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The subway stairs exited onto an island in the middle of the avenue a few feet away from the New York City courthouse where many years later the lawyers and cops of *Law & Order* would descend, often at the end of the show when Jack McCoy would pontificate, ruminate, or recriminate. Years before the series became ubiquitous, I encountered a crime scene on those very steps on my way to work in the courthouse. In between the pillars at the top of the steps, a police officer in full uniform was pointing a gun at a man coming out of the doors. Bang! Then another Bang! Two shots exploded on a summer morning. I ducked and yelled something truly ineffectual like, "Oh, my God." Then, two more shots: Bang! Bang!

Something was weird. No one was screaming or running. The man on the steps was still standing. A uniformed police officer walked down the steps. No one was rushing at the shooter. I must have been the only person on the street who did not see the movie trucks, the extras, the booms and all of the equipment. A year or so later, I saw "my" scene at the end of the first film in *The Godfather* saga, when Michael Corleone orchestrates the assassination of Emilio Barzini, Philip Tattaglia, Salvatore Tessio, and the rest of his enemies.

You really can't believe your own eyes. And, by the way, a few years later in almost the same spot while driving over the Brooklyn Bridge, I witnessed a tank battalion about to invade the city – to shoot the marshmallow man in *Ghostbusters*. This time, I didn't panic because, by then, I was a lawyer and would never dream of jumping to conclusions.

"[R]eliability is the linchpin in determining the admissibility of identification testimony."[1]

The August heat was oppressive on the walk through Chinatown. The usually busy streets were sluggish as the few people willing to leave the air conditioning slowed their pace to cope with the humidity. It was my last day of work, and my supervisor proposed that we have a drink to celebrate a great summer internship. How could I refuse?

"Let's go in here," he pointed to a bar. Not the fern-hung, brick-walled saloons of that era, but a real bar with dim lighting, vinyl booths and daytime drinkers. I slid into a booth, sitting in the middle of the table. Rather than sit across, he sat next to me so I had to move even further in. I tried to chat about the case I had been researching, but his leg was pressed against mine. "It's been a pleasure to see you every day," he said. "I'm sorry I had to go away on vacation for three weeks. I would have liked to have given you more work to

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[1] Manson v. Brathwaite, 432 U.S. 98, 144 (1977).

do." Actually, I had been glad when he was gone even though it meant I had to fend for myself and find other assignments. This job had not been a pleasure for me at all. From the very first day, he made me uncomfortable when he would sit on the arm of the old-fashioned wooden chair at my work table in the corner of his office, leaning over me to point out something on the table. Like many other women in those breakthrough days when we were showing up in noticeable numbers in law schools for the first time, but before we knew how to react to unwanted touching or notice, I was totally clueless what to do. I started to avoid him by working in the library, making excuses about needing to be near the books, but I never confronted him directly.

That leg certainly was persistent; but when I felt his hand on my knee, bare since it was too hot for stockings, I jumped up. "Look at the time. I have to go. Please, excuse me. Thanks so much for the drink and the great summer."

I fled back to my third year at law school. I was twenty years old and had no name for what had happened; that took another 15 years.

"A hostile or abusive work environment can be sex discrimination."[2]

THREE TALES FROM THE NIGHT COURT CRYPT

The dingy courtroom where nightly arraignments were conducted was a world unto itself. Colorful characters paraded from the holding pens, to stand in front of the judge and then to walk out, perhaps for good or perhaps until another day. The lawyers working until midnight often became a bit goofy and groggy after a few hours so the judge got into the habit of taking a break around 10 p.m. A lot of court personnel returned to work visibly happier after a quick trip to the nearby bars.

There was a small, dingy, barely furnished room off the main courtroom laughably called "chambers" where the judge would retire during this break. Most of the lawyers speculated that he had his own supply of pick-me-ups in the desk drawer. The room actually was put to a different use once a week. Wednesday night was "warrant night."

The judge motioned to me, the wet-around-the-ears defense attorney, to follow him into the back room during the break. "I want you to see something," he said as he opened the door to a room in which two police officers were running a movie projector. On the wall was a flickering image of two women and a man, naked, contorted, all orifices exposed.

"Give me a pen," demanded the judge while he leered at the improvised screen. He turned to me while scribbling his signature. "Young lady, you know what standard I apply when deciding to sign a search warrant for pornography? 'If you can't tell the difference if you run the film backwards or forwards, then it has no artistic value.'" Despite his smarmy intentions of embarrassing me and his salacious grin, the judge probably got it right.

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[2] Meritor Savings Bank v. Vinson, 477 U.S. 57, 66 (1986).

