matter of law, constitute an affirmative action *plan*. These transfer decisions were informal race-motivated attempts to remedy, on an *ad hoc* basis, a perceived imbalance similar to the informal affirmative action rejected by this court in *Lehman v. Yellow Freight System, Inc.*, 651 F.2d 520, 525–28 (7th Cir.1981). *See also Lilly v. City of Beckley*, 797 F.2d 191, 194–96 (4th Cir.1986) (informal race-motivated decisions not a legitimate affirmative action plan). I agree with my brothers, however, that Mr. Mathis is entitled to qualified immunity on this issue of racial discrimination. When he acted, the precise requirements for a permissible affirmative action plan were not so well established that it can be said that he should have known that his conduct violated the law. *See Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). *Lehman*, while attempting to isolate some of the factors necessary for a valid plan, explicitly noted the "dearth of authority on this issue," 651 F.2d at 515 (footnote omitted), and also emphasized "the rather unique record," *id.* at 528, under scrutiny.

With regard to the district court's decision to grant a new trial on the issue of political discrimination, I do not believe that the district court abused its discretion. *See Davlan v. Otis Elevator Co.*, 816 F.2d 287, 289 (7th Cir.1987).

Susan WASSELL, Plaintiff–Appellant,

v.

Wilbur L. ADAMS and Florena M. Adams, doing business as Ron–Ric Motel, Defendants–Appellees.

No. 88–1118.

United States Court of Appeals, Seventh Circuit.

Argued Nov. 29, 1988.

Decided Jan. 5, 1989.

[redacted]

[redacted]

Before POSNER, COFFEY and RIPPLE, Circuit Judges.

POSNER, Circuit Judge.

The plaintiff, born Susan Marisconish, grew up on Macaroni Street in a small town in a poor coal-mining region of Pennsylvania—a town so small and obscure that it has no name. She was the ninth of ten children, and as a child was sexually abused by her stepfather. After graduating from high school she worked briefly as a nurse's aide, then became engaged to Michael Wassell, also from Pennsylvania. Michael joined the Navy in 1985 and was sent to Great Lakes Naval Training Station, just north of Chicago, for basic training. He and Susan had decided to get married as soon as he completed basic training. The graduation was scheduled for a Friday. Susan, who by now was 21 years old, traveled to Chicago with Michael's parents for the graduation. The three checked into a double room at the Ron-Ric motel, near the base, on the Thursday (September 22, 1985) before graduation. The Ron-Ric is a small and inexpensive motel that caters to the fami-

lies of sailors at the Great Lakes Naval Training Station a few blocks to the east. The motel has 14 rooms and charges a maximum of $36 a night for a double room. The motel was owned by Wilbur and Florena Adams, the defendants in the case.

Four blocks to the west of the Ron–Ric motel is a high-crime area: murder, prostitution, robbery, drugs—the works. The Adamses occasionally warned women guests not to walk alone in the neighborhood at night. They did not warn the Wassells or Susan.

Susan spent Friday night with Michael at another motel. On Saturday the Wassells checked out and left for Pennsylvania, and at the Wassells' suggestion Susan moved from the double room that she had shared with them to a single room in the Ron–Ric. Michael spent Saturday night with her but had to return to the base on Sunday for several days. She remained to look for an apartment where they could live after they were married (for he was scheduled to remain at the base after completing basic training). She spent most of Sunday in her room reading the newspaper and watching television. In the evening she went to look at an apartment.

