Michigan Law Review

Volume 95 | Issue 4

1997

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STRAIGHTJACKETING PROFESSIONALISM: A COMMENT ON RUSSELL

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Professor Russell's essay[1] sounds a much needed cautionary note about the public's characterization of Christopher Darden and Johnnie Cochran both during and after the spectacle of O.J. Simpson's criminal trial. Russell cogently argues that Darden and Cochran's choices, as well as those of other black lawyers confronting similar problems,[2] must be evaluated against the backdrop of racism that devalues and constrains the lives of African Americans in general and African-American lawyers in particular.[3] Black lawyers, Russell insists, not only face "glass ceilings" inhibiting their advancement, but must also live inside "glass bubble[s] . . . that severely circumscribe[ ] the flexibility and creativity so critical to the Black lawyer's — or indeed any lawyer's — professional identity."[4]

Given continuing racism and the difficulties associated with being a "token," Russell argues that branding black attorneys such as Darden and Cochran as either "sellouts" or reckless opportunists who "play the race card" saddles African-American lawyers with problems "essentially not of their creation."[5] In addition, she asserts that employing these tropes perpetuates a false dichotomy between, on the one hand, "raising racism as an issue," and, on the other, "claiming the irrelevance of race."[6] This false conflict,

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1. Margaret M. Russell, *Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straightjacket of Legal Practice*, 95 MICH. L. REV. 766 (1997).

2. Like Professor Russell, I too limit my discussion of "representing race" to the experiences of black lawyers. *See id.* at 771 & n.19. For reasons upon which I elaborate more fully elsewhere, differences between the experiences and commitments of black lawyers and those of lawyers from other racial minority groups render problematic the kind of broad generalizations about "minority" lawyers that are often made in popular and scholarly literature. *See* David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms: An Institutional Analysis*, 84 CAL. L. REV. 493, 501 n.12 (1996).

3. *See* Russell, *supra* note 1, at 769-71.

4. *Id.* at 772. For one attempt to chronicle the "glass ceiling" facing black lawyers, see Wilkins & Gulati, *supra* note 2, at 568-84.

5. Russell, *supra* note 1, at 772.

6. *Id.* at 773. Russell offers several reasons why this dichotomy is false. *See id.* at 773-75. Although I am not sure that her arguments prove that the choice between "raising race as an issue" and "claiming the irrelevance of race" is "false" in the sense that there is not a real choice between these two strategies, the gist of her claim is nevertheless powerful: there

Russell concludes, reinforces racial hierarchy by "accentuat[ing] intraracial conflict."[7] More important, it deprives black attorneys of the "critically-needed latitude" they need to begin to explore "complex questions of legal professionalism, ethics, community identification, race-conscious lawyering strategies, or political agenda formation."[8]

I share Russell's intuition. Discussions of the "Darden Dilemma" and the "Cochran Conundrum" must account for the manner in which racism first constrained the choices these two men faced, and then shaped the public's perception of their actions. I also believe that inattention to this broader racial context inhibits our ability to explore what it means to "represent race" in ways that avoid the duality of "sellouts" and "race cards." What follows, therefore, is more about scope, emphasis, and tone, than critique.

I believe that in order to reach a comprehensive understanding of what it means to "represent race," either in the Simpson case or generally, we must take up an aspect of the problem that Russell expressly sets aside: the merits.[9] By "merits," I mean both the strengths and weaknesses of the case against Simpson, and the legitimate *professional* obligations that Darden and Cochran assumed by virtue of their respective roles as prosecutor and defense lawyer. Black lawyers do not simply, because they are black, "represent race." As *lawyers,* they also represent clients and the goals and values of the legal system as a whole. If we are, in Professor Russell's telling words, to treat black lawyers "not as racial icons, but as real-life, three-dimensional human beings,"[10] we must take these professional obligations seriously when discussing the extent to which African-American lawyers can or should "represent race."

In the balance of this Comment, I suggest how Russell's decision to set aside the merits of Darden's and Cochran's arguments clouds her analysis of both the Darden Dilemma and the Cochran Conundrum. I begin, however, by exploring why placing too much emphasis on what Russell refers to as the "master narrative"[11] of race runs the risk of reinforcing the very essentialism that Russell rightly notes has been too often the bane of the black bar.

