through sarcastic questions about Briseno's own behavior. White's lack of a coherent narrative to guide him through the witness examinations was evident in his tendency to try to win points wherever he could, even if doing so undermined his larger goals. In the end, he all but abandoned Briseno's potential usefulness as a witness against Powell, Koon and Wind. Despite Briseno's damning testimony against his fellow officers, White referred to this testimony only once in his entire closing argument, and even then only in passing. His attempt to salvage a conviction of Briseno also turned out to be a failure: he offered no counter to the defense deconstruction of the videotape\textsuperscript{517} that constituted his sole evidence of any wrongdoing on Briseno's part.

The Briseno Dilemma was a challenging one. It demanded considerable narrative flexibility and creativity. It required that the prosecutors not only view the players and the evidence in a complicated way, but that they credit the jury with the ability to see the case in this more complicated way. In Part I below, we analyze the narrative problem that Officer Briseno posed and White's responses to it. To assist the reader in appreciating the choices White had and the decisions he made at each point in the trial, we describe and discuss the relevant portions of the trial proceedings in chronological order. Then, in Parts II and III, we offer and develop possible narrative frameworks within which a creative litigator might have worked to solve the problem.

I. The Trial

A. White's Opening Statement

White's first opportunity to present a narrative that accounts for the Briseno Dilemma was in his opening statement. He began by chronologically describing his version of the events of the night in question. When he reached Officer Briseno's involvement in the scene, White told the jury what they would see on the tape. The following is White's only specific mention of Briseno in his opening statement:

Also during the tape you are going to see another officer, Defendant Briseno, appear to intercede to stop Officer Powell from continuing to strike Mr. King. You are later going to see in the video, however, that Officer Briseno, while Mr. King is on the ground lying on his stomach, as his hands are moving back toward putting them behind his back, Officer Briseno walks over and delivers a

\textsuperscript{517} See the preceding two chapters, text at notes 163 - 507 supra.
stomp to the head and neck area of Mr. King. 518

In mentioning Briseno's apparent attempt to stop Officer Powell, White did not seem to be crediting Briseno with a decent act, but rather seemed to be warning the jury not to be fooled by this act. Significantly, White said Briseno "appear[s] to intercede," not that he actually interceded. The transition to the next sentence was marked by White's "however"; its use here suggests that whatever Briseno was doing when he "appear[ed] to intercede" on Mr. King's behalf at one point in the beating, his true motives are betrayed by his stomp to King's head.

White had not, by the end of his opening, tried to explain or reconcile these two seemingly contradictory actions. Neither had he remained neutral with regard to which of the two actions was indicative of the real Ted Briseno. His description of Briseno's stomp was significantly more judgmental than that of the apparent interception: not only did Briseno stomp on King's head, he did so while King was "on the ground lying on his stomach, as his hands are moving back toward putting them behind his back." Again, White seemed to be saying, "Don't be fooled. Briseno is just like all the others."

Two aspects of White's opening are striking with regard to Briseno. First, White gave no indication that he was going to ask the jury to credit anything Briseno would say later in the trial. At this point in the trial, of course, White did not know what Briseno's trial strategy would be, or even whether the officer would testify. Nevertheless, he knew from the videotape, if nothing else, that Briseno at some point in the beating may have attempted to intercede. From this, White should have been on notice that Briseno's defense theory might be at odds with that of the other defendants and might lead his attorney to condemn their behavior in the process of distancing Briseno from it. Whether White considered this possibility and rejected it we do not know. In any event, his opening prematurely committed him to the proposition that Briseno was not to be trusted. Second, despite his insinuation that the stomp was more true to Briseno's nature than the apparent intercession, White did not attempt to explain why the same person might have committed both acts. Perhaps he was making a deliberate choice to wait and see what the defense strategy would be; perhaps he was simply unable to create in his own mind a convincing story that would account for both actions.

B. Barnett's Opening Statement

White's first glimpse into Briseno's defense strategy came during

518 Tr. vol. 44, 5267/15 - 24 (March 5, 1992).
the opening statement of Briseno’s lawyer, John Drummond Barnett. Describing what his client saw when he arrived on the scene, Barnett explained:

He then saw Officer Powell take his baton and with a power stroke smash him [Rodney King] right in the face. . . . After that blow was struck, Officer Powell, in a torrent of blows, continued to hit Mr. King, as Mr. King was on the – on the ground and on his knees. He continued to hit him backwards and forward [sic] in power strokes. Power strokes meaning like a baseball bat[,] like Louisville Slugger[,] [sic] like this baton.519

Barnett’s use of the word “smash” was strongly at odds with the technical “escalation of force” rhetoric employed by the other defense attorneys.520 In addition, the invocation of baseball seemed designed to foreshadow later testimony about Powell’s notorious, callous statement when King was brought to the hospital after the beating, “We played a little baseball tonight, didn’t we?” The description of the other officers as “out of control”521 was a necessary ingredient of the defense theory (discussed in detail in the following subsection) that Barnett presented: Briseno was the hero, who valiantly attempted to save Rodney King from the torrent of blows visited upon him by a mob of out-of-control cops. This defense theory involved a twist on the Briseno Dilemma, making it necessary for Barnett, and not only White, to come up with a solution. For Barnett, the problem was this: In portraying his client as a hero, how could he explain the stomp to King’s head? Barnett’s answer was as simple as it was dubious. According to Barnett, Briseno’s “press down”522 on King’s body was an attempt to put King in a position in which King could be handcuffed, “so that Mr. King . . . [could] be put safely in custody, and . . . so that the actions of these batons . . . [would] cease.”523 This behavior was perfectly consistent with Briseno’s earlier attempt to stop Powell from striking King. Barnett claimed: both actions were attempts to intercede on King’s behalf. By the time Barnett finished, it should have been apparent to White that Briseno’s upcoming testimony could prove very valuable to the prosecution’s case.

519 Id. at 5343/23 - 5344/6.
520 See the references in note 511 supra.
521 Id. at 5346/18. Barnett was describing what was going through his client’s mind as he “place[d] his foot down” on King’s body: “He sees Wind winding up like this, (indicating). He knows Powell is behind his back. He believes, his perception is that they’re out of control and that he has to be mindful of his own safety.” Id. at 5346/15 - 19
522 Id. at 5346/14. According to Barnett, the “stomp” was not a stomp at all. Rather, Briseno “doesn’t want to get hit with the baton . . . being wielded by Officer Wind, and so he puts his foot out like this, his weak foot, and he starts to press down.” Id. at 5346/11 - 14
523 Id. at 5347/1 - 3.
C. Barnett’s Direct Examination of Briseno

Briseno’s direct testimony detailed every aspect of his defense theory. The theory was as follows:

Briseno arrived on the scene and initially attempted to help secure a fairly compliant King for what looked like a straightforward arrest. Then, all of a sudden, things got out of hand. King began to ignore some of the officers’ commands and was not subdued even after he was shot twice with a taser gun. Powell was out of control, hitting King with a series of power strokes that were, in Briseno’s mind, unnecessary and dangerous. Briseno attempted to intervene and stop Powell, but was rebuffed. Other officers joined in the beating, and Koon did nothing to stop them. Briseno thought that the other officers must have seen something he didn’t; from his vantage point, the beating appeared to be totally unjustified. Finally, Briseno decided to take action. He was worried for King’s life; he thought that someone might pull a gun. He wanted to subdue King and get him in a safe position to handcuff him, but he did not want to get hit by the other officers’ batons. If he could get King to stop moving, the other officers would stop hitting him. So he leaned in and attempted to place his left (weak) leg on King’s shoulder to hold him down or stop him from moving, which would enable Briseno to kneel and handcuff King. King rolled over and up when Briseno placed his foot on his shoulder, giving the act the look of a stomp rather than behavior designed to protect King. The attempted intervention was unsuccessful, and the beating continued. Afterwards, Briseno was furious. Throughout the entire beating, he never saw anything that would justify the other officers’ behavior. He was planning to report the incident to the lieutenant on duty at the station house, but when he got to the station the lieutenant was not there. At the station, Briseno happened to see a message from Koon alluding to a “beating” and a “big time use of force” that night. Briseno was sat-

\[524\] At least initially, Briseno described King as compliant with the officers’ commands. See, e.g., Tr. vol. 65, 10914/2 - 10915/14, 10917/14 - 10918/7 (April 3, 1992).
\[525\] Id. at 10919/12 - 10925/5.
\[526\] Id. at 10930/11 - 10935/19.
\[527\] Id. at 10941/3 - 10944/17, 10966/19 - 10969/7.
\[528\] Id. at 10941/3 - 10944/23, 10947/6 - 10948/22.
\[529\] Id. at 10944/18 - 23, 10971/13 - 10972/4.
\[530\] Id. at 10940/24 - 10941/1, 10948/2-4, 10954/22 - 10955/5.
\[531\] Id. at 10954/9 - 10955/28.
\[532\] Id. at 10956/14 - 10957/21.
\[533\] Id. at 10969/24 - 10972/13.
\[534\] Id. at 10974/6 - 10, 10952/7 - 18.
\[535\] Id. at 10974/24 - 10975/10.
\[536\] Id. at 10975/17 - 28.
sified – it looked as though Koon was properly reporting the incident – and Briseno did not feel the need to do so, given that he was now confident that the incident would be properly investigated.  

Barnett elicited on direct examination of Briseno the following themes that are central to this defense theory. What they all have in common is their potential usefulness to the prosecution.

1. The other officers, particularly Powell, were so out of control in their beating that they would not have stopped even if it meant hitting one of their own. For example, Briseno testified that he saw Powell hitting King "from the shoulder up" and "to the head" with a series of forward and backward power strokes that appeared to him that night to be "improper." Briseno himself was worried that he would be hit by the other officers' blows, and for that reason he did not want to get too close to King. With the aid of the videotape, Briseno testified about the beating at various points as follows:

MR. BARNETT: All right. And what are you doing?  
MR. BRISENO: This is when I am stopping Officer Powell.  
MR. BARNETT: All right. Are you stopping Officer Powell – Why are you stopping Officer Powell?  
MR. BRISENO: Because what I recall was I didn’t see Mr. King moving and I thought Officer Powell – Officer Powell was out of control then.  
MR. BARNETT: And so what are you trying to do?  
MR. BRISENO: Stop Officer Powell.  

MR. BARNETT: Are you concerned – All right. So your purpose is what?  
MR. BRISENO: To stop Officer Powell.  

MR. BARNETT: ... Did you think that from what you had seen that what they were doing was wrong?  
MR. BRISENO: Yes, sir.  
MR. BARNETT: Did you – Were you thinking anything else besides what they were doing is wrong?

537 Id. at 10976/1 - 10977/8.  
538 Id. at 10931/7.  
539 Id. at 10931/15.  
540 Id. at 10935/15 - 19. See also id. at 10941/20 - 10944/6.  
541 Id. at 10954/22 - 27. See the references in note 530 supra.  
542 Id. at 10937/4 - 20.
MR. BRISENO: I was thinking a lot of things. I was thinking that – I thought that maybe they saw a weapon I didn’t see. I didn’t know what they were doing. I just couldn’t understand why they were continuing doing what I saw there was no reason for.\footnote{id}{10941/20 - 10942/3.}

MR. BARNETT: That night what were you thinking at this point?

MR. BRISENO: Like I was telling you, I just – I didn’t understand what was going on out there. I just didn’t understand it. It didn’t make any sense to me. I couldn’t see why they were doing what they were doing.

MR. BARNETT: What do you mean doing what they were doing?

MR. BRISENO: It was like he moved. They hit him. I couldn’t see it. I can’t understand it. I couldn’t understand it. I was trying to look at and view what – what they were looking at and I couldn’t see it. I thought, you know – I understood a lot of things that night, but I’m thinking evidently they saw something I didn’t see.

MR. BARNETT: Are you thinking that that night?

MR. BRISENO: Yes, sir.\footnote{id}{10942/24 - 10943/14.}

2. Briseno, who had as clear a view of the incident as anyone, did not see anything that justified the beating. He saw King did not have a weapon. Briseno repeatedly testified on direct that he did not see what the other officers must have seen. A typical example is: “Again, I didn’t know what was going on. I just didn’t know what was going on out there. I couldn’t see – I tried, I looked everywhere from the beginning of the car back to where we traveled from. I couldn’t see it. I didn’t understand it.”\footnote{id}{10947/12 - 17.} Briseno also testified that at one point at least he had a clear vantage point and called out to the other officers that King was not armed:

MR. BARNETT: You seem to be pointing here at 4:10:25. Do you remember what you were saying?

MR. BRISENO: Yes, sir.

MR. BARNETT: And what was that?

MR. BRISENO: I was yelling that Mr. King’s hands were free.

MR. BARNETT: And why were you yelling that?
MR. BRISENO: I wanted the officer [sic] to know because I thought he might have had a weapon in his hand earlier. I just didn't know why they were doing what they were doing. I was trying to let them know his hands were free.  

3. Briseno thought that King's life was in danger. Regarding his thinking before he put his foot on Mr. King, Briseno testified:

MR. BARNETT: Were you concerned?
MR. BRISENO: Sure.
MR. BARNETT: What were you concerned about?
MR. BRISENO: Mr. King. I just – I didn't know what was going to go on from here. I just didn't know at this point.  

And in describing an emotional conversation he had immediately after the episode with the probationary officer who had accompanied him to the scene, Briseno's testimony was:

MR. BARNETT: What did he say?
MR. BRISENO: He said he had never seen anybody get hit in the face before, he didn't like it, and he said he thought he was going to have to shoot Mr. King.
MR. BARNETT: All right. And what did you say?
MR. BRISENO: I said I thought we were going to have a shooting also.
MR. BARNETT: Why did you think you were going to have a shooting?
MR. BRISENO: Because the officers, to my opinion, reached that fatigue factor, there is only one other thing left, and I thought somebody is going to pull their gun out.  

4. Briseno was outraged at the incident, and angry with Sergeant Koon as well as with the officers who had done the actual beating. He also believed, at least in the hours following the incident, that the officers involved deserved punishment. Briseno was not only critical of Powell; he testified to his anger with Sergeant Koon's handling of the situation as well. Barnett also took pains to elicit Koon's refusal to acknowledge Briseno's protests during the beating:

MR. BARNETT: And what are you saying [at a certain point on the tape]?
MR. BRISENO: I went to Sergeant Koon.
MR. BARNETT: Well, and what did you say?

546 Id. at 10948/10 - 22.
547 Id. at 10944/18 - 23.
548 Id. at 10971/12 - 25.
MR. BRISENO: I asked him “what the fuck was going on out here”?

MR. BARNETT: Well, were you – did you use just those words?

MR. BRISENO: Yes, sir.

MR. BARNETT: All right. Were you – did he even acknowledge you were there?

MR. BRISENO: No, sir.

MR. BARNETT: Did he respond to you in any way?

MR. BRISENO: No, sir.549

Note how Barnett’s use of the word “even” in the question, “Did he even acknowledge you were there?” turns a conventional, straightforward direct-examiner’s question about the sergeant’s behavior that night (a variant of “How did he respond?”) into a leading question that conjures up an image of a totally unresponsive Sergeant Koon. Furthermore, in an attempt to mitigate the potential harm that Briseno’s failure to report the incident might cause,550 Barnett elicited from his client explicit testimony regarding Briseno’s anger following the incident:

MR. BARNETT: Could you describe what your mental state was . . . immediately following the beating]?