"I know it when I see it."[3]

I had tried to consult with my client during three frustrating visits to the detention center. Each time he just sat at the table with his hands clasped and stared into space. He would not speak or answer my increasingly frantic questions. He would not listen to my entreaties that unless he helped himself, I could not help him in court.

Out of desperation, I had requested the judge order a competency evaluation. The day my client, still wordless and listless, came to court for the results, I stood before the judge hoping that the prison psychiatrists had either gotten through to him or found him incompetent. Apparently, he had been willing to answer a few of their questions. Yes, he knew the name of the President. Yes, he understood he was in jail for breaking a window and stealing money from a store. Yes, he understood that there was a judge, a prosecutor and a defense attorney. The doctors found him to be competent.

Now, I had to decide whether to contest this conclusion. The judge, a petite woman whose head barely showed above the bench, stood so that she looked down at the defendant standing quietly with his usual downcast eyes and slumped shoulders. She pronounced, "Is he vertical? Then, he is competent." She looked at me, "So, do you want to fight the findings – or not?" Not much to argue at that point.

"[P]resent ability to consult with his lawyer . . . rational as well as factual understanding of the proceedings against him."[4]

The judge, well known for his cigars and star sapphire pinky ring, was more at home at a pinochle game than in criminal court where his impatience and legal ignorance were legendary. These were the days when there was some Fourth Amendment clarity; it was not that difficult to identify an illegal stop, pat down, or search. Because I was pretty confident that my client's rights had been violated, when I made an application for his release on recognizance, I raised the blatant illegality of the stop-and-frisk of my client that had turned up a loaded firearm. The judge, appalled at my temerity, glared over the top of the bench. "The Fourth Amendment...the Fourth Amendment. Missy, don't you know this is Arraignment? The Constitution stops at my courtroom door." Speechless, I watched as my client was taken back to the holding pens, where other protections of the Constitution probably would not apply.

"Secure against unreasonable searches and seizures . . . ."[5]

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[3] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[4] Dusky v. United States, 362 U.S. 402, 402 (1960).

[5] U.S. CONST. amend. IV.

THREE CAUTIONARY TALES

In New York State courts, voir dire is still important. The number of peremptory challenges afforded each side depends on the severity of the charges, but can add up to as many as twenty per side, which, when added to the limitless number of challenges for cause, might result in two or more days devoted to jury selection.

My first felony trial involved a drug sale of a small amount of cocaine, but the recently enacted "Rockefeller drug laws," about which "draconian" was the most commonly used adjective, mandated a life sentence upon conviction. My young client had no prior record but that made no difference to the sentence he faced. The entire case was infused with a grave sense of responsibility to try to overcome the injustice of this law.

Finding a jury that would be willing to acquit started with voir dire. I had prepared thoughtful questions designed to probe and to educate, to make a personal connection with the jury, and to win them over from the outset by indirectly letting them know the stakes. The first twelve jurors entered the box. Questioning lasted for two hours. Some of them seemed fine, but I intended to challenge many others. The process would repeat several times over until both lawyers had used up all of our challenges.

Ordinarily challenging a juror is discrete. A board is passed to the lawyers but none of the jurors is supposed to know who bumped whom lest the decision produce some bias.

After the first round, the court officer passed the board to the prosecutor, a burly, former military guy with a reputation among defense attorneys as a hard-nose. (He later became a judge with a quick temper). He stood, buttoned his jacket and gestured broadly, waving away the board. Facing the jurors, he declared, "Your honor, I have no challenges. It is my belief that any twelve citizens of the City of New York can be fair and impartial. These good people are all fine with me. And so will anyone else seated in the box."

So, when jurors 2, 5, 8, 11 and 12 were excused, there was no question about who doubted their ability to be fair. And when in the next two rounds, nine more people stepped down due to my pickiness, I started to itch with self-consciousness. Although I had six more challenges left, I lost heart each time the prosecutor stood to say, "All fine with me, Your Honor." "Me, too," I finally said.

"The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community."[6]

A judge from the Eastern District of New York was on the phone asking me to take on a *pro se* case from his docket. About a year earlier, after six years of criminal defense practice and a year of clinical teaching, wanting a new

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[6] Batson v. Kentucky, 476 U.S. 79, 87 (1986).

challenge, I had accepted a *pro se* case at the request of a respected and considerate judge in the Southern District. I was in the midst of taking my first depositions, writing my first pleadings and motions, and generally teaching myself federal civil practice. I was gaining new experiences while doing a good deed. This second judge probably had heard that someone only a few blocks from the courthouse might be susceptible to a little personal pitch.