Upon returning to her room at the motel, she locked the door, fastened the chain, and went to bed. She fell into a deep sleep, from which she was awakened by a knock on the door. She turned on a light and saw by the clock built into the television set that it was 1:00 a.m. She went to the door and looked through the peephole but saw no one. Next to the door was a pane of clear glass. She did not look through it. The door had two locks plus a chain. She unlocked the door and opened it all the way, thinking that Michael had come from the base and, not wanting to wake her, was en route to the Adamses' apartment to fetch a key to the room. It was not Michael at the door. It was a respectably dressed black man whom Susan had never seen before. He asked for "Cindy" (maybe "Sidney," she thought later). She told him there was no Cindy there. Then he asked for a glass of water. She went to the bathroom, which was at the other end of the room, about 25 feet from the door (seems far—but that was the testimony), to fetch the glass of water. When she came out of the bathroom, the man was sitting at the table in the room. (The room had a screen door as well as a solid door, but the screen door had not been latched.) He took the water but said it wasn't cold enough. He also said he had no money, and Susan remarked that she had $20 in her car. The man went into the bathroom to get a colder glass of water. Susan began to get nervous. She was standing between the bathroom and the door of her room. She hid her purse, which contained her car keys and $800 in cash that Michael had given her. There was no telephone in the room. There was an alarm attached to the television set, which would be activated if someone tried to remove the set, but she had not been told and did not know about the alarm, although a notice of the alarm was posted by the set. The parking lot on which the motel rooms opened was brightly lit by floodlights.

A few tense minutes passed after the man entered the bathroom. He poked his head out of the doorway and asked Susan to join him in the bathroom, he wanted to show her something. She refused. After a while he emerged from the bathroom—naked from the waist down. Susan fled from the room, and beat on the door of the adjacent room. There was no response. The man ran after her and grabbed her. She screamed, but no one appeared. The motel had no security guard; the Adamses lived in a basement apartment at the other end of the motel and did not hear her screams.

The man covered Susan's mouth and dragged her back to her room. There he gagged her with a wash cloth. He raped her at least twice (once anally). These outrages occupied more than an hour. Eventually Susan persuaded the rapist to take a shower with her. After the shower, she managed to get out of the bathroom before he did, dress, and flee in her car. To save herself after the rapes, she had tried to convince him that she liked him, and had succeeded at least to the extent that his guard was down. The Adamses'

lawyer tried halfheartedly to show that she had consented to the rapes, but backed off from this position in closing argument.

The rapist was never prosecuted; a suspect was caught but Susan was too upset to identify him. There had been a rape at the motel several years previously (a sailor had opened the door of his room to two men who said they were "the management," and the men raped his wife). There had also been a robbery, and an incident in which an intruder kicked in the door to one of the rooms. These were the only serious crimes committed during the seven years that the Adamses owned the motel.

Susan married Michael, but the rape had induced posttrauma stress that has, according to her testimony and that of a psychologist testifying as her expert witness, blighted her life. She brought this suit against the Adamses on January 21, 1986. It is a diversity suit that charges the Adamses with negligence in failing to warn Susan or take other precautions to protect her against the assault. The substantive issues are governed by the law of Illinois. A jury composed of four women and three men found that the Adamses had indeed been negligent and that their negligence had been a proximate cause of the assault, and the jury assessed Susan's damages at $850,000, which was the figure her lawyer had requested in closing argument. But in addition the jury found that Susan had been negligent too—and indeed that her negligence had been 97 percent to blame for the attack and the Adamses' only 3 percent. So, following the approach to comparative negligence laid down in *Alvis v. Ribar*, 85 Ill.2d 1, 52 Ill.Dec. 23, 421 N.E.2d 886 (1981)—the decision in which the Supreme Court of Illinois abolished the common law rule that contributory negligence is a complete bar to a negligence suit—the jury awarded Susan only $25,500 in damages. This happens to be approximately the midpoint of the psychologist's estimate—$20,000 to $30,000—of the expense of the therapy that the psychologist believes Susan may need for her post-traumatic stress.

Susan's lawyer asked the district judge to grant judgment in her favor notwithstanding the verdict, on the ground either that she had been nonnegligent as a matter of law or that her negligence was immaterial because the Adamses had been not merely negligent but willful and wanton in their disregard for her safety. In the alternative, counsel asked the judge to grant a new trial on the ground that the jury's apportionment of negligence was contrary to the manifest weight of the evidence. There were other grounds for the motion, but they have been abandoned. The judge denied the motion, and Susan appeals.

Had she filed her suit after November 25, 1986, she could not have recovered any damages, assuming the jury would have made the same apportionment of responsibility between her and the Adamses. Illinois' new comparative negligence statute (Ill.Rev.Stat. ch. 110, ¶ 2–1116; see also ¶ 2–1107.1) bars recovery in negligence (or strict liability product) cases in which the plaintiff's "fault ... is more than 50% of the proximate cause of the injury or damage for which recovery is sought." But as her suit was filed before that date, the new statute is inapplicable. See Ill.Rev.Stat. ch. 34, ¶ 429.7 Historical Note.