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ought to be ways to discuss race that neither deny its significance nor make illegitimate the use of racial sentiment.

7. *Id.* at 794.

8. *Id.*

9. *See id.* at 774-75 ("[T]his is not an essay about the merits of the Simpson case, nor about the personal characters or legal talents of Christopher Darden and Johnnie Cochran." (footnote omitted)); *id.* at 790 ("As emphasized from the outset, my focus is neither the substance of the Simpson prosecution itself nor the relative merits of individual lawyering strategies in the context of that case.").

10. *Id.* at 774.

11. *Id.* at 774 n.23.

I. WHY THE MERITS MATTER

Russell accurately depicts the many obstacles facing black lawyers. These barriers should not be minimized. The small number of blacks in the profession, particularly in the upper echelons, assures that African-American lawyers will confront daily all of the problems associated with being a token: heightened visibility and a corresponding pressure to perform (including pressure to be a "role model" for other black lawyers), isolation from formal and informal networks of power, and pressures to assimilate to prevailing norms.[12] At the same time, study after study confirms that race bias continues to infect virtually every aspect of the American legal system.[13]

This bias doubly affects black lawyers. First, as Russell emphasizes, there are the long-term debilitating consequences of the constant barrage of insults, slights, and innuendoes that disparage black lawyers' professional standing and competence.[14] Equally, if not more important, however, is the effect that racial bias in the legal system has on the welfare (and therefore on the choices) of *clients.* Black clients, who bear the brunt of the legal system's racism, may find it more difficult to secure justice if they hire a black lawyer. White clients may also be less likely to engage the services of a black lawyer if they are concerned that he or she will not be taken seriously by other important actors in the system.

Nevertheless, it is a mistake to assume that race completely dominates the professional lives of black lawyers. Russell asserts that "[a]ttorneys of color often find that they are identified, categorized, and evaluated first as members of their racial group, and only secondarily as lawyers."[15] As a descriptive matter, this statement overstates the effect of race in the lives of most black lawyers. The majority of black lawyers today practice as their predecessors did a generation ago: in solo practice or in small minority firms representing predominately black clients.[16] Racism undoubtedly helps to

12. In 1990, blacks comprised just over three percent of the nation's lawyers. *See* ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 111 (1992). On the problems associated with being a token, see ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 210-12 (1977) (discussing the problems of tokenism). I discuss the implications of Kanter's work for black lawyers in corporate law firms in Wilkins & Gulati, *supra* note 2, at 571-72.

13. *See* Suellyn Scarnecchia, *State Responses to Task Force Reports on Race and Ethnic Bias in the Courts,* 16 HAMLINE L. REV. 923 (1993) (discussing fifteen task force reports confirming race and ethnic bias in the courts).

14. *See* Russell, *supra* note 1, at 769-70.

15. *Id.* at 767.

16. Given the dearth of accurate empirical information on the black bar, it is impossible to say with certainty where the majority of black lawyers are currently employed. Nevertheless, given the small number of blacks in large firms and other elite areas of corporate practice, together with the large percentage of the bar as a whole that remains in solo and small

confine these lawyers to the lower echelons of the bar. Nevertheless, it seems likely that in their daily interactions with clients — and, more important, in their understanding of themselves — these black women and men view their professional identity as lawyers as being at least as important as their racial identity.

Even blacks who practice in more rarefied climates should not forget that, despite all of the debilitating insults and slights,[17] their professional status still carries considerable weight. Most of the time, the bailiff shows the lawyer to the counsel table; the receptionist takes the lawyer's coat and asks if she wants a cup of coffee; the paralegal stays up all night to finish the memo; the cab stops; and the shop door is buzzed open.[18] More important, when these courtesies are not accorded, black lawyers frequently have the ability to take corrective action, to impose their professional status on an admittedly recalcitrant world.