MR. BRISENO: I was very angry, very upset, very frustrated.

MR. BARNETT: Well, why were you angry and frustrated and upset?

MR. BRISENO: Of the incident that I just saw.

MR. BARNETT: Well, what did you tell your probationer?

MR. BRISENO: Well, I was taking my anger and my frustrations out on my probationer because I was upset with the sergeant.

MR. BARNETT: All right. Well, what did you say?

MR. BRISENO: I recall telling him that I was upset with the situation, that –

MR. BARNETT: Tell the jury what you said to him.

MR. BRISENO: I told him – my probationer that I was upset with the sergeant, that “Goddamn, sergeant should have handled this a lot different, he should have handled it a lot better” and that “the officers should have their asses reamed.”

MR. BARNETT: Is that the exact words that you used?

MR. BRISENO: Yes, sir.

549 Id. at 10961/9 - 21.

550 A jury might well have thought that the fact that Briseno did not report the incident belied his claim that he was genuinely shocked at the officers’ behavior and had feared for King’s life.
MR. BARNETT: Were you saying it in this normal tone of voice?
MR. BRISENO: No, sir.
MR. BARNETT: What were you doing?
MR. BRISENO: I was screaming. I was yelling at him. I was taking my anger and frustrations from the sergeant and I was delivering it to my probationer.\textsuperscript{551}

In short, Briseno testified on direct examination that he was in a prime position to see a justification for the beating of Rodney King and did not see one, that the other officers were out of control and utterly unresponsive to his pleas to cease the beating, and that he was so angry at his fellow officers’ behavior that he was screaming in frustration after the incident.

Much of this testimony was powerfully incriminating evidence against the other three officers. One important indication of the potentially damaging effect Briseno’s testimony may have had on the other officers, particularly Powell, was the decision of Powell’s attorney, Michael Stone, to cross-examine Briseno immediately following Barnett’s direct.\textsuperscript{552} Stone apparently felt the need to minimize the damage done to his client on direct. For example, Stone spent much of his cross attempting to establish that Briseno believed Powell’s initial strike to King’s face was accidental:

MR. STONE: The strike of the baton to Mr. King’s face appeared to you to be accidental, right?
MR. WHITE: Objection, calls for speculation.
THE COURT: Overruled.
MR. BRISENO: I believed it was accidental, yes.
MR. STONE: Well, and you saw it, didn’t you?
MR. BRISENO: Yes.
MR. STONE: And you were watching?
MR. BRISENO: Yes.
MR. STONE: And it was accidental?
MR. WHITE: Objection, calls for speculation.
THE COURT: Sustained.
MR. STONE: According to your perception?... is that right? Your perception was it accidental [sic]?

\textsuperscript{551} \textit{Id.} at 10969/24 - 10970/26.
\textsuperscript{552} Defense counsel for Officers Koon, Powell and Wind appear to have worked as a team throughout the trial. It is obvious from the record that the team chose Stone to do the principal cross examination of Briseno. Possibly, this was because Briseno’s testimony was most damaging to Stone’s client, Powell. Or, by virtue of Stone’s highly successful cross-examination of prosecution witness Melanie Singer (see the preceding chapter, text at notes 339 - 507 \textit{supra}), Stone may have been given the role of defense “hatchet man” by his colleagues.
MR. BRISENO: Yes.
MR. STONE: All right. And that is based on what you saw?
MR. BRISENO: Yes.553

At this point in the trial, White had the evident option of giving up the conviction of Briseno and concentrating on accrediting his testimony in order to increase the likelihood of convicting the other three officers. Assuming that White did not elect this strategy – and there is no indication that he did – his task on cross-examination (and in his closing argument) was to maximize the effect of Briseno’s incriminating direct-examination testimony while at the same time presenting to the jury a narrative explaining Briseno’s stomp to King’s head.

D. White’s Cross-Examination of Briseno

The story White began to tell on cross-examination was the story he stuck to throughout the trial: a cadre of “rogue” cops went wild one night and beat a black man within an inch of his life. White knew that Briseno could help him tell this story, and he began the cross with a long series of general questions about the incident – about King’s behavior, the officers’ behavior, Briseno’s perception of the beating. Had Briseno been a non-defendant witness, this initial testimony would have been near-perfect from the prosecution’s perspective. White asked respectful, relatively non-confrontational questions in order to take advantage of Briseno’s incriminating testimony against his co-defendants.554 For his part, Briseno was mildly resistant, but far from hostile, to White’s questioning, and he eventually ended up testifying in accordance with what appear to have been White’s intentions.

553 Id. at 10990/15 - 10991/14. This excerpt is also important because, in fighting to keep out Briseno’s testimony that Powell’s initial strike appeared to be accidental, White displayed an obvious appreciation of the potential value of Briseno’s testimony. Other examples of Stone’s attempts to minimize the damage of Briseno’s direct are at id. at 10991/19 - 10994/2 (attempting to establish that Powell’s blow did not have much “power” behind it or to be intentional) and id. at 10993/19 - 10994/25 (establishing that Briseno did not actually see any of Powell’s blows strike King’s face or head). On re-cross, Stone and Briseno became even more adversarial toward one another. See, e.g., id. at 11072/14 - 24 (Briseno responding testily to Stone’s contention that King was moving: “I don’t care, too much force was used.”); id. at 11082/25 - 11086/16 (Stone grilling Briseno about whether Briseno really wanted the beating to stop and questioning Briseno’s failure to ask other officers to help him stop it).

554 Note that White’s initial treatment of Briseno on cross was inconsistent with White’s opening statement, in which he had discussed Briseno only in negative terms. White, who had not known at the time of his opening statement whether Briseno would testify at all and, if he did, what he would say, appeared to be reacting to – and attempting to take advantage of – Briseno’s defense strategy. It is only later in the cross that, as we discuss below, White failed to find a way to preserve the parts of Briseno’s testimony that he wanted the jury to credit while discrediting the parts that he wanted the jury to reject.
White first established that King basically complied with the officers’ orders. He then got Briseno to testify to the important point that while Powell was continually striking King, none of the officers was issuing commands to King, and Koon was standing by idly. Briseno also testified that King was not making any “aggressive” or “combative” movements. White was further able to elicit Briseno’s opinion that the beating was unreasonable and improper. In an interesting exchange that illustrates both Briseno’s value to the prosecution’s case and his reluctance to sell out his co-defendants, he testified as follows:

MR. WHITE: ... What were you thinking at this time during these second series of baton blows?

555 The following is a good example of Briseno’s reluctance to give White the most prosecution-friendly answers at first but willingness to go along with White in the end:

MR. WHITE: Now, when Mr. King got out of the car he was given orders, is that correct?
MR. BRISENO: Yes, sir.
MR. WHITE: And in your mind he was complying with those orders, wasn’t he?
MR. BRISENO: No, sir.
MR. WHITE: All right. What orders did you hear Mr. King being given?
MR. BRISENO: “Put your hands up. Turn around.”
MR. WHITE: Did he comply with those orders?
MR. BRISENO: No, sir.
MR. WHITE: Did he eventually comply with those orders?
MR. BRISENO: Yes, sir.
MR. WHITE: He eventually put his hands up in the air, didn’t he?
MR. BRISENO: Yes, sir.
MR. WHITE: He was told to get to his knees?
MR. BRISENO: Yes, sir.
MR. WHITE: He eventually complied with that order, didn’t he?
MR. BRISENO: Yes, sir.
MR. WHITE: He was told to lie on his stomach?
MR. BRISENO: Yes, sir.
MR. WHITE: And he eventually complied with that order, didn’t he?
MR. BRISENO: Yes, sir.

Id. at 10999/6 - 11000/4.

556 Id. at 11007/16 - 11008/3. The fact that nobody was even ordering King to do anything as he was being beaten damaged the defense claim that the beating was provoked by King’s refusal to obey the officers’ commands. White also painted a picture of Koon as unconcerned with King’s welfare. Briseno answered “No” to the following three questions: “Did you hear Sergeant Koon giving Mr. King any commands?; “Did you hear Sergeant Koon tell Officer Powell to watch out, don’t hit him in the head?”; and “Did you hear anything from Sergeant Koon up to this point in time from the first baton blow to the second series of baton blows?” Id. at 11007/22 - 11008/3.

557 Id. at 11008/13 - 18, 11012/8 - 11, 11023/24 - 28. White was careful to ask Briseno questions using these words, as he later introduced the LAPD guidelines that prohibit the use of the baton absent “aggressive” or “combative” movement. Id. at 11011/17 - 11012/7, 11023/6 - 23.
MR. BRISENO: I was just thinking that from my perception that it was - seemed to be he was striking - being from the upper shoulders and the head from the back where I was standing, it looked like they wish [sic] just hitting him everywhere. I wanted to get up and stop it.

MR. WHITE: All right. You wanted to get up and stop it?
MR. BRISENO: Yes, sir.
MR. WHITE: Would that - would that mean that you thought these blows were unreasonable?
MR. BRISENO: Yes, sir.
MR. WHITE: Would that mean that you thought these blows were excessive, these blows were excessive?
MR. BRISENO: That it was just a lot of force. I don't know about excessive.
MR. WHITE: Well, you didn't think they were reasonable, did you?
MR. BRISENO: No.

MR. WHITE: You didn't think this was a proper use of force, did you, at this time?
MR. BRISENO: Not at this time, no.
MR. WHITE: Okay. You thought this was an unnecessary use of force at this time, didn't you?
MR. BRISENO: I can't say that it was unnecessary, because of my perspective of where I was standing. I don't know what Officer Powell saw. I don't know what was going through Officer Powell's mind.

MR. WHITE: All right.
But you didn't see anything that would justify the - this second series of baton blows, did you?
MR. BRISENO: I didn't see anything, no.
MR. WHITE: You didn't see any aggressive movements by Mr. King, did you?
MR. BRISENO: No, I didn't.
MR. WHITE: You didn't see any combative movement by Mr. King, did you?
MR. BRISENO: No.
MR. WHITE: You didn't see any threatening movements by Mr. King, did you?
MR. BRISENO: No, sir.\footnote{Id. at 11009/1 - 11010/20.}

This exchange was devastating to the other defendants notwith-
standing—indeed, all the more because of—Briseno’s determined reluctance to testify to the legal conclusion that the force used was "excessive." White continued, effectively eliciting testimony from Briseno that Powell was using "too much" force,559 that Briseno had never before tried to stop another officer from using force but thought that this situation required "drastic" measures,560 that Koon was negligently allowing the beating to continue,561 that Briseno was moving around specifically to see if King had a weapon or was otherwise acting in a threatening manner and that he failed continually to see a justification for the beating,562 and that Briseno made the highly unusual decision to report to his superiors what he agreed was the "misconduct" of all three of his co-defendants.563 At this point, however, the impressive narrative that White had just constructed—a story of "rogue" cops bravely accused of brutality by a concerned "good" cop—took a perplexing turn. White began asking a series of questions about Briseno’s failure to report the incident to his superiors.564 Briseno responded in a straightforward manner that he did indeed fail to report the incident.565

Why did White dwell on Briseno’s failure to report? Briseno was not charged with that offense. Moreover, White’s previous series of questions was designed to establish that the force used by the officers was so excessive that Briseno took the highly unusual step of returning to the station to make a report. By highlighting Briseno’s decision not to make the report once he got to the station,566 White either totally undermined his previous narrative (the outraged "good" cop determined to see his fellow officers punished for their behavior) or at the very least threw into serious doubt the veracity of someone who had turned out to be one of his star witnesses.

White did make one attempt to provide a narrative explanation for Briseno’s failure to report. The idea was to show that in refusing to report the other officers, Briseno was adhering to the "code of silence"—the unwritten rule that requires police officers to "look the other way" when they witness their colleagues engaged in wrongdoing. By showing that Briseno was willing to follow the code of silence,

559 Id. at 11013/15 - 18.
560 Id. at 11014/12 - 11016/12.
561 Id. at 11015/3 - 11016/22.
562 Id. at 11024/4 -27, 11026/3 - 11027/26.
563 Id. at 11028/15 - 11031/17.
564 Id. at 11030/21 - 11032/15.
565 Id. at 11030/15 - 11032/12.
566 As we have noted, Briseno’s testimony was that he did not make the report because he saw Koon’s transmission on the ACC and was satisfied that the sergeant was properly reporting the incident. See his direct examination testimony, id. at 10976/12 - 10977/8.
White could explain – without justifying – Brisenó's decision not to report the incident while, at the same time, White managed to preserve the helpful testimony he had elicited from Brisenó about the unjustifiability of the other officers' behavior toward King. Here was an officer who knew that the force used by the others was unreasonable, but his fraternal tie to his colleagues prevented him from stopping or reporting it. The code of silence was so strong that even an essentially "good" cop was forced to forgo speaking out when "bad" cops engaged in unreasonable force. This code-of-silence narrative could be substantiated by Brisenó's earlier, repeated testimony that while he felt the force used by the other cops was unjustified and unreasonable, he assumed that they must have seen something that he did not see. He was unwilling to blame the other officers, even as he questioned their behavior.

White successfully established this narrative. Immediately after eliciting Brisenó's failure to report the incident, White asked him, "Officer Brisenó, are you familiar with the code of silence?" Over Barnett's objections, Brisenó said that he had heard of the code. He also conceded that an officer invoking the code will at times use the excuse of I-don't-know-what-was-going-through-that-officer's-mind in order to justify a failure to report an apparent incident of unreasonable force. White skillfully juxtaposed this concession with reminders of Brisenó's earlier testimonial reluctance to brand Powell's behavior as "excessive" because, in Brisenó's words, "I don't know what Officer Powell saw. I don't know what was going through Officer Powell's mind." By so doing, White made a strong pitch to the jury that Brisenó had adhered to the code of silence. But what could this pitch possibly accomplish, in the end?