[1] Susan Wassell's counsel argues that the jury's verdict "reflected a chastened, hardened, urban mentality—that lurking behind every door is evil and danger, even if the guest is from a small town unfamiliar with the area." He takes umbrage at the defendants' argument that Susan's "antennae" should have been alerted when she didn't see anyone through the peephole. He rejects the metaphor, remarking unexceptionably that human beings do not have antennae and that this case is not a Kafka story about a person who turned into an insect (i.e., is not *The Metamorphosis*). He points out that a person awakened from a deep sleep is not apt to be thinking clearly and that once Susan opened the door the fat was in the fire—if she had slammed the door in the rapist's face he might have kicked the door in, as had happened once before at this motel, although she didn't know that at the time.

The Adamses' counsel argued to the jury (perhaps with the wisdom of hindsight) that Susan's "tragic mistake" was failing to flee when the man entered the bathroom. Susan's counsel insists that Susan was not negligent at all but that, if she was, she was at most 5 percent responsible for the catastrophe, which, he argues, could have been averted costlessly by a simple warning from the Adamses. To this the Adamses' counsel replies absurdly that a warning *would* have been costly—it might have scared guests away! The loss of business from telling the truth is not a social loss; it is a social gain.

[2, 3] The common law refused to compare the plaintiff's and the defendant's negligence. See 4 Harper, James & Gray, The Law of Torts § 22.1 (1986). The negligent plaintiff could recover nothing, unless the defendant's culpability was of a higher degree than simple negligence. See *id.*, §§ 22.5, 22.6, and the discussion of "degrees" of negligence in *Alvis v. Ribar, supra,* 85 Ill.2d at 9–10, 52 Ill.Dec. at 26–27, 421 N.E.2d at 889–90. Susan argues that the defendants were willful and wanton, which, she says, would make her negligence as irrelevant under a regime of comparative negligence as it would be in a jurisdiction in which contributory negligence was still a complete defense. See *id.*, 85 Ill.2d at 10, 52 Ill.Dec. at 27, 421 N.E.2d at 890; 4 Harper, James & Gray, *supra,* § 22.6.

Both the premise (that the Adamses were willful and wanton) and the conclusion (that if so, her own negligence was irrelevant) are wrong. As we guessed in *Davis v. United States,* 716 F.2d 418, 429 (7th Cir.1983), that it would, Illinois appears to be lining up with the states that allow the plaintiff's simple negligence to be compared with the defendant's "willful and wanton conduct," see *State Farm Mutual Automobile Ins. Co. v. Mendenhall,* 164 Ill.App.3d 58, 115 Ill.Dec. 139, 517 N.E.2d 341 (1987); see also *Bofman v. Material Service Corp.,* 125 Ill.App.3d 1053, 81 Ill. Dec. 262, 466 N.E.2d 1064 (1984); *Soucie v. Drago Amusements Co.,* 145 Ill.App.3d 348, 99 Ill.Dec. 262, 495 N.E.2d 997 (1986). We say "appears to be" because only *Mendenhall* discusses the issue and it is not a decision of the Illinois Supreme Court, and because a critical premise of the decision may be shaky. That is the proposition that "willful and wanton" under Illinois law denotes merely a heightened form of negligence, so that there is only a small difference between simple negligence and willful and wanton misconduct despite the ominous sound of the words "willful" and "wanton." See 164 Ill.App.3d at 61, 115 Ill.Dec. at 141–42, 517 N.E.2d at 343–44; *Davis v. United States, supra,* 716 F.2d at 425–27. As we noted in *Davis,* there are two lines of "willful and wanton" decisions in Illinois. One, which seemed to be in the ascendancy when we wrote *Davis,* and is the position taken in section 342 of the Second Restatement of Torts (1965), indeed regards "willful and wanton" as merely a heightened form of "negligent." Section 342 requires only that the defendant "knows *or has to reason to know* of the [dangerous condition of his premises] and *should* realize that it involves an unreasonable risk of harm" (emphasis added). But the cases since *Davis* appear to have swung round to the narrower concept, under which willful and wanton conduct denotes "conscious disregard for ... the safety of others," *Rabel v. Illinois Wesleyan University,* 161 Ill. App.3d 348, 356, 112 Ill.Dec. 889, 895, 514 N.E.2d 552, 558 (1987), or "knowledge that [the defendant's] conduct posed a high probability of serious physical harm to others." *Albers v. Community Consolidated # 204 School,* 155 Ill.App.3d 1083, 1085, 108 Ill.Dec. 675, 677, 508 N.E.2d 1252, 1254 (1987). See also *Soucie v. Drago Amusements Co., supra,* 145 Ill.App.3d at 352, 99 Ill.Dec. at 264, 495 N.E.2d at 999. These formulations come close to—perhaps duplicate—the standard of recklessness that we limned in *Duckworth v. Franzen,* 780 F.2d 645, 652 (7th Cir.1985), a prisoners' suit involving a claim that reckless disregard for prisoners' safety violates the Eighth Amendment's prohibition against cruel and unusual punishments. *Bresland v. Ideal Roller & Graphics Co.,* 150 Ill.App.3d 445, 457, 103 Ill.Dec. 513, 522, 501 N.E.2d 830, 839 (1986), describes willful and wanton