The point here is not to minimize the degrading, long-term effects of not being accorded the normal privileges of professional standing. However, failing to acknowledge the degree to which a black lawyer's professional status acts as a partial buffer against many of the most pernicious effects of racism also has its costs. To assert as a factual matter that race is the dominant feature in the lives of black lawyers is to run the risk of equating the difficulties of black middle class status with the far more pressing problems faced by poor blacks.[19]

Normatively, positing race as the dominant feature of a black lawyer's identity is even more troubling. Black lawyers are lawyers regardless of whether white America always is prepared to accept them as such. This professional status carries with it unique duties and responsibilities. Lawyers, for example, are obligated to keep client confidences in circumstances where ordinary citizens might have a moral (or even a legal) duty to disclose.[20] When a lawyer agrees to represent a client, she is ethically obligated to defend her

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firm practice, it is reasonable to surmise that most black lawyers continue to practice in these traditional settings. *Cf.* David B. Wilkins, *Two Paths to the Mountaintop: The Role of Legal Education in Shaping the Values of Black Corporate Lawyers,* 45 STAN. L. REV. 1981, 1983 n.11 (1993) (noting that reports on the number of black lawyers entering corporate practice are exaggerated).

17. *See* Russell, *supra* note 1, at 769 n.10.

18. *Cf. id.* at 770 (noting that minorities in the legal profession report being "sized up" according to their color, rather than their professional status).

19. Russell is well aware of this danger. *See id.* at 770 n.16 ("What, one wonders, do these anecdotes reveal about assumptions made about the humanity of people of color who could never afford to take cabs, shop at upscale stores, dine in swanky restaurants, or drive BMWs?").

20. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) (requiring a lawyer to preserve the confidences and secrets of a client except under certain narrowly drawn circumstances).

client's interests zealously within the bounds of the law.[21] A lawyer also has obligations to preserve and enhance the legal framework that are different from — and arguably more capacious than — the duties of ordinary citizens.[22]

These duties carry moral weight. Like every other person who decides to become a lawyer, a black man or woman entering the legal profession voluntarily agrees to abide by the rules of legal ethics.[23] The moral force of this voluntary commitment is reinforced by the fact that other participants in the system — judges, opposing lawyers, and, most of all, clients — reasonably rely on black lawyers (as they rely on all lawyers) to abide by these professional commitments. The legal system could not function if it were otherwise.

These professional obligations are not rendered irrelevant by racism. To imply that racism negates the moral force of a black lawyer's assumption of professional obligations is to deny these women and men the very moral agency that the civil rights movement rightly insists is their inalienable due. Nor is the American justice system so riddled with racism that lawyers are excused from what would otherwise be legitimate role obligations. Many would contend that lawyers in Nazi Germany or apartheid South Africa had no moral obligation to honor the professional norms of these racist regimes; indeed, they may have had an affirmative obligation to resist. Notwithstanding its many problems, however, the United States is not such a regime.[24] To be sure, the law has imposed sub-

21. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1983) (stating that an attorney must "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf"); *see also* L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909 (1980) (discussing a lawyer's duty to clients).

22. *See* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 17 (1988) (arguing that no plausible account of the democratic state can "manage without some notion that lawyers must be committed to helping to maintain the legal framework"); David B. Wilkins, *In Defense of Law and Morality: Why Lawyers Should Have a Prima Facie Duty to Obey the Law*, 38 WM. & MARY L. REV. 269 (1996).

23. *See* Thomas D. Morgan & Robert W. Tuttle, *Legal Representation in a Pluralist Society*, 63 GEO. WASH. L. REV. 984, 1003 & n.103 (1995) (documenting this requirement).

24. Even Professor Paul Butler concedes as much. Butler's recent proposal that black jurors refuse to convict black defendants accused of nonviolent crimes constitutes one of the sharpest attacks on the American criminal justice system. *See* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995). Even Butler, however, carefully couches his proposal for resistance by black jurors within the existing norms regarding juries' power to nullify "unjust" laws and convictions. *See id.* at 708-09. Moreover, by conceding that jurors should not nullify the convictions of black offenders who are guilty of violent crimes, Butler implicitly acknowledges that the U.S. legal system is tolerably just in at least these cases. The bottom line is that, as the brilliant 1970s pop poet Gil Scott-Heron once said, "New York ain't like Johannesburg!" GIL SCOTT-HERON, *What's the Word/Johannesburg*, *on* FROM SOUTH AFRICA TO SOUTH CAROLINA (Arista Records 1975).

stantial burdens on African Americans.[25] It has also provided important benefits, ones that have made possible the partial flourishing of blacks in the United States.