"Ordinarily I would be happy to help out, your honor, but I'm handling another matter, plus I'm having a baby in four months." Silence. I hated to play the baby card, especially at a time when pregnant women were "problems" for employers, when part-time work, job sharing, and paid maternity leave were almost unheard of, and pregnancy discrimination was not yet illegal. A baby excuse seemed unprofessional, but I tried anyway since a simple "no" did not seem like it would work.

"How about this?" The judge wanted to negotiate. "Why don't you see if you can locate the plaintiffs who filed a law suit two years ago against the detention center? See if they are still interested in pursuing the claim." Absurd idea, I thought, but could I actually tell the judge that? Who wouldn't want to go forward if they had free legal representation? "Then, we can see where we are at that point. You can spend a few weeks on this then report back to me." Without really considering the implications of this investigation, whether there was a legitimate and ethical role I could play, or what expectations might be created, I agreed to do (what I thought was) a favor for the judge because the judge had made it impossible to refuse. So I made some calls, wrote some letters, and found two of the plaintiffs who, unsurprisingly, did want to proceed.

Not only was I pregnant, I was naïve. I was on the hook and the judge was not going to release me. A few months after my son's second birthday party, the trial in *Cutter v. City of New York* (nom de litigation) began before a jury of six after the judge had denied the defendant's summary judgment motion. I had drafted an old friend, also interested in some federal trial experience, to be co-counsel. We each took a part of the case and provided each other with moral support.

Against all odds, we won a significant judgment for each of the two plaintiffs I had been able to locate. My friend and I, and our spouses, had a wonderful celebratory dinner, amazed at our success and plotted our attorneys' fees request. Our clients, serving their multi-year prison sentences, were speechless. The amount of money was beyond their imaginations.

About two weeks later: "I am granting the defendant's motion to set aside the verdict and order a new trial." An unappealable order from this judge who had pulled a bait-and-switch by not relieving me from the case. Oy vey. What birthday would my son be celebrating before this *pro bono* commitment was over?

(P.S. The plaintiffs accepted the City's subsequent settlement offer. Several years later, I received a letter from one of the other named plaintiffs whom I had not been able to locate. He had heard about the verdict and wanted to know how he could get his share. But that was another kettle of fish).

"Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least fifty (50) hours of pro bono publico legal services per year."[7]

From time to time, I am asked on an application or by a student whether any kind of ethical complaint ever has been filed against me. "Yes," I am obliged to admit, "a long time ago when I was a public defender." So I tell the story, embarrassed all over again.

I was assigned to work on a misdemeanor case – I cannot remember the details since it was one of many, many cases I was handling at the time. My co-counsel was a guy whom I had known around the courthouse and who seemed okay, although a bit strange in ways that I had never bothered to try to figure out.

On the eve of trial, our clients' positions clashed to the detriment of his client. My co-counsel was furious and stormed out of the courtroom. A few days later, I received a letter from him venting his anger and swearing that he would "squish me like a bug." I shrugged off this bizarre threat as something between a joke and the ranting of a lunatic.

Not long after, I received a notice from the Bar Association that a complaint had been filed against me by this lawyer. With this formal notice in hand, it was difficult to laugh anymore. Indeed, the accusation immediately made me queasy and full of self-doubt. Where there's smoke, there's fire, right? Had I misserved my client? Deceived the Court? I was pretty inexperienced; maybe I was incompetent. Even a nutty, fabricated, and transparently outrageous accusation could have some truth or be taken seriously. I was terrified into writing a multi-page response.

And then I waited to hear. And waited. And waited. All the delay convinced me that the complaint was being taken seriously. Finally, relief. The grievance was dismissed. As the years pass, the particulars of this story are hazy. But that sick feeling, that intense upset stomach that accompanied even this baseless charge, has returned every time I have cause to question my ethical choices, even without an accusation of misconduct. Nausea – not any formal rule of professional responsibility – is my infallible early-warning system that something might be off track.

"Neither the lawyer's personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client."[8]

AND THEN . . . .

Life stories, law stories, her stories, war stories. A lawyer's life is full of anecdotes and adventures and rife with memorable characters. Merely crossing a

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[7] MODEL RULES OF PROF'L CONDUCT R. 6.1 (1983).

[8] N.Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY EC 5-1.

street, picking up the phone, or saying "yes" can yield an oft-told tale that instructs, irritates, humors or humbles, but lives on long past its time.

We must not make a scarecrow of the law,
Setting it up to fear the birds of prey,
And let it keep one shape, till custom make it
Their perch and not their terror.[9]

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[9] WILLIAM SHAKESPEARE, MEASURE FOR MEASURE, act 2, Sc. 1.