The problem with White's version of the code-of-silence narrative was that it did nothing to explain the stomp to King's head, and thus did nothing to solve the Brisenó Dilemma. In fact, it contradicted virtually any narrative designed to convict Brisenó of the stomp. In order to convict Brisenó of having used excessive force, the jury had to find that he partook, albeit to a lesser extent than the other officers, in the beating of Rodney King. The code-of-silence narrative that White told was predicated on the notion that Brisenó was indeed appalled at his fellow officers' behavior but was willing to forgo reporting it. In White's story, Brisenó watched the other officers in horror, but was willing – in deference to the code of silence – to grant them the possibility that they saw something he did not see. This particular telling of

567 Id. at 11032/16 - 17.
568 Id. at 11010/4 - 6.
569 See id. at 11033/6 - 11035/10.
a code-of-silence story left no room for the officer obeying the code of
silence to have participated in the offensive behavior. Conceivably,
White could have told a code-of-silence story that implicated Briseno
in the offensive behavior: i.e., Briseno’s reluctance to report the inci-
dent was borne out of a desire to protect his fellow officers and a
growing realization that his own behavior was potentially blamewor-
thy. But that is not the story White chose to tell.
The narrative and logical flaws in the code-of-silence story be-
came increasingly apparent as White continued his cross of Briseno.
White next grilled Briseno again about his failure to report, arguably
driving home the point that the failure was a direct result of the
code. White then embarked on a long series of questions emphasizing
again that the officers were out of control, that King was not being
combative, and that Briseno was angry, frustrated, scared, and looking
for a way to stop the beating. So far, so good, if Briseno was a non-
defendant witness and White had only been using the code-of-silence
narrative as an explanation for a potentially impeaching inconsistency
(the failure to report) in his star witness’ story. But because White’s
job was to prosecute Briseno as well as the other three officers, he
culminated this series of questions about Briseno’s desire to stop the
horrific beating with the question: “So, you went over and you
stomped on Mr. King; isn’t that correct?” The question reeked of
sarcasm. Its underlying meaning was You expect us to believe that you
wanted the beating to stop when we can all see in the video that you
stomped on Mr. King’s head? The tone and substance of the question
were standard-issue demolition techniques for a prosecutor crossing a
criminal defendant’s exculpatory testimony, but here the implication
undermined completely the code-of-silence narrative that White had
just finished constructing. And by calling into question Briseno’s pro-
fessed desire to stop the beating, White risked losing the value of
Briseno’s entire previous testimony about the other officers’ use of
unjustified and improper force.
White continued in this vein, grilling Briseno about the stomp
and suggesting that this seemingly violent act was a bizarre way to
stop a beating. In doing so, White implied that far from wanting to
stop the beating, Briseno was eager to join in. Other aspects of
White’s cross further demonstrate his failure to solve the Briseno Di-

570 Id. at 11031/23 - 11035/10.
571 Id. at 11038/1 - 11040/8.
572 Id. at 11040/10 - 11.
573 White’s closing argument to the jury suggests that he did in fact decide to pass up any
value that he might have gained from Briseno’s favorable testimony. As mentioned above,
White referred to this testimony only once – in passing – in his closing.
574 Id. at 11040/13 - 11048/7.
lemma. He seemed to be trying to score points piecemeal wherever he
could, without working to develop a narrative capable of tying them
all together. He allowed Brisenò’s answers to dictate the direction of
the cross and undertook to accredit specific nuggets of testimony that
he found helpful while continuing to deride Brisenò generally as a liar.
For example:

White attempted to show that Brisenò’s stomp on King was not
only a move he was never taught at the police academy, but that it was
less likely to end the beating than if Brisenò had tried more forcefully
to verbally or physically stop the officers.575 The point was a good one:
certainly, it seems odd to attempt to subdue the victim rather than the
beater if one’s goal is to stop a beating. But when Brisenò protested
that he did yell to Koon to stop the beating and Koon ignored him,
White changed the direction of his cross practically in mid-sentence.
He immediately embarked on a series of questions designed to elicit
from Brisenò the fact that Koon was negligent in his supervisory ca-
pacity.576 In bolstering and expanding on Brisenò’s testimony that
Koon was unresponsive to Brisenò’s pleas to cease the beating, White
was contradicting the thrust of his previous line of questions aimed at
casting doubt on Brisenò’s concern for King. The switch in direction
made no narrative sense and illustrates Whites’s tendency to try to
score isolated points at the expense of narrative coherence.

Another illustration is the following passage:

575 Id. at 11041/5 - 11043/13.
576 Id. at 11041/17 - 11042/21:
MR. WHITE: . . . You could have gone in and covered up Mr. King with
your body, isn’t that correct?
MR. BRISENO: No.
MR. WHITE: ............
MR. BRISENO: Why is that?
MR. WHITE: Well, I’m not going to bend over there and end up maybe pos-
sibly getting hit by batons and I’m not going to tie up with
him.
MR. WHITE: ............
MR. BRISENO: You could have gone over to Sergeant Koon and said, ‘Stop
this right now’; isn’t that correct?
MR. BRISENO: I had yelled at Sergeant Koon earlier.
MR. WHITE: And what did you yell at him?
MR. BRISENO: It was – again, it was like, ‘What the fuck are you doing?’
MR. WHITE: All right. And that was because this force was continuing, and
continuing; is that correct?
MR. BRISENO: Yes.
MR. WHITE: And Sergeant Koon was doing nothing?
MR. BRISENO: Yes.
MR. WHITE: The supervisor at the scene, the person who had control over
these officers was doing nothing?
MR. BRISENO: Yes.
MR. WHITE: As you were approaching Mr. King, were you still angry?
MR. BRISENO: Yes.
MR. WHITE: Were you still frustrated?
MR. BRISENO: Yes.
MR. WHITE: You wanted this incident to stop, didn't you?
MR. BRISENO: Yes.
MR. WHITE: You didn't want to see this man beaten to death, did you?
MR. BRISENO: No.
MR. WHITE: Didn't want to see this man shot, did you?
MR. BRISENO: No.
MR. WHITE: You didn't want to see this man shot for no reason, did you?
MR. BRISENO: No.
MR. WHITE: You wanted this incident to end?
MR. BRISENO: Yes.
MR. WHITE: So you went over to place - to rest your foot on Mr. King's shoulder?
MR. BARNETT: Objection, argumentative.
THE COURT: Overruled.
MR. BRISENO: Yes.\textsuperscript{577}

White then went on to question Briseno at length about how forcefully Briseno placed his foot on Mr. King,\textsuperscript{578} implying that Briseno, who weighed less than half what King weighed, could not really have intended to subdue King with a gentle placing of a foot on his shoulder. The narrative difficulty with this line of questioning is that it is the \textit{initial} questions and answers about Briseno's fear for King's life that were most helpful to White. Yet when White sarcastically questioned Briseno about the stomp, White was telling the story of a witness who was lying about his fear for King's life. Again, White displayed his fundamental inability to resolve the Briseno Dilemma. In the abstract, both Briseno's testimony that he feared for King's life and White's caustic cross deriding Briseno's justification for the stomp were valuable components of the prosecution's case. But White failed to craft a line of questioning that allowed him to milk the value from each point without canceling the other out.

The deficiencies of White's cross examination of Briseno reside almost entirely in the narrative dimension. His question-framing and performative skills as a cross-examiner are not at issue. (Indeed, they are impressive.) Our point has to do with his failure to tell a story that was capable of accepting and endorsing Briseno's valuable testimony.

\textsuperscript{577} Id. at 11050/2 - 25.
\textsuperscript{578} Id. at 11051/23 - 11054/1.
that Briseno was appalled by his fellow officers’ violence against Rodney King while simultaneously explaining Briseno’s deliberate choice to join in the violence by stomping Mr. King. This failure is manifested again in White’s closing arguments to the jury.

E. White’s Initial Closing Argument

White began his closing argument by emphasizing to the jury that “you have four separate cases here” and that the jury must evaluate each one distinctly. The strategy of discussing each defendant separately would have been a useful one if White planned to use Briseno’s testimony against the other officers. However, as mentioned above, White did not in fact go on to do this. He made only one passing mention of Briseno’s favorable testimony, forbore completely to take advantage of its dramatic, damning force as evidence of the guilt of Powell, Koon and Wind, and proceeded to argue for Briseno’s own conviction by ridiculing Briseno’s purported justification for the stomp.

White’s theory for conviction of Briseno was fairly straightforward. He sarcastically referred to the stomp as “this so-called placement” of Briseno’s foot on King, and he repeatedly referred to the apparently “violent reaction of Mr. King’s body” to this “foot placement, according to Officer Briseno.” He played the video of Briseno’s stomp for the jury and asked them to evaluate for themselves whether the behavior was “reasonable or unreasonable.” White did nothing in his closing to account for the fact that he had spent much of his cross examination of Briseno accredit ing Briseno’s testimony. White’s undifferentiating incredulity toward Briseno’s story in closing argument seems strained – and may perhaps even have registered on the jury as feigned or hypocritical – after the jury saw White treat Briseno with kid gloves through a substantial portion of his cross.

The only time White attempted to provide a narrative that explained Briseno’s behavior consistently with conviction was at the end of the argument:

Now, why did Mr. Briseno do that? Well, maybe he just got caught

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579 Tr. vol. 75A, 13503/11 - 12 (April 20, 1992).
580 The fact that White did not intend to use his opening remarks about “four separate cases” as a foundation for Briseno’s testimony against the others is evident from the following comment by White: “You can’t say, well, if one is guilty, they are all guilty. ¶ The prosecution believes that is the case, but that is not how your deliberations work.” Id. at 13503/22 - 25.
581 Id. at 13579/12.
582 Id. at 13579/11 - 13580/19. The quoted passage is at id. at 13579/16 - 18.
583 Id. at 13579/10 - 13581/1. The quoted passage is at id. at 13579/24 - 25.
up in the frenzy of this event. Maybe after determining or after seeing this force being used against Mr. King again and again and again for no apparent reason, maybe he just got caught up in it.

He saw King move, Mr. King wasn’t resisting, Mr. King wasn’t doing anything as far as trying to escape, he saw Mr. King move and he got the same mind-set as these other . . . defendants. Every little movement produced a use of force. Every movement, no matter how insignificant[,] produced a use of force.584

Thus, it appears that White’s explanation for Briseno’s behavior was that he “just got caught up in” the collective fury of the officers and, all of a sudden, “got the same mind-set” as the others. This narrative may or may not have had some potential convincing power, but it comes across as saying too little, too late. These eight lines represent White’s only attempt to reconcile the Briseno Dilemma in his entire closing argument, and he had not said one word to prepare the jury for such a narrative, either in his opening statement (which may be understandable because he did not yet know Briseno’s strategy) or, more significantly, in any of his questioning of Briseno.

Furthermore, in making this argument for Briseno’s conviction, White risked hurting his case against the other officers. Inexplicably, White emphasized in his closing that Briseno’s stomp came at a time when the blows of the other officers had subsided somewhat. White apparently brought this up to make Briseno’s stomp look worse. In response to the anticipated defense that Briseno was protecting King from imminent harm, White asked, “was this injury that Mr. Briseno is alleging, did it appear to be imminent? Well, at that point in time Officer Powell looked like he was reaching for his handcuffs.585 In the context of a closing argument devoted for the most part to emphasizing the relentless abuse of King by the other officers, it seems risky to have pointed out their momentary self-restraint in an effort to convict Briseno. After all, “this injury that Mr. Briseno is alleging”– as White referred to it sarcastically here – is precisely the injury that formed the core of White’s case against the other officers. White’s implicit suggestion that Briseno was wrong to have feared for King’s life (and not just that he disingenuously stated that he feared for King’s life) undercut his case against the other officers.

F. Barnett’s Closing Argument

Barnett framed his closing argument as a search for the answer to one crucial question: “[I]s there some evidence from which Mr. Briseno could believe that . . . it was necessary to protect Mr.
Thus framed, Briseno’s defense theory was a potential boon to White’s prosecution of the other officers. There are two ways in which the jury could have bought the theory and acquitted Briseno, one of which aided White immensely. The jury could have believed either that at the time of the incident Briseno reasonably thought King was in danger and acted accordingly but was wrong to have been worried about King, or that he was right to be worried and acted properly. White would have preferred a variation of the latter, with a narrative twist that would also allow for the conviction of Briseno. Briseno theoretically would have been happy with either. Perhaps he would have preferred the former, so as not to help convict his fellow officers, but to take this line would have required Barnett to argue to the jury that Briseno was reasonable but mistaken in his attempted defense of King. Probably deciding that this argument would concede too much, Barnett argued instead that Briseno “needed to take that action so that Mr. Wind and Mr. Powell would quit beating Mr. King to a pulp.”

Barnett did not hesitate to condemn the actions of the other officers. At one point, he portrayed his client as the hero of the entire incident: “Of all the police officers at the scene, one officer steps forward and tries to stop his fellow officers, and that policeman sits there and it is Officer Theodore Briseno. He is the one[ ,] he is the only one[ ,] who tried to stop this beating.”

White’s failure throughout the trial, and particularly in his closing, to capitalize on Briseno’s damaging testimony is most surprising, however, in light of Barnett’s open attack on Stone in Barnett’s closing argument. Barnett not only explicitly acknowledged that Briseno’s testimony was extremely damaging to the other officers; he argued at length that Stone tried to prevent Briseno from testifying against

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586 Tr. vol. 77, 13879/27 - 13880/2 (April 22, 1992). Barnett’s legal theory was one of “defense of another.” He argued that the state has the burden of proving that Briseno did not act in defense of King. See id. at 13872/21 - 13873/16 (“They have to prove the negative. They have to prove and they’ve got to prove beyond a reasonable doubt that Ted Briseno did not attempt to help Mr. King.” Id. at 13873/2 - 5).

587 Id. at 13882/11 - 13.

588 For example, Barnett distinguished Briseno’s kick from Officer Wind’s kicks: “[Briseno] used his left foot, his weak foot, not like Mr. Wind.” Id. at 13883/11 - 12. See also id. at 13884/18 - 22 (“Look at what Mr. Briseno did not do. He did not, for instance, thereafter, after he had been thrown off, after putting his foot down and going backward, he didn’t go up and start kicking him like Mr. Wind did or start beating him.”), 13887/1 - 3 (“You have to step into Mr. Briseno’s shoes. Powell is out of control, Wind is out of control. The situation is electric.”).

589 Id. at 13885/16 - 20.

590 Id. at 13895/17 - 23: “[T]hey got a problem and that problem is Ted Briseno. What are they going to do with him? What are they going to do with Ted Briseno who was at the scene and who said in word and in deed what they did was wrong? ¶ If he repeats that, it is very damaging to their case.”
his fellow officers by threatening Briseno in Stone’s opening statement, and that Stone then put on perjured testimony in an attempt to discredit Briseno.\footnote{Id. at 13895/23 - 13918/9. Barnett recalled that Stone explained what looked like Briseno’s attempt to stop Powell as instead an attempt to protect Powell from getting “shocked” if he touched the just-tasered King. Barnett argued that the “problem is it isn’t true,” \textit{id.} at 13896/13, and that Stone was telling Briseno what he’d better testify if he wanted to stay in good with the other officers: “Join the team or become the enemy.” \textit{id.} at 13899/1.} The following statement summed up Barnett’s attack on Briseno’s co-defendants: “[Briseno’s] detractors reached into the depths of the sewer of perjury to blunt this truthful testimony, and to no avail. ¶ Ted Briseno stood and stands alone against the power of the state and against the cruel weapons of slander, deceit and perjury and the extortion of his former comrades.”\footnote{Id. at 13918/3 - 9.}

Barnett ended his argument by explicitly articulating the narrative incoherence of White’s prosecution theories, although in a slightly different way than we have been discussing. Barnett’s argument was that White’s condemnation of the brutality of the other officers by itself created a reasonable doubt as to whether Briseno may not have been acting in response to that brutality and thus in defense of King: “In evaluating the argument the prosecutor made in this case you might want to consider the argument they made against the other defendants and see if you can detect a certain tension in their logic, a certain inability to make the facts work for the prosecution of the others, as well as the prosecution of Ted Briseno.”\footnote{Id. at 13921/5 - 11.} Therein lies the Briseno Dilemma, of course; and White’s last opportunity to solve it came in his final argument to the jury.

\section*{G. White’s Rebuttal Closing Argument}

White did little in his rebuttal argument either to highlight Barnett’s tirade against the other officers or to answer Barnett’s question about the inconsistency in the prosecution’s theories of the case. White did spare Barnett and Briseno from his opening remark that “[a]fter listening to . . . Mr. Mounger, Mr. De Pasquale, and Mr. Stone [the other three defendant’s lawyers], I’m reminded of the comment that desperate men do desperate things.”\footnote{Id. at 14002/17 - 20.} But then, just a few minutes later, he included Briseno in his list of men who are not “above the law.”\footnote{Id. at 14004/1 - 4.} He did not address Briseno’s specific defense-of-another defense until the end of his argument, when he made the important point that “usually . . . [this defense] is used in cases where someone
attacks another person and then an individual steps in and fights off the attacker," whereas here Briseno testified he "had to inflict damage on Mr. King in defense of Mr. King." White then reminded the jury it only had to conclude that Briseno acted unreasonably in order to convict him.