As a result, although Russell may be correct that every case that a black lawyer takes on is "at some level a 'race case,'"[26] it is also necessarily a *professional* case. Therefore, black lawyers cannot, as Russell suggests, dispense with "the norms of mainstream legal practice" in favor of "community-based reflection" when deciding how to respond to ethical situations such as those that confronted Darden and Cochran.[27] The legal profession's "mainstream" norms carry moral, not just practical, weight. They therefore constitute a legitimate constraint on how a black lawyer should respond to the fact that he or she is both representing race as well as representing *clients.*

This does not mean that black lawyers must accept uncritically prevailing ethical practices. Like other members of the profession, black lawyers have the right — and indeed the duty — to question the norms of "mainstream legal practice," and to seek to change these prevailing understandings when they produce injustice. As I argue elsewhere, African-American attorneys may have a particularly strong duty to seek change in cases where existing norms disadvantage the black community.[28] Nor are black lawyers required to endorse the dominant view of what constitutes "mainstream legal practice." Bar leaders frequently claim that no-holds-barred, zealous advocacy is the only model of law practice consistent with the legal profession's ideals and traditions. As William Simon

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25. *See* ROBERT M. COVER, JUSTICE ACCUSED (1975) (documenting the contribution of fugitive slave laws and other legal mechanisms to the oppression of blacks in the United States).

26. Russell, *supra* note 1, at 787. I take up the merits of this contention below. *See infra* note 59 and accompanying text.

27. *See* Russell, *supra* note 1, at 785 (arguing that black lawyers should seek to understand the legitimate concerns underlying the Darden Dilemma "through community-based reflection, rather than through the norms of mainstream legal practice"). Russell does not specify what she has in mind by "community-based reflection" other than to suggest that "Black attorneys and Black communities" use the Darden Dilemma "as a basis for reconnection and debate." *Id.* I agree that a dialogue between black lawyers and members of the black community about issues such as the Darden Dilemma would help to clarify the competing values at stake. My point is simply that any such dialogue would have to pay substantial attention to the "mainstream norms of legal practice" that legitimately constrain the extent to which black lawyers can and should represent race.

28. *See* David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030, 1040-43 (1995) [hereinafter Wilkins, *Race, Ethics, and the First Amendment*]; DAVID B. WILKINS, *Social Engineers or Corporate Tools:* Brown v. Board of Education *and the Conscience of the Black Corporate Bar, in* RACE, LAW AND CULTURE: REFLECTIONS ON *BROWN V. BOARD OF EDUCATION* (forthcoming 1997) [hereinafter WILKINS, *Social Engineers*]; Wilkins, *supra* note 16, at 1995-2008.

argues, this claim is demonstrably false.[29] Consequently, in addition to seeking actively to change the norms of "mainstream legal practice," black lawyers should maximize the opportunities for race-conscious lawyering that are available within the bar's existing ethical norms.[30]

Professor Russell's "Lesson From the Elders" section illustrates nicely the danger of overlooking the legitimate constraints imposed by professional roles.[31] In the case she describes, Judge Higginbotham eloquently refused to recuse himself from a race discrimination case involving a class of black employees. As Russell notes, the crux of Higginbotham's argument is a rejection of the "defendant's tacit presumption that a Black judge posed a unique threat to norms of judicial neutrality" simply because he or she may have spoken out on issues of race or had a strong commitment to racial justice.[32] Put somewhat differently, Higginbotham merely demanded to be accorded the same respect as any other judge of any color, who, in the name of judicial norms of impartiality and due process, is presumed to be able to put away his or her personal loyalties and rule on cases according to the evidence and the law.

Judge Higginbotham rightly viewed the claim that race somehow overwhelmed or supplanted his obligations to his professional role as an affront to his human dignity as a free and equal moral actor capable of honoring his chosen commitments. As we examine the actions of Darden and Cochran, we must be careful to accord them the same level of respect.