misconduct as "so close to ... intentional misconduct that a party found liable on that basis should not be able to obtain contribution [from his joint tortfeasors]."

If the more recent formulations are authoritative, this would undermine the argument in *Davis* and *Mendenhall* for allowing a plaintiff's simple negligence to be compared with a defendant's willful and wanton misconduct. But it would not help Susan Wassell win her case. No rational jury could find that the Adamses *consciously* disregarded a *high* probability of serious physical harm. Cf. *Doe v. United States*, 718 F.2d 1039 (11th Cir.1983). If the laxer version of "willful and wanton" is used, Susan's argument against permitting the jury to compare her culpability with that of the Adamses falls, yet she might seem in that event to have a powerful fallback position. The laxer the standard for "willful and wanton," the stronger the inference that the Adamses *were* willful and wanton—and if so, surely Susan's own negligence was not so great as to outweigh theirs by a factor of more than 30. But as we shall see in a moment, the defendants' negligence in this case was at most simple, not aggravated, negligence. Indeed, the jury may not have thought the defendants negligent at all.

[4–7] The district judge was right to deny Susan's request for judgment notwithstanding the verdict. But was he right to deny her request for a new trial? This court treats the question as one of federal law, even in a diversity case. *Davlan v. Otis Elevator Co.*, 816 F.2d 287, 289 (7th Cir.1987); see also *Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963, 971 (7th Cir.1983). And the federal standard is that "a new trial can be granted only when the jury's verdict is against the clear weight of the evidence," *Davlan v. Otis Elevator Co., supra*, 816 F.2d at 289, and we can reverse only when persuaded that in applying this standard the district judge abused his discretion, *id.*; see also *Foster v. Continental Can Corp.*, 783 F.2d 731, 735 (7th Cir.1986); *Babb v. Minder*, 806 F.2d 749, 752 (7th Cir.1986). The Illinois approach to these questions is similar. See, e.g., *Lowe v. Kang*, 167 Ill.App.3d 772, 782, 118 Ill. Dec. 552, 558, 521 N.E.2d 1245, 1251 (1988); *Mazikoske v. Firestone Tire & Rubber Co.*, 149 Ill.App.3d 166, 181–82, 102 Ill.Dec. 729, 739, 500 N.E.2d 622, 632 (1986); *Junker v. Ziegler*, 113 Ill.2d 332, 339–40, 101 Ill.Dec. 627, 630, 498 N.E.2d 1135, 1138 (1986); *Ford v. City of Chicago*, 132 Ill.App.3d 408, 412–13, 87 Ill.Dec. 240, 244, 476 N.E. 2d 1232, 1236 (1985). So Susan has a tough row to hoe to get the district court's refusal to grant her a new trial reversed.