It is at this point that White conceded that Briseno "may not have had an evil heart, he may not have had an evil mind," arguing at the same time that his actions were nonetheless unreasonable. Yet White just left it at that, and did not create any story at all to explain why this man, who was not evil, came to act in such an unreasonable, and hence illegal, manner.

II. Alternative Narratives

We have described the Briseno Dilemma and White’s reaction to it in order to illustrate a complex narrative challenge that a particular prosecutor encountered. As we have discussed, White failed to develop a solution to the dilemma – one that would take advantage of Briseno’s powerful testimony against his fellow officers without eliminating the possibility of obtaining a conviction of Briseno himself. White failed to imagine and present a narrative framework within which the Briseno Dilemma could be solved. The remaining parts of this article suggest such possible frameworks.

They do not suggest that White necessarily should have employed one or another particular narrative structure in pursuit of his aims. Rather, they demonstrate that narrative resources fitted to the task exist – available stories that a creative litigator faced with White’s dilemma would have done well to consider. The point is that once a litigator faces up to the need to create a coherent and cohesive narrative for his or her jury and recognizes that the job is difficult, more than one possible story may be summoned up to do the work.

A. Doublethink: Theodore Briseno as Winston Smith in 1984

If you want a picture of the future, imagine a boot stamping on a human face – forever. George Orwell, 1984

The narrative question that White had to answer with regard to Theodore Briseno is, How does one who is not evil come to act so unreasonably? An answer to this question may be found in George Orwell’s 1984. Orwell’s protagonist, Winston Smith, is a futuristic

596 Id. at 14029/15 - 21.
597 Id. at 14030/3 - 5. See text at note 515 supra.
Theodore Briseno. Living in a society devoid of individuality, where critical thought is punishable by death, Smith is initially wary of the omnipotent “Party.” He takes steps – albeit tiny, insignificant, and futile ones – to effectuate the Party’s destruction, but he ultimately succumbs to its power. In the end, Smith is as mindless a minion of the evil Party as anyone else; he believes he has “won the victory over himself”;599 and his silent, callous obedience to the Party’s orders be-speaks not evil, but the ultimate submission.

This subsection analogizes the plight of Winston Smith to that of Theodore Briseno, suggesting not that there is an exact parallel between the two (although some of the narrative similarities are striking) but that Smith’s story provides a framework within which a creative litigator could have shaped Briseno’s. Just as a reader of 1984 could convict Smith of various atrocities despite his obvious lack of an “evil heart” or an “evil mind” (to use White’s words) – and would very likely damn the Party as pure evil – a jury asked to consider Briseno’s story in this context may have been more inclined to convict both Briseno for the stomp to King’s head, and the other officers for their more demonstrably “evil” behavior.600

Analogizing Briseno’s behavior, motivation, and mentation to those of Orwell’s protagonist, Winston Smith, provides one way in which White might have solved the Briseno Dilemma. How did Briseno appear so comfortable describing the other cops’ actions as “out of control” and his own stomp to King’s head as perfectly reasonable? White could perhaps have argued that he did so by using what Orwell calls “doublethink” – “conscious deception while retaining the firmness of purpose that goes with complete honesty.”601 Orwell’s words are also a fairly accurate description of a liar who makes a good trial witness. For the process of doublethink involves more than a willingness to lie. In an important sense, one must be willing and able to lie to oneself, not only in order that others will believe the lie more readily, but also so that the lie is internalized and perpetuated. Orwell explains, “The process has to be conscious, or it would not be carried out with sufficient precision, but it also has to be unconscious, or it

599 Orwell at 245.
600 By invoking Orwell’s novel we do not imply that White needed to refer explicitly to 1984 in the courtroom in order to tap the sources of the novel’s power. 1984 is a masterpiece in part because of how chillingly it convinces readers of Smith’s transformation from hate to love of the Party’s leader, “Big Brother.” White’s narrative failed to convince the jury of Briseno’s transformation from fear of and disgust with the other officers’ actions to active participation in them. By drawing parallels between the two narratives – one coherent and moving, the other incoherent and easily dismissed – we intend only to present an example of a narrative structure that White might have employed in order to prosecute all four officers more effectively.
601 Orwell at 177.
would bring with it a feeling of falsity and hence of guilt."\textsuperscript{602}

Smith is eventually taught to doubt the existence of objective reality. As a Party official lectures him, "When you delude yourself into thinking that you see something, you assume that everyone else sees the same thing as you. But I tell you, Winston, that reality is not external. Reality exists in the human mind, and nowhere else. . . . That is the fact that you have got to relearn."\textsuperscript{603} Briseno has learned this fact well. When he sees the beating continue despite his protests, his reaction is not to continue to question the behavior of the other officers, but to assume that they must be seeing something that he doesn't see.

Perhaps it is necessary for every police officer to have a certain amount of trust in his or her fellow officers and to believe that they will behave properly. Perhaps, therefore, it is understandable that Briseno's initial reaction to his fellow officers' continuing violence was confusion and self-doubt. Yet, is there not some point at which the behavior of one's fellow officers goes so far that it becomes unreasonable to keep giving them the benefit of the doubt? The Party teaches that there is no such point. Rather, when one remains unable to see the reality that the Party seems to see, the proper course is to go on forever accepting that one is simply missing something which must be real because the Party seems to see it.

This much, perhaps, explains why Briseno stopped trying to fend off Powell and the other officers who, to his individual perception, were beating King for no reason. But White's narrative needs to go further to explain Briseno's own affirmative act of stomping Rodney King. It needs to explain how one who is not evil comes not only to accept but to mirror the actions of those who are evil.

Winston Smith, the protagonist of 1984 is not evil; the Party is. The Party murders, tortures, and most important, controls. In the country of Oceania, the Party controls the work done, the language spoken, and the thoughts thought. Smith is one of the very few who has somehow managed to elude the grasp of the Party's thought-control, and he rebels by making furtive notes in his diary - "Down with Big Brother"\textsuperscript{604} – when he believes the omniscient telescreen in his apartment is not watching him. He also arranges a secret meeting with someone he believes to be an officer of a subversive group and he eagerly reads "the book" that contains a plan for the overthrow of the Party. He defies the Party's strict prohibition against love by enjoying an illicit affair with a woman he met at work. Yet despite these small steps toward subversion of the Party, Smith is essentially a Party regul-

\textsuperscript{602} \textit{Id.}

\textsuperscript{603} \textsc{Orwell} at 205 - 206.

\textsuperscript{604} \textsc{Orwell} at 19.
lar, as he carries out his daily task of forging records and participates in daily hateful screeds against the Party’s enemy.

Like Smith, Theodore Briseno was initially appalled at what he saw going on around him. He testified truthfully that he thought the other officers were “wrong” and “out of control.” He testified truthfully that he was worried for Rodney King’s life. He testified truthfully that he tried to put an end to the beating, by reaching out to Powell to stop the blows and by yelling to Koon. And (so White’s narrative might go), Briseno was entirely right in his perceptions and his first reactions to them. But Koon and Powell ignored Briseno, and the beating continued, and Briseno began to wonder, “Do they see something I don’t see?,” and that became the constant refrain in his mind (as in his testimony). Smith, too, at several points in the narrative, wonders whether he is the insane one and is wrong to think that the Party is evil.605

Once it became clear to Briseno that his fellow officers (including the supervising officer on the scene, Koon) were not going to heed his pleas to stop, three things happened, all of which also happen to Smith. (1) Briseno further doubted himself. (2) He felt pressure from the others to act as they were acting. And (3) the part of Briseno that had been indoctrinated by the evil culture surrounding him began to reveal itself. The manifestation of these three phenomena was the stomp to King’s head.

In 1984, a similar manifestation is Smith’s evolving reaction to the “Two Minutes Hate,” a regular part of the Oceania workday, in which the nation’s hated enemy is shown on the telescreen denouncing the Party. The Party uses the “Two Minutes Hate” to inflame the people, to unite them against the enemy, and to instill in them a fear of revolution. Smith, despite his sympathy for the subversive enemy, finds it frighteningly easy to join in the “Two Minutes Hate,” initially for fear of being discovered as a traitor but very quickly as a willing participant:

The horrible thing about the Two Minutes Hate was not that one was obliged to act a part, but that it was impossible to avoid joining in. Within thirty seconds any pretense was always unnecessary. A hideous ecstasy of fear and vindictiveness, a desire to kill, to torture, to smash faces in with a sledge hammer, seemed to flow through the whole group of people like an electric current, turning one even against one’s own will into a grimacing, screaming lunatic.

605 See Orwell at 68: “He wondered, as he had many times wondered before, whether he himself was a lunatic. Perhaps a lunatic was simply a minority of one. . . . But the thought of being a lunatic did not greatly trouble him; the horror was that he might also be wrong.”
Another poignant example of Smith's increasing desensitization to violence and brutality comes when he is walking through town and a bomb goes off, demolishing a city block. Smith dives for cover. After brushing himself off, he sees on the pavement the bloody stump of a severed hand. Detachedly, he kicks the hand into the gutter "as though it had been a cabbage stalk" and walks home.\footnote{ORWELL at 137.} Remembering this event several weeks later, Smith acknowledges that the Party has succeeded in stripping him of his humanity.\footnote{ORWELL at 136 - 137.}

Why was it so easy for Smith to join in the hate, not as a pretender but as a participant? Partly because the electricity he felt was real; it was a mob mentality at work. Partly because of his nagging doubts about his own sanity. But perhaps the most compelling explanation for the ease with which Smith succumbed is related to the way in which the Party structured the Two Minutes Hate. It is no accident that the object of the hate is the Party's enemy, who is shown on screen delivering "an attack [on the Party] so exaggerated and perverse that a child should have been able to see through it, and yet just plausible enough to fill one with an alarmed feeling that other people, less level-headed than oneself, might be taken in by it."\footnote{ORWELL at 14.} The Party minions are placed in a binary dilemma; to doubt the Party is to sympathize with the enemy. The enemy is so clearly wrong and dangerous that Smith has little choice but to side with the Party, not only for fear of being branded a traitor but, importantly, for fear of being as wrong as the enemy is.

Briseno was in a similar position. Prior to stomping King, Briseno had yelled at Koon to stop the beating; after stomping King, Briseno raged against the other officers; but while stomping King – like Smith during the "Two Minutes Hate" – Briseno's behavior exuded hatred of King. Even if the stomp cannot easily be explained simply as a concession to peer pressure or simply by a sudden access of the infectious fear and loathing that made the other officers want to punish King, it makes sense as a volatile mixture of the two – an initial desire to avoid detection as a "wimp" (or maybe even as a "nigger lover"),\footnote{King's apparent refusal to heed the officers' commands and his startling resistance to the taser stymied the officers' efforts to enforce the law and challenged their authority. If Briseno didn't join in the beating, he might be said to have condoned King's behavior.} compounded by confusion and distrust of what his eyes were telling him ("The other officers must see something I don't see"), triggering increasing self-doubts about his own paralysis in the midst of violent action, and finally transformed into genuine, momentary sharing of
the group hatred of King and desire to hurt him. This telling of the story has the advantage of emphasizing the evil of the other cops, because it highlights their effect on the impressionable one among them. That is the truly frightening thing about the Party in 1984— not simply its oppression of the people it governs, but the way in which it is able to control, brainwash, and convert any dissenters.

By utilizing a variant of the COPS=PARTY analogy, White may have been able to concede that that Briseno’s stomp was not necessarily evil but insist that it was nonetheless unreasonable. Were White prosecuting Winston Smith, rather than Theodore Briseno, he might have had a tough time getting a jury to blame Smith for anything, given the totality of the Party’s brainwashing and the all-consuming force of its evil. But the analogy is only an analogy, not an equation; White could draw upon 1984’s narrative structure without asserting that the cops who beat Rodney King were as powerful or as evil as the Party in 1984. Thus, the very reason why an exact equation of the cops with the Party pushes the analogy too far would provide the means by which a jury could condemn Briseno for unreasonable—though-not-evil behavior: Briseno could not as convincingly plead submission to overpowersing Party dominance as Smith might have.

B. Theodore Briseno As Bernard Marx in Brave New World

Aldous Huxley’s Brave New World is a futuristic novel about a world state called Utopia, in which the governing power maintains complete, authoritarian rule. Creativity and free-thinking are not only discouraged, they are prevented, using electric shocks on babies

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610 Briseno’s response to the complicated and explosive environment in which he suddenly found himself recalls the results of the famous “Stanford Prison Experiment” in which psychologists Philip Zimbardo, Craig Haney and W. Curtis Banks asked a group of "normal" college students to simulate a prison environment for several days. As Haney and Zimbardo describe in a recent retrospective, “[t]he outcome of our study was shocking and unexpected to us. . . . Many of these seemingly gentle and caring young men . . . [who had been chosen to play the role of prison guards and who] had described themselves as pacifists or Vietnam War ‘doves,’ soon began mistreating their peers and were indifferent to the obvious suffering their actions produced.” Craig Haney & Philip Zimbardo, The Past and Future of U.S. Prison Policy—Twenty-Five Years After the Stanford Prison Experiment, 53 American Psychologist 709 (1998) [hereafter, “Haney & Zimbardo”], at p. 709. Haney and Zimbardo conclude that the experiment “demonstrated the power of situations to overwhelm psychologically normal healthy people and to elicit from them unexpectedly cruel, yet ‘situationally appropriate’ behavior.” Id. at 719.

611 See, e.g., ORWELL at 211, where a Party member describes the brainwashing process: “What happens to you here is forever. . . . Never again will you be capable of ordinary human feeling. Everything will be dead inside you. Never again will you be capable of love, or friendship, or joy of living, or laughter, or curiosity, or courage, or integrity. You will be hollow. We shall squeeze you empty, and then we shall fill you with ourselves.”

612 ALDOUS HUXLEY, BRAVE NEW WORLD (1932; Harper Perennial ed. 1969) [hereafter, “Huxley”].
before they have a chance to develop such potentially "deviant" characteristics. Humans no longer give birth but are cloned through a process of egg-splitting, producing children who are all alike and who will obediently serve one very narrow, predetermined function in society. Those who are not cloned properly — or, worse, who are products of natural childbirth — are exiled to Savage "reservations" so that they are unable to taint the mainstream society with their deviance. The characters in the novel are arrayed along a spectrum of acceptance of the authoritarian rule forced upon them. Some blindly obey; some directly challenge; one, Bernard Marx, finds himself caught in the middle — believing that the social control has gone too far but unable to muster the strength to risk his own destruction by challenging it head-on. Terry White, in fashioning a prosecution theory as to why the four defendants were culpable for beating Rodney King and why their culpable behavior should not go unpunished, might have drawn on this narrative to convince the jury of the vices of extreme state-sponsored social control. The officers' force was excessive, the theory might go; and if we allow it, we will be ceding an unacceptably dangerous amount of power to the state. Within this frame story, Bernard Marx would provide a model for telling Briseno's sub-story in particular, for explaining his seemingly contradictory behavior on the night of the beating.