II. Race and Role: Balancing the Dilemmas and Conundrums of Lawyering in a Racialized World

Russell paints a vivid portrait of the external constraints that brand black attorneys with either the "sellout" or the "race-card" trope. White Americans are increasingly unsympathetic to claims that race plays an important role in the lives of black Americans. The attitude that we have "gotten beyond" race is applied with special force to the law.

The belief that race talk has no place in the courtroom is misguided. To be sure, the legal system's formal commitment to "equal

29. *See* William H. Simon, *Should Lawyers Obey the Law?*, 38 Wm. & Mary L. Rev. 217 (1996) (arguing that the "dominant view" of legal ethics ignores important aspects of traditional legal discourse).

30. *See* Wilkins, *supra* note 16, at 2023 (arguing that "the traditional model of legal ethics is not as unyielding [to the claims of race-conscious lawyering] as many law school ethics courses might lead one to believe").

31. *See* Russell, *supra* note 1, at 775-79.

32. *Id.* at 777.

justice under the law" signals that race should not matter in assessing the guilt or innocence of a criminal defendant. In the face of this commitment, arguments about race in the courtroom appear to many whites to be out of place. This intuition, however, conflates the legal system's commitment to the ideal of colorblind adjudication with the factual assertion that this ideal has been met in practice. As a result, attorneys are under pressure to suppress or deny instances in which race affects the administration of justice. Those who defy the pressure and bring race into the courtroom force other participants in the proceedings and the public at large to confront the discomforting extent to which the ideals of American justice remain unfulfilled. Accusing these lawyers of "playing the race card" is one way to deflect attention from this uncomfortable reality. As Russell eloquently describes, black attorneys are particularly vulnerable to this dynamic.[33]

Because she focuses exclusively on the limitations on race discourse imposed by white society, however, Russell suggests that the racial narratives embedded in the Darden Dilemma and the Cochran Conundrum are identical. More important, because she sets the merits of Darden's and Cochran's arguments to one side, she leaves the impression that understanding this unitary racial narrative provides the key to unraveling these dilemmas and conundrums. Both of these claims place too much emphasis on the straightjacketing effect of white racism.

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33. *See id.* at 771-72. Although Russell is undoubtedly correct to assert that black attorneys face especially high barriers to bringing race into the courtroom, she understates the extent to which this dynamic inhibits the discussion of race by all lawyers. *See id.* at 772 ("Unlike white attorneys, who have the relatively luxurious comfort of invisibility and transparency in raising issues of race in the lawyering process, Black attorneys must always brace themselves to have *their* racial, professional, and personal identities placed at issue as well."). Experience suggests that white lawyers who attempt to focus attention on continuing racism in the justice system frequently have their "professional" and "personal" identities — and sometimes even their "racial" loyalties — called into question as well. Consider, for example, the constant barrage of attacks leveled against William Kunstler during his long and illustrious career as a critic of the racism embedded in the legal system. *See, e.g.*, Adam Freedman, Book Review, NATL. REV., Dec. 31, 1994, at 65 (reviewing WILLIAM KUNSTLER, MY LIFE AS A RADICAL LAWYER (1994), and cataloguing criticisms against Kunstler). Significantly, in one of his last cases Kunstler was criticized by members of the Jewish community for representing the Arab defendants in the World Trade Center bombing case and suggesting that they were the victims of a racist prosecution. *See* David Margolick, *Still Radical After All These Years: At 74, William Kunstler Defends Clients Most Lawyers Avoid,* N.Y. TIMES, July 6, 1993, at B1. More generally, given that all lawyers face growing upheaval and uncertainty in their professional lives, *see, e.g.*, Derrick Bell & Erin Edmonds, *Students as Teachers, Teachers as Learners,* 91 MICH. L. REV. 2025, 2046-52 (1993) (describing the way in which many associates and partners of all races feel alienated from their jobs as lawyers), it is important not to exaggerate the extent to which "the comforting sense of belonging or even anonymity . . . attaches quite naturally to white lawyers." Russell, *supra* note 1, at 768. This is another example of how blacks act as a bellwether for problems that pervade the legal profession as a whole. *See* Wilkins & Gulati, *supra* note 2, at 613.