The old common law rule barring the contributorily negligent plaintiff from recovering *any* damages came eventually to seem too harsh. That is why it has been changed in most jurisdictions, including Illinois. It was harsh, all right, at least if one focuses narrowly on the plight of individual plaintiffs, but it was also simple and therefore cheap to administer. The same cannot be said for comparative negligence, which far from being simple requires a formless, unguided inquiry, because there is no methodology for comparing the causal contributions of the plaintiff's and of the defendant's negligence to the plaintiff's injury. In this case, either the plaintiff or the defendants could have avoided that injury. It is hard to say more, but the statute requires more—yet without giving the finder of facts any guidance as to how to make the apportionment.

We have suggested in previous cases, such as *Davis v. United States, supra*, 716 F.2d at 429, that one way to make sense of comparative negligence is to assume that the required comparison is between the respective costs to the plaintiff and to the defendant of avoiding the injury. If each could have avoided it at the same cost, they are each 50 percent responsible for it. According to this method of comparing negligence, the jury found that Susan could have avoided the attack at a cost of less than one thirty-second the cost to the Adamses. Is this possible?

[8, 9] It is careless to open a motel or hotel door in the middle of the night without trying to find out who is knocking. Still, people aren't at their most alert when they are awakened in the middle of the

night, and it wasn't crazy for Susan to assume that Michael had returned without telling her, even though he had said he would be spending the night at the base. So it cannot be assumed that the cost—not to her (although her testimony suggests that she is not so naive or provincial as her lawyer tried to convince the jury she was), but to the reasonable person who found himself or herself in her position, for that is the benchmark in determining plaintiff's as well as defendant's negligence, see, e.g., *Blacconeri v. Aguayo*, 132 Ill.App.3d 984, 988, 88 Ill.Dec. 231, 234–35, 478 N.E.2d 546, 549–50 (1985); 4 Harper, James & Gray, *supra*, § 22.10, at pp. 334–38—was zero, or even that it was slight. As innkeepers (in the increasingly quaint legal term), the Adamses had a duty to exercise a high degree of care to protect their guests from assaults on the motel premises. See, e.g., *McCarty v. Pheasant Run, Inc.*, 826 F.2d 1554, 1558 (7th Cir.1987) (Illinois law); *Yamada v. Hilton Hotel Corp.*, 60 Ill.App.3d 101, 112, 17 Ill.Dec. 228, 237, 376 N.E.2d 227, 236 (1977); *Mrzlak v. Ettinger*, 25 Ill.App.3d 706, 712, 323 N.E.2d 796, 800 (1975); *Fortney v. Hotel Rancroft, Inc.*, 5 Ill.App.2d 327, 125 N.E.2d 544, 546, 548 (1955); *Peters v. Holiday Inns, Inc.*, 89 Wis.2d 115, 278 N.W.2d 208 (1979). And the cost to the Adamses of warning all their female guests of the dangers of the neighborhood would have been negligible. Surely a warning to Susan would not have cost the Adamses 32 times the cost to her of schooling herself to greater vigilance.

[10] But this analysis is incomplete. It is unlikely that a warning would have averted the attack. Susan testified that she thought the man who had knocked on the door was her fiancé. Thinking this, she would have opened the door no matter how dangerous she believed the neighborhood to be. The warning that was not given might have deterred her from walking alone in the neighborhood. But that was not the pertinent danger. Of course, if the Adamses had told her not to open her door in the middle of the night under any circumstances without carefully ascertaining who was trying to enter the room, this would have been a pertinent warning and might have had an effect. But it is absurd to think that hoteliers are required to give so *obvious* a warning, any more than they must warn guests not to stick their fingers into the electrical outlets. Everyone, or at least the average person, knows better than to open his or her door to a stranger in the middle of the night. The problem was not that Susan thought that she *should* open her bedroom door in the middle of the night to anyone who knocked, but that she wasn't thinking clearly. A warning would not have availed against a temporary, sleep-induced lapse.