1. The Technocracy

After painting the overall picture of Utopia as an engineered society, a programmed, well-run machine in which individuality and deviance from the tightly-structured norm are allowed no place, Huxley begins to question the wisdom of such social stability when it is purchased at the double cost of oppressing particular, ill-fitting individuals and denying members of the general public the power to think and act for themselves. White might have taken the same tack by acknowledging that most, if not all, of the jurors would enter the trial accepting the premise that the police are an integral and positive component of society, indispensable to the maintenance of social stability. He then might have questioned whether this premise calls for ceding to the police force an unbounded power to use brute force upon defenseless individuals whenever police officers conclude that that course is a necessary means to stability. In seeking the conviction and punishment of all four officers, White could begin by depicting the dangerous paradox of an out-of-control police force within the larger context of a society concerned with controlling crime. *Brave New World* could serve as a parable not only to illustrate the ultimately destructive physical and moral implications of a such a rogue
police force but also to point up the connection between those frightening implications, the defendants' specific actions on the night they beat Rodney King, and the defendants' trial strategy for justifying the beating.

In Huxley's novel, technology plays a central role in fortifying an authoritarian regime. Utopia is a scientifically-engineered society that relies on virtual drones to keep it functional. The manufacturing of single-purpose humans and their further regimentation through the use of electric shock conditioning ensures that each person will unquestioningly fulfill his or her role in society. This technocracy is what makes the suppression of the "other" – the dark-skinned Savages – and social stability possible. It is eerily similar to the increasing use of technology by the police for the purpose of effectuating social control. The tasers, the batons and baton maneuvers, the "swarm" tactic, and the number of officers called in to subdue one defiant individual are all emblematic of the extent to which the police are rapidly approaching Utopia's extreme of technocratic control in the service of a well-ordered society.

As an element of its program for preserving social order, the Utopian State provides an anesthetic drug, soma, for productive citizens so that they can live in ignorant bliss, using the drug whenever they find themselves confronted with the horror of imperfection. More progressive members of the dominant society may go on vacation to visit the Savage reservations, but they do not venture there without their soma on hand to dull the pain of witnessing poverty, filth, and defiance. Through its manipulation of technology – the video and its systematic deconstruction into stills; the charts showing the LAPD's taxonomy of authorized uses of force – the defense team in the Rodney King trial metaphorically dispensed soma in the courtroom so that the jury would not have to suffer the painful reality of the violence muster by the state to control deviance. By remaking the video frame by frame and "educating" the jury about the "approved" levels of force to be used in programs of "escalation" and "de-escalation," the defense team was seeking to convince the jury that the brutality used on Mr. King was an acceptable, even necessary component of social control. The defense was assuming that the jury, like the soma-users in Brave New World, would be amenable to taking the path of least resistance – that, if sufficient soma were made available as a means of denying that we live in a society where police officers beat defenseless citizens, the jury would be inclined to take it. White could have commented on the insult to the jurors that is implicit in this defense assumption and cautioned them about the danger of taking the drug that the defense was offering.
Inhabitants of Huxley's *Brave New World* become unhappy and incapable of functioning when the soma wears off because it is difficult to face the realities of that world. It is similarly difficult for citizens who rely on the police for protection to face the reality that police officers can be brutal, oppressive, corrupted by bigotry and the seduction of power. For, if we cannot trust the police, who, then, will hold society together? But the comfort of soma must be exposed for the artifice and the lure that it is. Soma is no cure-all but, like any drug, is part of the disease. Put it aside and we can see that it is the source of an illusion which magnifies the Savages into menacing figures in order to conceal the real menace lurking in a society that has given its police officers unrestrained power to brutalize citizens. In asking the jurors to put soma aside, White could have drawn their attention to the savage-like image of King that the defense had conjured up as an excuse for beating him bloody. White could then have asked the jurors: Do you want to be conditioned into believing that this kind of force is actually necessary to preserve law and order? How can you let them brainwash you this way?

2. **Briseno**

To obtain convictions of all four officers, White needed to find a way to explain the behavior of one of its members who was not entirely complicit in the evil intentions of the others but who participated in their actions sufficiently to be responsible for the part he played. Huxley's novel is rich with characters who fall at various points along the spectrum of conformity and hence of complicity in evil. One in particular, Bernard Marx, fails to challenge Utopia's authoritarian rule, though recognizing its faults. It is Marx who most resembles Officer Briseno.

Two other characters in the novel occupy positions that illuminate Marx's – John (a Savage) and Mustapha Mond (a senior member of the Utopian State). These two have a discussion in which Mond reveals how he, a thinking, feeling, member of the power structure, can continue to play his part in it although he is aware of its evils. When John is brought to Utopia from the reservation, he is struck by the lunacy of it all. Children are conditioned not to read, not to enjoy art or religion, not to be emotionally touched by death. John much prefers his world, full of poverty and filth as it is, because it is not sterile and devoid of feeling and meaning. Mond understands the problems John sees in Utopia's system of social control and has nevertheless chosen to be a part of it. He is not an unthinking follower, like most Utopians – he appreciates the benefit of high art – yet, he is more interested in a society in which everyone can be stable and con-
tent than one in which unhappiness and unpredictability exist. Mond recognizes that the science of Utopia is just a "cookery book, with an orthodox theory of cooking that nobody's allowed to question, and a list of recipes that musn't be added to except by special permission from the head cook." He was on the verge of being sent into exile in his younger days because he began to experiment with "recipes," but then chose stability and happiness over inquisitiveness and creativity.

Somewhere in between these two thinking characters lies Bernard Marx. He is a questioning tool of the state, though one who is ultimately self-motivated. He takes an interest in John and brings him from the reservation to Utopia so that others may learn from and study him. When confronted with a choice between alliance with a Savage and allegiance to the State, however, Bernard yields to the power of the State, as the following scene demonstrates:

John visits his mother in the hospital and is outraged by callous treatment that he and his mother receive. Seeing children brought in to ogle the dying woman as part of their state-mandated desensitization to death particularly enrages him. John erupts, trying to shake the workers from their ignorant bliss, to force them to see that they are slaves to the State. He throws boxes of soma tablets out the window, shouting, "I'll teach you; I'll make you be free whether you want to or not." Bernard looks on in horrified disbelief, knowing that the workers will mob the Savage and tear him apart, knowing that John is inviting certain destruction.

Bernard is facing a dilemma distinctly similar to Briseno's. Will he step forward and protect one defiant individual against the doom that awaits anyone who persists in challenging the power of the state? As Bernard wavers between abandoning John and daring to intervene, another improbable rebel joins the Savage in fronting the mob and throwing soma out the window by handfuls. Huxley captures Bernard's predicament and response to this dreadful situation:

Hesitant on the fringes of battle, "They're done for," said Bernard and, urged by a sudden impulse, ran forward to help them; then thought better of it and halted; then, ashamed, stepped forward again; then again thought better of it, and was standing in an agony of humiliated indecision — thinking that they might be killed if he didn't help them, and that he might be killed if he did — when .... goggle-eyed and swine-snouted in their gas-masks, in ran the police.

Bernard dashed to meet them. He waved his arms; and it was

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613 Huxley at 232.
614 Huxley at 219.
action, he was doing something. He shouted, “Help!” several times, more and more loudly so as to give himself the illusion of helping. “Help! Help! Help!”

Bernard wants to protect John from annihilation by the mob but cannot bring himself to intervene and risk being identified with John and mobbed himself. Paralyzed by indecision, in the end he chooses the easy way out: he can appear to be helping both sides by calling for help from the police. The police will quell the mob. Of course, they will stifle John as well. Still, Bernard can simultaneously scramble to safety and salve his conscience in the “illusion of helping.”

Briseno may have responded similarly. As a police officer, he is inextricably tied to his fellow officers in the necessary work of preserving order and stability. Rodney King represents a threat to order and stability, yet Briseno is able to see that his fellow officers are overreacting and that King does not deserve the terrible beating they are giving him. Does he step forward to protect this defiant individual, risking identification with that defiance? Ultimately, he seeks safety in self-delusion, stomping King and justifying the stomp as an attempt to help King. Then, at trial, he again takes the course that offers him maximum self-protection, disassociating himself from his fellows’ manifestly criminal conduct but simultaneously telling himself that he is trying to help them by claiming that they must have seen something he did not.

C. Theodore Briseno as One of Browning’s “Ordinary Men”

Still another narrative that White might have drawn upon to explain the seemingly contradictory behavior of Briseno is one that has recurred in explanations of how the hideous atrocities of Nazi Germany came to be perpetrated, at least in part, by individuals whom Holocaust scholar Christopher Browning describes as “ordinary men.” In his seminal work, Browning focuses on the members of one German Police Battalion – Battalion 101 – stationed in Poland during World War II. Most of the men recruited for Battalion 101 came from a characteristically anti-Nazi social class and a city that was one of the “least Nazified cities in Germany.” In fact, the vast majority of the members of the battalion “had no affiliation whatsoever

615 HUXLEY at 220.

616 While Bernard does not actively assist the swine-snouted police in subduing John, his beckoning to them for help accomplishes the same goal as Briseno’s stomp – falsely signaling to them that Bernard is on their side.


618 Id. at 48.
They joined the force believing that their job, like the job of police in the United States, was to protect the innocent. Yet the vast majority of these men eventually became ruthless killers.

Again, our goal here is to suggest analogies, not equations. As a narrative framework that might have assisted the prosecution to think through possible solutions to the Briseno Dilemma, an analogy to the "ordinary men" of Battalion 101 opens another way to tell stories about the degrees of good and evil, the degrees of integrity and perversion of judgment, that account for a range of violent human conduct. While there may be strategic or legal reasons why the prosecution would choose not to employ one or another specific story line, White was unlikely to be able to both benefit from Briseno's testimony and secure his conviction without asking and aiding the jury to contemplate varying degrees of culpability of human behavior.

In his essay "The Grey Zone," Primo Levi explains that along a spectrum of moral culpability, most people do not occupy the outer fringes (that is, they are not clearly villains or clearly victims) but,

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620 A direct comparison between the officers of Battalion 101 and the LAPD officers involved in the Rodney King beating might well cause a jury to take offense at the suggestion that there is any similarity between American police officers on trial for an isolated incident of possible brutality against a criminal suspect, and Nazi soldiers who participated in the mass murder of innocent Jews. Nonetheless, the story of Battalion 101 offers potential instruction precisely because the behavior of its soldiers was so much more extreme than that of the LAPD officers. If many of the "ordinary," non-party members of Battalion 101 could be convinced to round up and kill large numbers of Jews - after quickly overcoming initial hesitations about the necessity of and justifications for this work - it seems very possible to imagine that Briseno's one act of violence against Rodney King was the result of a questioning man's struggle between his own instincts and his desire to trust and please his supervisor and fellow officers. Certainly, a Holocaust narrative would have to be used with appropriate sensitivity to its inherently explosive nature. See the Conclusion of this chapter for an illustration of one possible way to draw upon the narrative without making an overt, potentially offensive analogy between the police officers on trial and Nazi murderers.

621 Each of the alternative narratives that we suggest relies to some extent upon psychological theories of how individuals react to authority. In addition to using these theories as a guide to shape the narrative that White could have presented at trial, he might have also done well to consider presenting expert psychological testimony to support the story he was trying to tell. Would expert testimony along these lines have been helpful? Admissible? Would it have opened the door to damaging contrary expert testimony or created a no-win battle of experts? See text at notes 311 - 313 supra. White might reasonably have decided to forgo expert testimony after pondering these questions. But the possibility of using expert testimony to corroborate a prosecution narrative was at least a possibility worth exploring.

rather, fall within a large gray area between the extremes. Somewhere between a genocidal killer like Hitler, who apparently never questioned the morality of his actions, and the utterly innocent, defenseless Jewish Holocaust victim there are people like the Nazi who refuses (even if only once) to kill a particularly sympathetic victim and the police officer who believes the actions of his fellow officers to be morally wrong but who falts and commits a single act of violence in solidarity with them. The Jewish extermination camp inmates who dig the graves of others in order to save their own lives occupy yet another position on the spectrum, their actions encompassing so many complicated external factors that a characterization of their level of culpability may be virtually impossible.

By creating a narrative that allows for a gray zone of morality, White would not have had to abandon a general prosecutive theory of the case directed against the four officers as a group. Each could be portrayed as standing at a different point along the spectrum of culpability, though all were sufficiently culpable to deserve conviction. White may have been able to place Briseno at a point in the gray zone closer to the “good” end – thus encouraging the jury to credit his testimony against the other officers, who fall elsewhere in the gray zone, closer to the “evil” end – while still insisting that Briseno’s use of force against King was sufficiently bad to be found “unreasonable,” hence illegal. White’s task, if he took this tack, would be to persuade the jury, first, that a gray zone exists on the spectrum of human morality, and second, that Briseno’s conduct fell within that zone, though it was not as morally reprehensible as the conduct of the other officers. The fact that Briseno was within the gray zone would explain, without justifying, his one moment of weakness; it would explain how, while questioning the actions of his fellows, he might still feel compelled to participate in them.

How, then, might the prosecution have presented a “gray zone” story to the jury? Examining the less zealous participants in the killing of Jews prior to and during World War II presents one potential model for a convincing narrative. Scholars have highlighted three factors as

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623 On this end of the gray zone is SS Officer Muhsfeld of the Birkenau crematoria who discovered that a sixteen-year-old girl had survived a gas chamber. The officer hesitated before eventually ordering that she be killed, and then left before his orders were carried out. BROWNING at 187.

624 Browning compares Muhsfeld’s “instant of pity” to another officer’s one weakness on the other end of the “gray zone”:

[Even] Lieutenant Buchmann, the most conspicuous and outspoken critic of the battalion’s murderous actions, faltered at least once. Absent his protector, Major Trapp, and facing orders from the local Security Police in Lukow, he too led his men to the killing fields shortly before his transfer back to Hamburg. BROWNING at 188.
playing a crucial role in the willingness of "ordinary men" to participate in brutal mass killings: an institutional authority structure with legitimacy among party and non-party members alike; the creation of a subhuman "other"; and the existence of personal risks for the ordinary men who did not kill, such as the risk of being viewed by peers as cowardly or weak. These three factors are arguably present in Briso's situation, as well, and could provide the setting for a narrative that explains his apparently inconsistent behavior.

There was no need for White to create this narrative out of thin air. In their opening arguments and direct examinations, the defense attorneys laid the foundation for a narrative predicated upon the existence of all three factors in the professional lives of the officers. At various points in the trial, each of the defense attorneys emphasized the constraints placed upon the defendants as police officers by the LAPD's institutional structure. Through their own language, the defense attorneys worked to construct King as a member of an inferior and suspicious "Other" caste. Finally, the prevalence of peer pressure within the Los Angeles Police Department was made quite explicit by Briso's own testimony under cross-examination by White. White could have taken the subject further once he saw that Briso was willing to be open about the pressure to conform that exists in the department. These three predicates, if reconfigured a bit by White, could have been used to create a narrative context in which Briso's actions could be comprehended — a context that would afford him understanding and a measure of credibility, but not acquittal. Such a narrative would be completely coherent with White's theory of the case against Powell, Koon and Wind. By evoking factors like legitimate authority and peer pressure to explain Briso's understandable yet culpable behavior, White could place the bulk of the blame on Koon and Powell, who were in positions of power over the others, and on Wind for a willingness to blindly follow his superiors.