A. *Why Conundrums are More Risky Than Dilemmas*

Russell argues that the Darden Dilemma, although "influenced . . . and at times perhaps exacerbated by Black community critiques . . . is *inherently and inevitably* a result of a legal system that devalues all Black lives."[34] The root cause according to Russell, is the extent to which "dominant popular discourse (even more than the 'Black community') pigeonholes [black lawyers who choose to work in areas not typically associated with racial justice] with an array of labels ('assimilationist,' 'colorblind,' 'mainstream,' 'conservative,' [and] 'sellout')."[35] Similarly, Russell maintains that although it was Darden who first introduced the "race card" trope into the Simpson trial, the genesis of this critique was the white community's anger over Cochran's violation of a "social taboo [when he] render[ed] painfully explicit the racial overtones that had suffused the [Simpson] case from its inception."[36] As a result, Russell concludes, the problems faced by both Darden and Cochran are ultimately the result of "racial attitudes and assumptions" beyond their — and their community's — "understanding and control."[37]

This parallel construction obscures important differences between the racial narratives embedded in these two cases. It is an empirical question whether the critique of Darden or other black lawyers who may be seen as working against the cause of racial justice[38] originated in the "dominant popular discourse" or in the black community. However, given the general inattention to issues of race that Russell so eloquently documents,[39] it seems doubtful that the white community created this conflict. It is hard to believe that the average white American views a black prosecutor who upholds the colorblind ideals of the justice system by putting black criminals in jail as betraying his community. That thought, as the passage from Paul Butler quoted by Russell attests,[40] is much more likely to have originated among blacks who are alarmed by the

34. Russell, *supra* note 1, at 784 (emphasis added).

35. *Id.* at 782.

36. *Id.* at 791.

37. *Id.* at 793.

38. I want to emphasize the speculative and contingent nature of this charge. As Darden himself argues, there are strong arguments that black prosecutors — either by watching out for racism in the prosecutor's office, or by preventing criminals (black and white) from preying on the black community — promote the cause of racial justice. *See id.* at 780 (quoting Darden). I make a similar claim on behalf of blacks who go into corporate law practice. *See* Wilkins, *supra* note 16.

39. *See* Russell, *supra* note 1, at 770 (noting the dearth of scholarship on the effect of race on legal practice).

40. *See id.* at 783 (quoting Butler as reporting that " 'some of my fellow African-American prosecutors hoped that [Marion Barry] would be acquitted, despite the fact that he was obviously guilty of at least one of the charges' " because they believed " 'that the prosecution of Barry was racist' ").

growing number of African-American men involved with the criminal justice system.

To be sure, the popular press has picked up and exploited the controversy over Darden for its own purposes. Much of this literature, however, treats the Darden Dilemma not so much as a dilemma, but as another example of some blacks attempting to play the race card on other blacks.[41] Blacks who are portrayed as being willing to brave the wrath of their "brothers and sisters" in the name of upholding "universal" commitments like putting guilty people in jail are generally valorized by mainstream popular discourse.[42] This sentiment helps to explain Darden's somewhat surprising popularity, particularly among whites.[43] To the extent that the Darden Dilemma is perceived as a real dilemma, therefore, it is primarily because of the sentiments of certain sectors of the black community.[44]

By contrast, the Cochran Conundrum, as Russell persuasively demonstrates, was essentially created — and certainly has been perpetuated — by whites angry over Simpson's acquittal. Darden may have been the first person to accuse Cochran of "playing the race card,"[45] but it was not until Robert Shapiro made his now infamous statement to Barbara Walters that the charge gained national currency. More important, it has been whites, both in the media and elsewhere, who have lodged the most vociferous objections to the

41. For example, consider the following statement by a white journalist quoted by Russell: "The truth is that, along with using race as a blunt instrument against whites, blacks use it to craft relations with one another." Bill Maxwell, *Intraracism Snares Chris Darden,* ARIZ. REPUBLIC, Oct. 25, 1995, at B5, *quoted in* Russell, *supra* note 1, at 788 n.59. Although Maxwell goes on to chastise Cochran for "playing the race card," the headline makes clear that the author's charge of "intraracism" would also apply to the claim that Darden had sold out the black community by prosecuting Simpson.