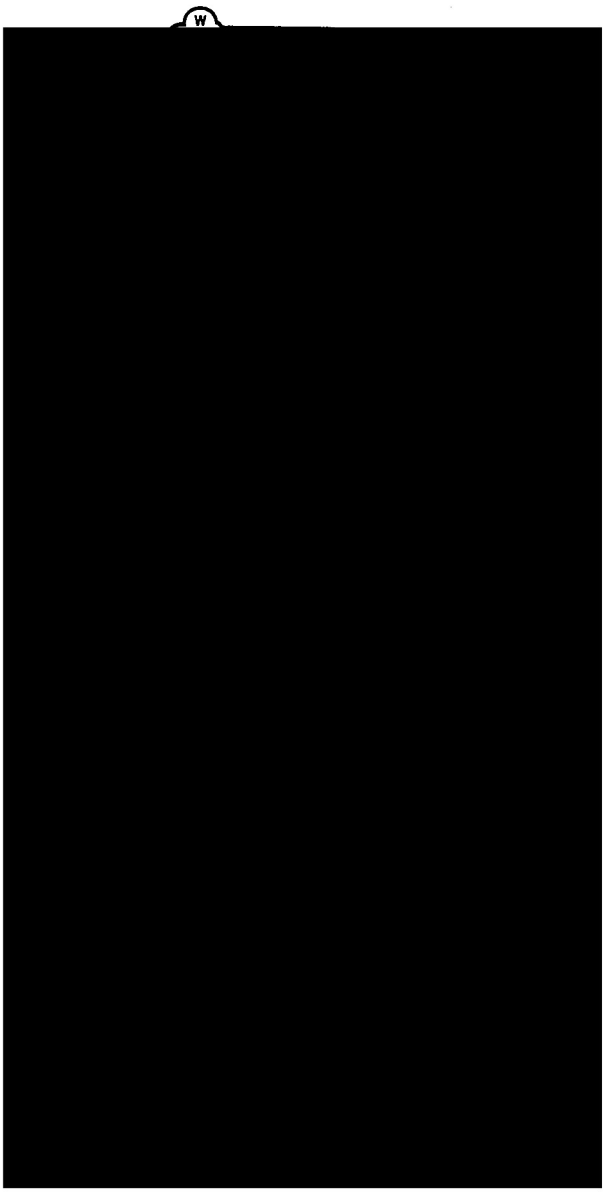
[11] Giving the jury every benefit of the doubt, as we are required to do especially in a case such as this where the jury was not asked to render either a special verdict or a general verdict with answers to written interrogatories (Fed.R.Civ.P. 49), we must assume that the jury was not so muddle-headed as to believe that the Adamses' negligence consisted in failing to give a futile warning. Rather, we must assume that the jury thought the Adamses' negligence consisted in failing to have a security guard, or telephones in each room, or alarms designed to protect the motel's patrons rather than just the owners' television sets. (The Adamses did, however, have an informal agreement with the local police that the police would cruise through the parking lot of the Ron–Ric whenever they drove down the street at night—and this was maybe three or four times a night.) The only one of these omitted precautions for which there is a cost figure in the record was the security guard. A guard would have cost $50 a night. That is almost $20,000 a year. This is not an enormous number. The plaintiff suggests that it would have been even lower because the guard would have been needed only on busy nights. But the evidence was in conflict on whether the Sunday night after a Friday graduation, which is the night that Susan was attacked, was a busy night. And the need for a security guard would seem to be greater, the less busy rather than the busier the motel; if there had been someone in the room adjacent to Su-

san's, she might have been saved from her ordeal. In any event the cost of the security guard, whether on all nights or just on busy nights—or just on unbusy nights—might be much greater than the monetary equivalent of the greater vigilance on the part of Susan that would have averted the attack.