1. A Legitimate Institutional Authority

The presence of an authority figure having either the respect of subordinates or simply a legitimacy within the broader society due to the nature of its authority, can be extremely powerful in influencing human behavior. In his famous electric shock experiments, Stanley Milgram examined the role that the presence of authority plays in the willingness of ordinary people to inflict severe pain on innocent victims.\textsuperscript{625} Milgram told the participants, who ranged in background

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{625} Stanley Milgram, \textit{Obedience to Authority: The Unique Experience That Challenged Human Nature} (HarperPerennial Classics ed. 2004) [originally published as \textit{Obedience to Authority: An Experimental View} (1974)]
\end{itemize}
\end{footnotesize}
from working class to professional, that the experiments were meant to explore the link between punishment and learning. A "victim" was strapped into a chair and an electrode was attached to his or her wrist in the presence of the participant. The participant was then placed in front of a fake shock generator in another room, with voltage markings indicated by both numerical level and evaluative degree ("slight shock" to "danger - severe shock"). The participant was told to ask the victim questions and administer increasing levels of shock with each wrong answer. The participant could hear the voice feedback of the victim at each shock, and the victims were instructed to express increasing indications of pain.\footnote{Milgram"}

Milgram found that the participants' willingness to administer shocks varied significantly when the role of the authority figure (the experimenter) was altered. When the authority figure was in the room with the participant, ordering each successive shock, a substantial proportion of the participants (two-thirds) continued to apply the highest voltage shock on the generator even in the face of vehement pleading and cries of agony by the victims.\footnote{Id. at 3.} In spite of the fact that the experimenter had no direct authority over the participant,\footnote{Id. at 22 - 23.} most participants were hesitant to challenge the authority of the experimenter. They continued to obey even though they seemed to be exhibiting high levels of stress, even though many protested to the experimenter along the way,\footnote{The participants were being paid to participate and knew that they could leave at anytime by forfeiting the pay.} and even though most claimed to be against the idea of electric shock when asked at the beginning of the experiment.\footnote{Id. at 41.}

The levels of obedience by the participants dropped significantly when the experimenter gave orders to administer the shocks by phone rather than in person. Several participants actually administered lower shocks than they were instructed to give when the experimenter was not present. In another variation, when the experimenter was present in the room, but was called away in the middle, leaving someone with no apparent authority to take over, there was also a sharp drop in the level of compliance with the directions.\footnote{Milgram at 5.} Finally, when the choice was left completely to the participant (no orders were given), the vast majority of the participants delivered only the very lowest shocks on

\footnote{Id. at 3.}
\footnote{Id. at 22 - 23.}
\footnote{The participants were being paid to participate and knew that they could leave at anytime by forfeiting the pay.}
\footnote{Milgram at 5.}
\footnote{Id. at 41.}
\footnote{Sixteen of 20 participants did not follow the orders of the non-authority figure. Id. at 93, 97.}
the generator.\textsuperscript{632}

Milgram’s experiments illustrate the powerful influence of the presence of an apparently legitimate authority figure who is part of a broader, well-accepted institutional authority – the scientific academic community, in Milgram’s study – in evoking one or more acts of cruelty from otherwise “moral” individuals.\textsuperscript{633} Milgram stressed that the core lesson of his study was that “ordinary people, simply doing their jobs, and without any particular hostility on their part, can become agents in a terrible destructive process.”\textsuperscript{634} He drew a connection between the participants in the study and the desk bureaucrat, Adolph Eichmann, who was responsible for ordering the murders of countless innocent Jews in Holocaust Germany. Milgram noted Hannah Arendt’s perception in \textit{Eichmann in Jerusalem} that it was incorrect to view Eichmann as a terrible, sadistic monster. Rather, Eichmann was a bureaucrat whose actions could be understood through the lens of duty and obligation.\textsuperscript{635} It was not necessarily fear of reprisal that led Eichmann to fulfill this obligation; a misguided acceptance of the hierarchy in which he operated and a desire to ascend the ranks of that hierarchy were sufficient.\textsuperscript{636} “The trouble with Eichmann was precisely that so many were like him, and that the many were neither perverted nor sadistic, that they were, and still are, terrifyingly

\textsuperscript{632} \textit{Milgram} at 70 - 72.

\textsuperscript{633} \textit{Id.} at 41. Milgram’s work is complemented by the Stanford Prison Experiment (“SPE”) discussed in note 610 supra. Whereas Milgram’s research “focused on individual compliance in the face of an authority figure’s increasingly extreme and unjust demands, the SPE examined the conformity pressures brought to bear on groups of people functioning within the same institutional setting.” Haney & Zimbardo at 710.

\textsuperscript{634} \textit{Milgram} at 6. Holocaust scholar Daniel Goldhagen strongly disputes this claim of Milgram’s and insists that while obedience to authority may be one factor in the willingness of ordinary Germans to engage in mass slaughter, deference to authority alone can not explain their actions: “[A]ll ‘crimes of obedience’ . . . depend upon the existence of a propitious social and political context, in which the actors deem the authority to issue commands legitimate and the commands themselves not to be a gross transgression of sacred values and the overarching moral order.” \textit{Goldhagen} at 383. In the context of a narrative explanation for the beating of Rodney King, Goldhagen’s point rings true. (White could not have expected a Simi Valley jury to be receptive to a story that assumed and taught that all human beings who operate within an authority structure – or even all police officers subject command – are potential perpetrators of a Holocaust.) We will discuss below other factors — the creation of a subhuman “Other,” and a concession to peer pressure — that may contribute to explaining Briseno’s contradictory behavior. Suffice it to say for now that even Goldhagen attaches some measure of importance to the appearance of a legitimate authority as the source of the gruesome orders. Before one of Battalion 101’s mass killings, “[i]t needed to be made clear to the men that an order of such gravity came from the highest of authorities and was therefore consecrated by the state and Hitler.” \textit{Goldhagen} at 212.

\textsuperscript{635} \textit{Milgram} at 5 - 6, referring to \textit{Hannah Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil} (Viking Press 1963).

normal."\(^6\)

The men in Battalion 101 were "ordinary" police officers apparently motivated to kill hundreds of innocent Jews by (at least in part) their unquestioning belief in the authority of their superiors. As Goldhagen quotes one officer:

[[I]t did not at all occur to me that these orders [to kill Jews] could be unjust. . . . The thought that one should disobey or evade the order to participate in the extermination of the Jews did not therefore enter my mind at all.]\(^6\)

The assumption for him was that the higher the rank of the authority figure giving the order, the more credible and justified the assignment. As Browning points out, although many of the men supposedly expressed doubt about the orders to kill, "a mere dozen out of nearly 500" actually opted out of the killing.\(^6\)

To a certain extent, then, Briseno's participation in the beating despite his initial disgust may be attributable to the LAPD's own hierarchy and Briseno's deference to the authority of his superiors. Perhaps Briseno first acted on instinct, trying to stop Powell from striking King. Then, as the use of force by the other officers continued and increased, Briseno looked to Koon for guidance. Getting none, Briseno acquiesced and joined in the beating. This would be consistent with Briseno's somewhat blind deference to authority later, when, despite his outrage at the beating, he did not report the incident, leaving it to Koon to do so.\(^6\)

On the stand, Briseno tried to excuse Koon's behavior by allowing for the fact that Koon may not have seen the force as excessive:

WHITE: Well, Sergeant Koon was the supervisor; isn't that correct?

BRISENO: Yes.

WHITE: He was at the scene supervising the officers?

BRISENO: Yes.

WHITE: It was his job to stop any excessive use of force, wasn't it?

BRISENO: If he had observed that, yes.\(^6\)

This trust in institutional authority and its hierarchy is also consistent with Briseno's unwillingness to indict his fellow officers at trial, even while claiming that he did not think their behavior was justified. Briseno testified over and over again that he did not see what the

\(^6\) Id. at 287.

\(^6\) Goldhagen at 179, quoting Kurt Möbius, former police battalion member who served in Chelmno, testifying on November 8, 1961.

\(^6\) Browning at 71.

\(^6\) See text accompanying notes 535 - 537, 564 - 566 supra.

\(^6\) Tr. vol. 65, 11015/8 - 16 (April 3, 1992).
other officers must have seen and that he could say only that the force used was not justified from his vantage point. He continued to searched for some sign that would justify the beating, but found none. On cross-examination, Briseno maintained that according to him, the officers’ force seemed unreasonable. Throughout his testimony, he was unwilling to say that the beating was, objectively speaking, unjustified—it was just that he himself could see no reason for it. He placed trust not in what he actually saw, but in what a group of law enforcement officers did under the supervision of their superior officer. Thus, like the behavior of the participants in Milgram’s study and of Browning’s “ordinary” police officers, Briseno’s behavior was prescribed to some extent by the presence of authority figures whose words and actions sanctioned the infliction of pain upon another human being. A prosecution story stressing that the presence of an institutional authority can in some way explain Briseno’s behavior—though it cannot excuse it—would have had the added advantage of increasing Koon’s responsibility as well, since Koon was that authority figure.

The defense attorneys reinforced the notion of authority for their own reasons—Powell’s and Wind’s attorneys, primarily to emphasize the chain of command and place blame anywhere but on their clients; Koon’s attorney, to legitimize Koon’s choice to allow extensive, heavy use of force against King on the ground of Koon’s extensive experience and heavy responsibilities. While the purpose of a story with a strong emphasis on LAPD authority would have been different for the prosecution, White might have capitalized on this help from the defense if he chose to make a point of the impact of the department’s rigid regimentation upon those within its ranks. Koon’s attorney, in his opening statement, touched on the institutional authority structure of the LAPD:

[O]n the Los Angeles Police Department the highest ranking officer that you will normally see on the street is a sergeant. Lieutenants and captains are inside . . . . ¶ The sergeant is there and by his mere title, by his presence, he is in command of his officers, and we will not dispute that . . . . ¶ And because he is a supervisor he oversees what his officers do, and that is exactly what he [Sergeant Koon] was doing on March 3rd of 1991.

Mounger further strengthened Koon’s authoritative legitimacy in the following statements:

642 See text accompanying notes 528, 534, 543 - 545 supra.
643 See text accompanying note 558 supra.
644 See id.
645 Tr. vol. 44, 5279/11 - 20 (March 5, 1992).
Now, you are going to hear testimony that Sergeant Koon has been a police officer for 14 and a half years and you can draw the inference from that that he has had a lot of experience. Except for five months in the police academy and one year when he was a supervisor at the jail division, the remainder of his 13 – over 13 years has been on the street, serving the citizens and dealing with the public.\(^{646}\)

With 14 and a half years, ladies and gentlemen, the testimony will reveal that he has more time as a police officer than all these other defendants combined. He is experienced and he is in charge of his officers.\(^{647}\)

Stone painted the same picture in his opening for Powell, stressing not only Koon's position of authority as a supervisor but the training that the officers receive from an even higher authority – those who oversee the entire police force and create its rules and regulations:

At that point Sergeant Koon had arrived, surveyed the situation and directed the four officers that he had there into the swarm position, as it is described, to take Mr. King into custody . . . . ¶ Now, when those four officers approached Mr. King, they all went for one of the limbs, either the left hand or the right hand, one of the legs, while Sergeant Koon, armed with a taser, instructed them and directed them and he told them, 'If he starts to fight, back off,' because, you see, the training that these officers receive and you will hear about, is that they don't tie up with resistant suspects.\(^{648}\)

The officers' perceptions are based on their experience and their knowledge and their training and their observations.\(^{649}\)

The hierarchical nature of the police force – and of the group of defendants – was emphasized again and again by the defense attorneys, so that the jury slowly learned the rules of the structure and the responsibilities of each individual. The defense attorneys sought to lend legitimacy to the actions of the officers by emphasizing the extent to which they were acting under the authority of an institutional and conceptual structure infused into the officers' training, their manuals, and their protocol.

White could have tapped into this institutional-legitimacy theme to explain Briseno's slow conversion from one who took what he saw at face value (King was being beaten unjustifiably), to one who joined in the beating because his supervisor seemed convinced that the beating was necessary and proper, even though Briseno himself still saw

\(^{646}\) Id. at 5278/11 - 19.  
\(^{647}\) Id. at 5278/25 - 5279/1.  
\(^{648}\) Id. at 5303/14 - 27.  
\(^{649}\) Id. at 5326/6 - 8.
no need for it. He may or may not have feared adverse consequences for his career if he did not join in; but, in any event, he believed in the institution of which he was a part: he believed that his supervisor had the authority to tell him what to do; he accepted that his supervisor had more knowledge, more training and more experience than Briseno and was more likely to be "right."

2. The Creation of an "Other"

Common to the experience of Battalion 101 and that of the white police officers who beat Rodney King was the creation of an "Other" to justify their behavior. In Nazi Poland, the "Other" was the Jews, and, to a lesser extent, homosexuals; in the United States, it has historically been African-Americans. Integral to Battalion 101's belief in the legitimacy of its orders to kill was the acceptance of the notion that the Jews and homosexuals were not innocent, and further, that their suppression was a necessary part of protecting the innocent. As one officer explained:

It is true that I know that it is also the duty of the police to protect the innocent, but I was then of the conviction that the Jews were not innocent but guilty... I believed the propaganda that all Jews were criminals and subhumans and that they were the cause of Germany's decline after the First World War.650

Browning argues that most of these men were probably not zealous anti-Semites themselves, but they "at least accepted the assimilation of the Jews into the image of the enemy."651

Daniel Goldhagen, on the other hand, argues that it was in fact deep-seated anti-Semitism that allowed the ordinary Germans of Battalion 101 to commit mass murder; this is the central thesis of his book. Goldhagen asks us to "consider how intense the psychological pressure not to slaughter [the Jews] would have been had these men indeed been opposed to the slaughter, had they indeed not seen the Jews as deserving this fate."652 Working with essentially the same data as Browning, Goldhagen contends that Browning exaggerates the extent to which the members of Battalion 101 were conflicted about their roles as killers and that Browning underestimates the pleasure they took in the killing.653

For our purposes, and for the purposes of a litigator like White who might have thought to use the story of Battalion 101 as a narrative device at trial, it is not necessary to resolve the dispute between

650 Goldhagen at 179.
651 Browning at 73.
652 Goldhagen at 215.
653 For Goldhagen's most strident critique of Browning, see Goldhagen at 546 n.1.
Browning and Goldhagen. As with 1984, where White might have chosen to incorporate aspects of Orwell’s narrative without adopting the whole of it, \(^{654}\) White here would have been free to take the portions of Browning’s and Goldhagen’s story lines that best suited his aims and to discard the rest. It seems that an interpretation along the lines of Browning’s – that the officers were inclined to believe that the Jews deserved what they got, but that they were nonetheless uncomfortable killers – would probably have been more useful to White in making an analogy to Briseno, in that White would have been attempting to reconcile what appears to be Briseno’s legitimate disgust with the beating and his subsequent participation in it. While any analogy to the Nazis would not have been an easy one to convince the jury to draw, there were points of similarity that could have proven useful to a creative litigator. In particular, there were at least three characteristics of Rodney King and the situation in which the police defendants encountered him that would lead them to perceive and treat him as “Other.”

First, King appeared to be a criminal, defying and resisting apprehension. Though Briseno had no information about any crime or crimes that King may have committed other than speeding, the desperate quality of his flight from the California Highway Patrol may well have led Briseno to assume that he was guilty of more serious offenses. He was, in any event, a perpetrator; and the job of the police was to place him in custody. \(^{655}\)

Second, King was African-American. Just as certain groups have been stereotypically associated with various types of criminality (Italian-Americans with organized crime, for instance), African-Americans have never been free from the stigma of criminality generally. \(^{656}\) Professor Randall Kennedy notes that slavery in the United States was often justified on the ground of the asserted tendency of blacks to engage in crime; \(^{657}\) this stigma has been used throughout history to

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\(^{654}\) See note 600 and accompanying text supra; text following note 611 supra.