[12] The assumption that the jury was clear-thinking and instruction-abiding is artificial, of course. During its deliberations, the jury sent the judge a question about the duty to warn (the judge did not answer it). This is some indication that the jury thought that the Adamses' negligence consisted in failing to warn Susan. But it is equally plausible that the jury didn't think the Adamses were negligent at all toward Susan, but, persuaded that she had suffered terribly, wanted to give her a token recovery. Concern with sympathy verdicts appears to lie behind Illinois' new statute barring the plaintiff from recovering any damages if he is more than 50 percent negligent. "The adoption of the pure comparative negligence doctrine [the doctrine, adopted in *Alvis v. Ribar*, that allows the plaintiff to recover something however great his negligence was relative to the defendant's] was thought to have increased a plaintiff's chances for winning at trial from about 50% to 60%, even though at the same time it tended to reduce the amount of the damage awards made at trial." Smith–Hurd Ill.Ann.Stat. ch. 110, ¶ 2–1116 Historical Note. It may be more than coincidence that the jury awarded Susan just enough money to allow her to undertake the recommended course of psychological therapy. We are not supposed to speculate about the jury's reasoning process, see, e.g., Fed.R.Evid. 606(b), and we have just seen that it would not necessarily strengthen Susan's case if we did. The issue for us is not whether this jury was rational and law-abiding but whether a rational jury could, consistently with the evidence, have returned the verdict that this jury did.

If we were the trier of fact, persuaded that both parties were negligent and forced to guess about the relative costs to the plaintiff and to the defendants of averting the assault, we would assess the defendants' share at more than 3 percent. But we are not the trier of fact, and are authorized to upset the jury's apportionment only if persuaded that the trial judge abused his discretion in determining that the jury's verdict was not against the clear weight of the evidence. We are not so persuaded. It seems probably wrong to us, but we have suggested an interpretation of the evidence under which the verdict was consistent with the evidence and the law. And that is enough to require us to uphold the district judge's refusal to set aside the verdict.

AFFIRMED.



"*RECITATIF*": INFORMING SELF AND OTHER

A crucial part of many operas is the *recitatif*, or recitative, which traditionally is sung in simple style, using everyday words, with minimal instrumental accompaniment.[6] Simplicity is valued because the function of the *recitatif* is to inform the audience about characters, situations, and developments in the plot. It is important that listeners understand each word of the *recitatif* so they may follow the story told in the opera.

Toni Morrison's short story, "*Recitatif*,"[7] draws attention to ways

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4. Ellen Pence, *Racism - A White Issue*, *in* ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE: BLACK WOMEN'S STUDIES 45, 46 (Gloria T. Hull et al. eds., 1982).

5. PLAYING IN THE DARK, *supra* note 2, at xi.

> The kind of work I have always wanted to do requires me to learn how to maneuver ways to free up the language from its sometimes sinister, frequently lazy, almost always predictable employment of racially informed and determined chains (The only short story I have ever written, "*Recitatif*," was an experiment in the removal of all racial codes from a narrative about two characters of different races from whom racial identity is crucial).

Id.; *see also* Elizabeth Abel, *Black Writing, White Reading: Race and the Politics of Feminist Interpretation*, 19 CRITICAL INQUIRY 470, 476 (1993) (reporting correspondence with Toni Morrison about "*Recitatif*").

6. *See* HAROLD ROSENTHAL & JOHN WARRACK, CONCISE OXFORD DICTIONARY OF OPERA 330-31 (1972) (I am grateful to Elise Garcia for helping me to understand this operatic form).

7. Toni Morrison, *Recitatif*, *in* CONFIRMATION: AN ANTHOLOGY OF AFRICAN AMERICAN WOMEN 243-61 (Amiri Baraka & Amina Baraka eds., 1983) [hereinafter *Recitatif*].

that race functions for informative purposes in contemporary written texts, as readers give significance to racial identification in matters of character, situation, and narrative movement and as they unconsciously or uncritically locate themselves in relation to race consciousness in the text. "*Recitatif*" invites readers to pay attention to the complex arrangements of raced and gendered tropes and codes that are, or are expected to be, quite clear to contemporary readers and to look closely

8. *Id.*
9. *Id.* at 244.
10. *Id.* at 245.
11. *Id.* at 247.
12. *Id.* at 246.

Raced Judicial Reasoning

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

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

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

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

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

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

Wassell v. Adams

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

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

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

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

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

48. 865 F.2d at 852.

49. *Id.*

50. *Id.* at 856.

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

Judge Posner then described the defendants' motel:

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

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

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

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51. *Id.* at 850.

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

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

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

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

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

Id. at 95.

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

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

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

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

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

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

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

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

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

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

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

60. *Id.* at 851.

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

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

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

63. *Id.* at 390.

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