\(^{655}\) And see note 299 supra, discussing Koon’s description of Rodney King as “buffed out,” implying he’d been in prison.

\(^{656}\) Regarding the prevalence of the stereotype in the early ‘90’s, see notes 130 - 156 supra and accompanying text.

\(^{657}\) RANDALL KENNEDY, RACE, CRIME, AND THE LAW 13 (Pantheon Books 1997) [hereafter, “KENNEDY”]. For suggestions that racial discrimination in capital sentencing and the continuing popularity of capital punishment in the American South are contemporary descendants of the institution of lynching African-Americans suspected of having committed crimes against whites, see David Jacobs, Jason T. Carmichael & Stephanie L. Kent, Vigilantism, Current Racial Threat, and Death Sentences, 70 AMER. SOCIOLOGICAL REV. 656 (2005), and FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT (2003).
defend lynching as a means of disciplining rogue blacks.658 There existed a double standard for whites and for free blacks who committed crimes in the antebellum period: several states castrated blacks convicted for raping white women, while whites convicted of the same offense were merely imprisoned.659 This discrimination, of course continued with the advent of the Black Codes. Today, African-Americans see that they are still disproportionately likely to suffer violence at the hands of law enforcement officers who suspect them of wrongdoing.660 The white LAPD-officer defendants were acting in a long, pervasive national and local tradition in violently assaulting an African-American whom they could perceive as disobedient and threatening.661

Finally, the officers themselves asserted that they believed King to be under the influence of PCP, a drug that they understood would render him abnormally immune to pain and endow him with superhuman strength. The image of King as a dreaded “duster” serve to dehumanize him further.662

Once again, the defense attorneys themselves gave the prosecution abundant material to support a story featuring the “Otherization” of Rodney King. They portrayed him as a menacing animal, invoking his race implicitly but not the least bit subtly.663 This obvious pitch might have been treated by White as based upon the insulting premise that the jurors shared the defendants’ bigoted perspectives664 and as revealing the extent to which the defendants’ initially legitimate grounds for viewing King as a law violator and perhaps even for suspecting him of being a duster were warped and swollen out of all proportion by race-based fantasies.

For example, Mounger’s opening statement on behalf of Sergeant

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658 Kennedy at 13.
661 See notes 124 and 660 supra and the references collected there; notes 197 - 200 and accompanying text.
662 See notes 111 - 112, 249, 342, 434 supra and the references collected there.
663 See notes 149, 458 supra and the references collected there.
Koon evoked a transparent image of Mr. King as "King Kong":
But rather than causing Rodney King to fall down, you are going to hear that Rodney King rose up to his feet and groaned, 'Ahh, Ahh' and started advancing toward Koon, and Koon ordered him again, 'Get down, get down,' but Rodney King kept coming.\textsuperscript{665}

Stone's opening for Powell built on the image:
And Officer Powell went up, grabbed his wrist and tried to move it back to a handcuffing position, and King began to laugh and suddenly he went into a push up position and with the full body weight of Officer Powell [193 lbs.] on his back he pushed up and Powell rolled off and all of the officers scrambled away.\textsuperscript{666}

Stone later used an officer's own words to convey the image quite literally:
But her husband, Timothy Singer, what did he say? He wasn't even involved in this and he said, "I was scared. This was like something out of a monster movie. This man, Rodney King, got up, and I could see the - the muscles in his face convulsing from the electricity and it was like right out of a monster movie."\textsuperscript{667}

These depictions of a monstrous beast out of control morphed readily into a zombie figure as soon as fears of PCP were added. As Mounger stated in his opening:
You are going to hear that Rodney King displayed the objective symptoms of being under the influence of something, and Sergeant Koon will tell you, "I knew he was under the influence of something. I saw a blank stare in his face. I saw watery eyes. I saw perspiration. I saw that he swayed. I saw that he was slow to follow the command of the officers. I saw him looking through me."\textsuperscript{668}

Stone also invoked the image:
Did King respond? Not really. He continued to pat the ground and make strange noises. Mr. King chose to do that.

Now, at that point every officer at the scene concluded, we got a duster on our hands and there is no doubt about that. There is no doubt about that. Their perception was this guy is under the influence of PCP, and oh, boy, look at how big he is. We have got problems.\textsuperscript{669}

Both Stone and De Pasquale ended with powerful references to the duty and bravery of the officers, preserving the important distinction between them and the criminal:
These officers, these defendants, do not get paid to lose street fights.

\textsuperscript{665} Tr. vol. 44, 5289/7 - 12 (March 5, 1992).
\textsuperscript{666} Id. at 5304/8 - 14.
\textsuperscript{667} Tr. vol. 76, 13655/3 - 9 (April 21, 1992).
\textsuperscript{668} Tr. vol. 44, 5282/17 - 25 (March 5, 1992).
\textsuperscript{669} Tr. vol. 76, 13650/3 - 11 (April 21, 1992).
They don't get paid to roll around in the dirt with the likes of Rod-
ney Glenn King. That is not their job. That is not their duty.670

The job that these law enforcement officers, these cops, are hired to
perform and the job they perform is to constitute a line between the
uncontrolled chaotic behavior of a person who drives wildly, who
conducts himself wildly without thought for his own or other peo-
ple's safety. That is a job that falls to these police officers, the line
between chaos and society.671

The defense thus parlayed its picture of King as a soulless spawn-
of-chaos with a claim of the legitimate authority of the police to define
for themselves the kind and degree of force that they are permitted to
use to put down such spawn. The overt conclusion of this line of argu-
ment was that the defendants were reasonable in their scrupulous ad-
herence to the LAPD's rules regarding the escalation and de-
escalation of force in dealing with the danger King appeared to pre-
sent. The subtext was that the jury could not afford to deny Simi Val-
ley the police protection that it needed against the ever-to-be-feared
incursion of crime, drugs, and their black carriers from L.A.672 But,
however persuasive the defense story may have been to the jurors
when unopposed by a counter-story combining the same elements in a
different plot, the point to note is that the defense story did hand
White, ready-mixed, two ingredients of a counter-story that cast
Briseno in the role of one of the "ordinary men" of Browning's Bat-
talion 101.

Briseno's deference to the authority of his supervisors, together
with the presence of an "Other" on the scene, offers an altogether
plausible non-exonerating explanation of Briseno's evolving response
to the incident. Operating more or less on human instinct at the out-
set, he attempted to protect King from Powell's blows. But as the
beating continued, the assent of his supervisor and his perception of
the otherness of the thing being beaten – subhuman, expendable,
threatening – allowed Briseno to justify the assault and even to par-
ticipate in it. The other officers were swept up earlier, more com-
pletely, less questioningly, in their perceptions of King as subhhuman.

3. Peer Pressure

A third factor common to Battalion 101 and Briseno was peer
pressure. The members of the battalion were rarely, if ever, forced
to commit the atrocities that many of them committed.673 Some re-

670 Id. at 13617/3 - 7.
672 See note 91 supra and accompanying text; note 204 supra.
673 See GOLDHAGEN at 555 - 56 n.98.
quested transfers and received them. Those who did refuse to kill Jews and asked to be given other duties had their requests granted, with little or no evidence of adverse professional consequences.674 The opportunity did exist to opt out of the killings, but few took advantage of it.675 Why did only twelve men of the 500-strong battalion choose to opt out when given the opportunity prior to a mass killing at Jozefow?676 According to Browning, many of the police officers cited a desire to be respected by their fellow officers and to avoid being viewed as weak or cowardly. One officer testified that eventually his peers began to notice his absence at the killings:

It could not be avoided that one or another of my comrades noticed that I was not going to the executions to fire away at the victims. They showered me with remarks such as "shithead" and "weakling" to express their disgust. But I suffered no [professional] consequences for my actions.677

The men did not want to stick out.678 "As important as the lack of time for reflection [in the decision of most members of the battalion to participate in the killings] was the pressure for conformity – the basic identification of men in uniform with their comrades and the strong urge not to separate themselves from the group by stepping out."679 "Who would have 'dared,' one policeman declared emphatically, to 'lose face' before the assembled troops."680 According to Browning, the men were extremely angry and ashamed after the particularly brutal massacre at Jozefow; they refused to talk about it with those who did not participate.681 Yet, in spite of the difficulty they all

674 See Browning at 56 - 57.
675 See Goldhagen at 253 - 55; Browning at 71.
676 Again, Goldhagen's primary answer to this question is that very few of the officers had qualms about participating in the killings in the first place.
677 Browning at 66.
678 A more recent example of this sentiment is found in the anonymous testimony of a New York City police officer explaining why officers who object to their fellows' abusive behavior do nothing to stop it: "'You don't want to be branded a rat.... If you were to challenge somebody for something that was going on, they would say: 'Listen, if the supervisor isn't saying anything, what the hell are you interjecting for? What are you, a rat?'... You gotta work with a lot of these guys.... You go on a gun job, the next thing you know you got nobody following you up the stairs.'" Bob Herbert, "A Cop's View," New York Times, March 15, 1998, p. 17.
679 Browning at 71.
680 Browning at 72.
681 Browning at 76. Compare Briseno's testimony regarding his outrage after the beating of Mr. King, text at notes 549 - 551 supra. Goldhagen, however, cautions that Browning's description of the officers as outraged ought to be taken with a grain of salt: "[T]he men's postwar self-reporting of their own afflictions should be viewed with some circumspection.... [I]t is hard to believe that the reaction was born from anything but the shock and gruesomeness of the moment, as their soon-thereafter-renewed, assiduous efforts in mass slaughter indicate." Goldhagen at 221 - 222.
experienced, "few went beyond complaining to extricate themselves" from the possibility of having to commit such atrocities again.\textsuperscript{682}

Similarly, in Milgram's shock study, the involvement of peers, in addition to an authority figure, made a great difference in the levels of shock that the participants were willing to administer. If the participant was part of a peer group that resisted orders and refused to administer the shocks, ninety percent of the participants would desist as well.\textsuperscript{683} If, on the other hand, two collaborators inflicted escalating levels of shock before the participant, the participant was much more likely to do the same.\textsuperscript{684}

In the same way, Briseno could have been depicted as torn between a desire to help King and a need to prove himself, to avoid being ostracized by his peers. Police conformity brought on by peer pressure has been well-documented, and White managed to tap into the idea to some extent when questioning Briseno about the "code of silence," but White did not attempt to use it to explain Briseno's participation in what White was arguing was excessive force. (White used the code of silence only to highlight Briseno's failure to report the incident. And Briseno was not charged with any offense based upon this failure.) White could have followed up his code-of-silence examination with additional questioning about peer pressure and its effects on the members of the force. Once he saw that Briseno was willing to be honest about the existence of the code, White could then have attempted to get Briseno to go along with a broader suggestion about the strength of peer pressure. Whether or not Briseno would go as far as to admit that he succumbed to peer pressure does not matter. What matters is that the suggestion would be before the jury.

Karen Frewin and Keith Tuffin discuss what they term "police culture," in their article focusing on conformity within police departments.\textsuperscript{685} Through conversations with eight police officers,\textsuperscript{686} the authors illustrate the strength of peer pressure on the behavior of the officers:

Peers are talked about as having intimate knowledge of one's policing activities: 'everyone knows the stupid things that you've done

\textsuperscript{682} Browning at 76.
\textsuperscript{683} Milgram at 116 - 18.
\textsuperscript{685} Karen Frewin and Keith Tuffin, Police Status, Conformity and Internal Pressure: A Discursive Analysis of Police Culture, 9 Discourse & Society 173 (1998) [hereafter, "Frewin & Tuffin"].
\textsuperscript{686} The officers varied in seniority, came from a variety of policing backgrounds, and included six men and two women. Officers attended interviews voluntarily.
People that have got a more liberal attitude to the homosexuality can’t stand up for people that come out . . . and to be honest I wouldn’t be prepared to make a stand[,] ah[,] because of the effect that it might have on my position in the department . . . .[*]688

The consequences of failing to conform range from mockery and rumor to much more serious results:

[‘]‘It could come from anywhere[,] yeah[,] it could be done on a supervisory role[,] it could be done from your peers[,] they could just make life so unpleasant[,] like they wouldn’t talk to you or they don’t respond to your call[,] you’re out there[,] you stop a vehicle[,] you go to an incident and you get hit[,] you get attacked[,] you call for a backup[,] and most calls for backup everyone goes the stops[,] come out red lights on[,] it’s make or break stuff[,] you get there as quick as you can[;] somebody else “Oh he’s been beaten up[,] I suppose we’d better go hadn’t we[,]” . . . mm . . . “I’ll just finish my cup of tea[,]” . . . right . . . you get there and he’s half dead or he is dead[,] “we tried but the traffic was heavy.”689

While Briseno may not have faced dismissal for standing by and doing nothing, he could have been subject to ridicule, anger or worse for having questioned his fellow officers, for standing up for such an unsympathetic victim as Rodney King. Had White capitalized on Briseno’s willingness to discuss the existence of peer pressure within the department, the prosecution could have woven that testimony into a story of a weak, sympathetic, yet culpable Briseno.

4. Conclusion

Browning quotes the incredible justification offered by one member of Battalion 101 for killing children:

I made the effort, and it was possible for me, to shoot only children. It so happened that the mothers led the children by the hand. My neighbor then shot the mother and I shot the child that belonged to her, because I reasoned with myself that after all without its mother the child could not live any longer. It was supposed to be, so to speak, soothing to my conscience to release children unable to live without their mothers.690

Browning explains that the German word for “release” has the same religious connotation as the English word “save.”691 Briseno’s claim that his stomp to King’s head was an effort to “save” King is perhaps

687 Frewin & Tuffin at 179.
688 Frewin & Tuffin at 181.
689 Frewin & Tuffin at 182.
690 Browning at 73.
691 Id.
as implausible as this Nazi officer’s claim that shooting only children was an effort on his part to “release” them. In the same way that Goldhagen would dismiss the officer’s claim as an after-the-fact fabrication designed to “self-exculpate”\textsuperscript{692} and cover-up internal anti-Semitism, White would have done well to expose Briseno’s justification for the stomp as self-exculpation designed to cloud his true motives for the stomp.

Briseno may well have been confronted with a real dilemma, a face-off between his own internal moral code and the structures of society that he presumably accepts to some degree – the legitimate authority of the LAPD, of Sergeant Koon as the supervising officer on the scene, and of his fellow officers; the socially constructed “Otherness” of an underclass of African-American men; the levels of peer pressure within the police force. Just as the men of Battalion 101 in Poland had difficult choices to make about compliance, even within a structure that seemed to allow for opting out of orders to commit atrocities, so, too, did Briseno, when placed in a situation where so many of his values urged him to collaborate in his comrades’ brutality.

The three factors we have discussed can be seen as a web of forces that Briseno floundered in. His instincts are that he doesn’t want to do what they are urging him to do, but he lacks the strength to resist them. In the end, he makes no clear choice: he tries to stop Powell from hitting King, then yells at Koon, then stomps King himself, then vents his anger and frustration on his probationary-officer sidekick, and finally fails to report the incident that has been so disturbing to him. Whether or not a jury believed that Briseno had the honest intention to protect Rodney King early on in the incident, there are lessons to be drawn from Browning’s “Ordinary Men” that can persuasively explain his subsequent behavior by a story line which would accredit his testimony against the other officers but simultaneously warrant his conviction.

III. AN ILLUSTRATIVE POSSIBLE CROSS-EXAMINATION OF BRISENO

The following is a potential line of cross-examination of Briseno that White might have drafted if he had chosen to try to develop a prosecution story based on the 1984 and Brave New World narratives that we have discussed. Our aim in offering it is not to specify the

\textsuperscript{692} Goldhagen at 546 n.1: “[T]he unsubstantiated, self-exculpating claims of the battalion men to opposition, reluctance, and refusal, which have been rejected [in my book] for methodological reasons . . . permeate [Browning’s book] and, since Browning appears to have generally accepted them uncritically, they inform and therefore substantially impair his understanding of the battalion.”
precise form of each question that White should have included in such a draft, still less to dictate the exact words that he should use when actually putting questions to the witness in the give-and-take [or hide-and-seek, or dance, or fencing match, or tug-of-war] of courtroom dialogue. Our aim is, rather, to provide one example of a general line of cross that might incorporate some of our suggested narrative strategies. The following cross attempts to utilize both the 1984 and Brave New World narratives.

1. *Re-establish and highlight the portions of Briseno's testimony that are damaging to the other defendants.*

How long have you been a police officer with the LAPD?
You are considered a veteran, aren’t you?
You’ve been involved in thousands of arrests over the course of your career, haven’t you?
And you testified that on the night in question, the force used by the other officers was “unreasonable,” is that correct?
You testified that they were “out of control”?
In your opinion, they were “wrong” to continue beating Rodney King, weren’t they?
Their behavior that night was “improper”?
They were using “too much” force given the situation?
Ok, and you had a good view of the entire event, didn’t you?
You were watching Mr. King as closely as you could, isn’t that right?
You didn’t see any aggressive movements by Mr. King, did you?
You didn’t see any combative movements by Mr. King, did you?
You didn’t see any threatening movements by Mr. King, did you?
In fact, you initially tried to stop the beating, didn’t you?
You were worried that they were going to kill Rodney King, weren’t you?
And afterwards, you were angry at the other officers, right?
You thought they should be punished for what they had done?
In fact, you screamed to your probationer that they should have their “asses reamed,” didn’t you?

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693 Words enclosed in quotations are taken from Briseno’s actual direct testimony.
694 This question and the next two were actually asked by White, see Tr. vol. 65, 11010/12 - 19 (April 3, 1992), and Briseno responded, “no” to each one.
2. Establish that despite Briseno’s anger at other officers, he began to doubt himself during the beating – that during the beating he thought that perhaps the other officers saw something that he did not see.

The force used by the other officers that night was excessive, was it not?695

Well, according to what you saw, it looked excessive, is that fair to say?

But you can’t speak for the other officers, is that right?

You testified several times on direct that on that night, you were thinking “they must see something I don’t see,” is that correct?

At the time, you didn’t know why they continued to beat Mr. King, did you?

You didn’t know what they saw that would justify this beating?

You were angry, right?

But you were also confused?

You couldn’t understand why they continued to beat a man that was not moving?

You couldn’t understand why Sergeant Koon was just standing there, letting it happen?

You couldn’t understand why Officer Powell was ignoring your pleas to stop the beating?

You couldn’t understand why Sergeant Koon was ignoring your pleas for him to stop the beating?

And so you thought at the time, “they must see something I don’t see,” is that right?

You thought perhaps you were missing something they could see that justified the beating of Mr. King, is that it?696

You thought that even though you couldn’t see it, there had to be something that justified the beating?

So your thinking was that maybe they were right that the beating was justified, and you were wrong in the way you were sizing up the

695 This question is intended to elicit a quibble. In the actual cross, Briseno was predictably reluctant to grant White that the force used was “excessive.” See text at note 558 supra.

696 White can afford to make this concession because he can point to the videotape to demonstrate that Briseno was right to see no justification for the beating and wrong – unreasonably wrong – to imagine that the other officers were seeing some valid justification he couldn’t see.
situation?

3. Establish that Briseno allowed for the possibility that the beating was somehow justified and thus felt he should join in for fear of taking King's "side."

You had worked with these officers before, right?
They were your buddies?
Your partners?
And you were going to have to work with them again after that night, weren't you?
Now, you said that Rodney King wasn't making any aggressive moves, right?
But he had just led the other officers on a high-speed chase, isn't that right?
You believed that he had committed a crime, didn't you?
You thought he was probably on PCP, right?
In the beginning, you testified that he didn't immediately comply with the officers' demands, right?
And the tasers didn't put him out of action, did they?
So when your fellow officers were beating this man, even though you didn't see anything to justify the beating, you wanted to give your partners the benefit of the doubt, didn't you?
Well, you thought they might be justified in the beating?
You thought maybe Mr. King did have a weapon, right?
After all, that wouldn't be unusual in a situation like this, would it? 697
And if Mr. King did have a weapon, you'd look pretty silly if you tried to interfere with your fellow officers' efforts to subdue him before he could use it, wouldn't you?
If the officers had been justified in the beating, you didn't want to be the one defending Rodney King, did you?

You wanted to make sure the other officers knew that you were on

697 Again (see note 696 supra), here White can concede that during the beating Briseno may have believed that perhaps King was doing something to justify it. Such a suggestion is consistent with the jury's finding that although Briseno did not act with an "evil heart" or "evil mind," he did act unreasonably – either because his belief was not reasonable or because a belief that perhaps the other officers were justified in their actions did not give Briseno a reasonable ground to stomp on King when Briseno himself could see nothing to justify the stomp. White could point to the videotape as confirming that in fact Briseno was correct in seeing nothing to justify the beating or stomping.
their side, right?
That’s why you stomped on Mr. King’s head, isn’t it?

This line of questioning does not undertake to develop the complementary idea of a paramilitary technocracy run amok. That idea would be better pursued during the cross of the defense experts, the other defendants, or both. Nor does this line of cross tap into the story driving Marx’s actions in *Brave New World*. Here is an example of how the last part of the preceding cross could be modified to mirror Marx’s motivations:

4. *Establish that Briseno stomped on King in order to give the appearance of participating in the beating but without beating King as badly as the other officers were doing.*

You were horrified at the beating that was going on, right?
And you had tried to stop it, right?
But the other officers ignored you?
They weren’t going to stop for anything, were they?
They certainly seemed to you to think the beating was justified, didn’t they?
You were even worried that if you tried to protect Mr. King, the other officers would hit you, isn’t that right?
You didn’t want them to turn their anger at Mr. King onto you, did you?
You wanted to show the other officers that you were on their side, right?
But you didn’t want to start beating Mr. King like the other officers were doing, did you?
So you gave Mr. King a quick stomp to the head?
That way you could appear to join in the beating without having to repeatedly hit Mr. King, isn’t that right?

5. *Establish that Briseno failed to report the beating, even though he was angry at the other officers and thought they deserved punishment.*

Immediately following the beating, you were still angry with the other

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698 See draft LINE II of cross examination in the text between note 335 and note 336 *supra*.
699 White delved into this area but did so in a way that implied that Briseno was not actually outraged at the beating. A more productive approach to the subject would be to
officers, weren’t you?
In fact, you testified that you were yelling at your probationer that the other officers “should have their asses reamed,” isn’t that right?
You thought they should be punished?
But you didn’t want to be the one to get them in trouble, did you?
If you had reported the incident, they would have learned sooner or later that you were the one who brought their actions to the attention of their superior officers, isn’t that correct?
If they were going to get punished, you didn’t want them to believe it was because of you, right?
And so, as angry as you were, you didn’t report the incident, did you?

IV. An Illustrative Possible Closing Argument Regarding Officer Briseno

What follows is a draft closing argument that White could have composed to deal with the Briseno Dilemma by evoking the “Ordinary Men” narrative. While not explicitly drawing an analogy between the officers on trial and the Nazis or going into Milgram’s studies in any depth, this argument develops a story line that explains Briseno’s behavior in a way which points to his conviction without discrediting or devaluing his testimony against the other officers:

Perhaps the most crucial testimony you have heard in this trial is that of Officer Theodore Briseno. Officer Briseno did a very courageous thing when he took the stand — he challenged the code of silence, the quiet agreement among police officers that covers up unlawful behavior when it occurs within our police departments and allows it to go unpunished. Breaking the code of silence is no small feat. Those who speak out against their fellow officers face potential ridicule and ostracism. Yet Officer Briseno sat before you and told you the truth. He told you that he thought the force used on Mr. King was unreasonable and that he saw no justification for it.

Officer Briseno had a choice — he could try to justify his own behavior by claiming that Mr. King deserved the beating he got, that Mr. King was dangerous and threatening and could not be stopped peacefully, even by a crew of more than ten police officers. Or Officer Briseno could tell you what really happened out there. He could tell you that the force used went beyond anything that was reasonable and

use it to suggest that Briseno was outraged at the beating but declined to report his fellow officers for the same reason that he momentarily joined the beating himself: he didn’t want to appear to be siding with King against his comrades.
that he saw absolutely nothing Mr. King did to deserve the blows he received that day. Officer Briseno chose to tell the truth, in spite of the cost to himself of his comrades' displeasure. Why? Perhaps because he knew that after you saw that videotape, you wouldn't buy anything but the truth. Or perhaps because Officer Briseno knows right from wrong, and is now trying to make up for the error of judgment that brought him here today – his stomp to Mr. King's head.

Why should you believe, though, that Officer Briseno told the truth about the unreasonable use of force by the other defendants and not about his own criminal behavior on the scene? How do we know that Officer Briseno was brave enough to indict his fellow officers, but that he lied about his own role in the beating when he told you that he was actually trying to help Mr. King by stomping on him? We know because we have the videotape, and we have our common sense. Officer Briseno's stomp was forceful, it was brutal, and it was unnecessary. If, as Officer Briseno has told you, Mr. King was unthreatening and was doing nothing to warrant the beating except moving in response to the constant barrage of blows he received, a stomp to the neck was not going to stop those blows. You've seen the video [White might show the tape of the stomp again here]. If you wanted to protect a man, is that how you would do it? Is that how any reasonable person would do it?

So how can Officer Briseno's behavior be explained? He sits before you today having told you that the force used on Mr. King was unreasonable, that he could not understand it, that it made him angry, that it left him frustrated and screaming. You can see from the tape that he may even have tried to stop it, first by fending off a baton swing by Officer Powell and then perhaps later when he is seen yelling at his supervisor, Sergeant Koon. And yet Officer Briseno dealt a brutal blow of his own to Mr. King. What are we to make of this inconsistent behavior?

It may be easier to understand than one thinks at first glance. We have all, at one time or another in our lives, been in a position in which we have had to make a difficult decision between right and wrong. From the child on the playground faced with a dilemma about whether to engage in teasing the class nerd so that she may be more popular herself, to the cog in the machinery of the Nazi regime who is unable to find the courage to refuse to participate in acts of horrific proportions, we all fall somewhere along a spectrum of guilt resulting from our complicity in morally questionable acts. How many of us have engaged in behavior we knew to be wrong, perhaps behavior as innocuous as speaking poorly about someone among others whom we hope to impress? Later, out of a sense of guilt, compassion, or perhaps
a different sort of peer pressure, we may then decide to reach out to that individual. Officer Briseno faced a serious, difficult dilemma. A man was being unjustifiably beaten before his very eyes by his friends and colleagues, by men who had vowed to protect the people. They were representatives of an institution that Officer Briseno respected, that he was part of, and his own supervisor refused to stop them. First Officer Briseno instinctively shielded Mr. King from Officer Powell's baton with his hand. Then, when the beating got worse, he appealed to Sergeant Koon. When this failed, Officer Briseno could not understand it. He was confused — you heard him testify again and again that he could not understand what was happening — and he began to doubt his own judgement and to become increasingly frustrated. All these other officers were going along with the beating. So he thought perhaps it was justified, even though he could see nothing Mr. King had done to warrant such treatment. Still, Officer Briseno, too, finally went along and made a snap judgment, in the heat of the moment, to join in what the others were doing. Perhaps he did so because he felt the pressure of his peers and did not want to have to explain to them later why he tried to stop them instead of helping them to subdue Mr. King; or perhaps he did it because he simply decided to place stock in the police department to which he belonged and its members — perhaps telling himself then, as he still insists might be the case, that they saw something, or thought they saw something, he didn’t see. Or perhaps he subconsciously allowed himself to demonize Mr. King, to view Mr. King as a dangerous animal and to treat Mr. King as a dangerous animal, just as the defense has tried to do in its presentation to you in this courtroom. Mr. King had fled from the California Highway Patrol officers and driven at high speeds, and even after his car was stopped he was not prompt in submitting to arrest. Officer Briseno has dealt with hundreds of criminals and may have imputed the characteristics of a superhuman, pain-resistant “King Kong” onto Mr. King, even though he tested negative for PCP and, we now know, was not the aggressor but rather the victim in this case.

Most likely, what Officer Briseno experienced out there that night was a combination of all of these emotions, most of which we have all fallen prey to at one time or another. The problem in this case, however, is that no matter how much we may sympathize with Officer Briseno because of the situation he found himself in, no matter how much we may respect him for coming clean now and telling the truth about the force used out there by his colleagues, Officer Briseno committed a crime. He joined in the crime of using unnecessary, unreasonable, excessive force, knowing what he did was wrong. Just as we cannot consider the economic plight of a person in deciding
whether he is guilty or innocent of theft for taking someone else’s property, you cannot accept Officer Briseno’s excuses – even the excuses he may have given himself – for choosing to do what he knew was wrong. You cannot accede, as he acceded, to the pressures that may have been at work to overwhelm his better moral judgement. Somewhere between the child in the schoolyard and the Nazi of the Second World War, we must draw a line and say enough is enough. We do not want to live in a society that allows a person to commit a brutal and illegal act and to escape punishment for it merely because he was not alone in the act or because his motivations may not have been quite as bad as those of his co-defendants. It is within your power to draw the line, to say that what this man has done is wrong and that it cannot go unpunished. That is what needs to be said, and you will say it by returning a verdict of guilty against Officer Briseno.

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INCONCLUSION

THE EIGHT AUTHORS

“Inconclusion” is not a typo. We venture no general conclusions. We did not set out to document a thesis but to explore what we could learn by studying the performance of the lawyers at the Rodney King trial through analytic techniques particularly sensitive to narrative structure and rhetorical techniques. What we learned does not lend itself to summary exposition beyond saying that the trial was a rich exercise in story-telling by the defense lawyers and that the prosecutors were far less resourceful in creating narratives to convey the elements of their case to the jury. Stimulated by that contrast, we have also let our imagination play over stories that the prosecution might have told. Throughout our analyses and our imaginative work, the devil is in the details. Our readers will be the jury that ponders those details and interrogates the devil dwelling in them.

The stories told in and about the Rodney King trial are also stories about a surrounding culture. The academic analyses preceding ours (collected in footnote 5 supra) and the journalistic commentaries that recounted the trial to the general public (cited in our footnotes passim) are chapters in an anthology that will speak of that culture to the future. We have added our chapters, and of course others will be added as future story-tellers react with fascination and frustration to the incompleteness of the anthology. It is an inevitable incompleteness, since the stories that we tell about our cases and our culture not only record and explicate them but constitute them.