42. *See* Wilkins, *Race, Ethics, and the First Amendment, supra* note 28, at 1065-66 (discussing the public acclaim given to a black lawyer who represented the Ku Klux Klan); Adolph Reed, Jr., *Steele Trap,* THE NATION, Mar. 4, 1991, at 274 (book review) (noting the unjustified public praise of Shelby Steele). Russell recognizes this phenomenon. *See* Russell, *supra* note 1, at 784 (noting "the token Black attorneys [the white community] ostensibly valorizes as the honored few"). She does not, however, explain how this fact influences the construction of the Darden Dilemma.

43. It is interesting that Darden generally is treated as something of a hero (or at least a tragic figure) by the press even though many in the media and elsewhere believe that the prosecution of which he was a prominent part botched the Simpson case.

44. It is important to remember that many in the black community want more — not less — prosecution of the criminals (most of whom are black) who prey upon their neighborhoods. Thus, recent polls found that 82% of blacks surveyed favored harsher treatment of criminals by courts in their communities. Seventy six percent favored putting more police on the streets, and 68% favored building more prisons. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1994, at 172, 174-75, 178 (Kathleen Maguire & Ann L. Pastore eds., 1995) (summarizing poll data). These data underline the difficulty of making blanket statements about the views of the "black community."

45. I return to Darden's use of this trope below. *See infra* notes 77-78 and accompanying text.

two examples most closely associated with this charge: the introduction of Mark Fuhrman's racism as a central element in the case, and Cochran's appeal to jurors to "send a message" about police misconduct during his closing argument.[46]

This difference between the racial narratives encoded in the Darden Dilemma and the Cochran Conundrum — the former reflecting ambivalence by certain sectors of the black community about the long-term effect of black prosecutors' helping to put more young black men in jail; the latter evidencing the white community's fear that blacks will invoke race to undermine the legitimate goals of the justice system (or even, more radically, to expose the illegitimate privilege enjoyed by whites in the justice system) — has important consequences for how black attorneys are likely to resolve these issues. As Darden's anguished testimony makes clear, the black community is not without sanctions to enforce its understanding of how black prosecutors, and more generally black lawyers, should balance their competing obligations to the black community and their professional role.[47] For many black attorneys, their ties to their community are important sources of strength and well-being.[48] To the extent that these lawyers perceive that the black community disapproves of certain lawyering roles or particular actions, they may be less likely to follow that particular path. Conversely, the chance to garner community approval (or indeed adulation) may induce some black attorneys to assume lawyering roles or actions — for example, becoming a civil rights lawyer, charging officials with racism, or actively appealing to racial solidarity — that they otherwise would not be inclined to pursue were it not for the support or encouragement of the black community.

This pressure, although substantial, is of a different order of magnitude compared with the pressures on black lawyers generated by the larger society. As Russell tellingly portrays, black lawyers who bring race into the courtroom face severe sanctions, including public vilification, loss of professional standing, and, in extreme cases, financial ruin.[49] By the same token, blacks who conform to the expectations of the white community — either by pursuing careers in mainstream fields such as corporate practice, or by openly defying the perceived or express wishes of other blacks — often receive substantial rewards. Careers in the mainstream hold out

46. *See* Russell, *supra* note 1, at 789 n.60.

47. *See id.* at 780 (noting Darden's "justifiable torment over his apparent ostracism from some in the Black community").

48. *See* Wilkins, *supra* note 16, at 1999-2000.

49. *See* Russell, *supra* note 1, at 788-93. Although Cochran certainly has not been ruined by the sharp reaction to some of his actions in the Simpson case, it is likely that his efforts to build an institutional client base for his law firm have been hampered by charges that he played the race card.

the promise of all of the money and status traditionally flowing to those in proximity to wealth and power.[50] As I indicated above, criticizing other blacks also has been known to improve the professional standing and personal wealth of those blacks perceived as willing to challenge the prevailing orthodoxy within the black community.[51]

This asymmetry between the pressures emanating from the black and white communities on matters of race politics is likely to affect the distribution of black lawyers who are willing to take on the troubles associated with one or the other of these lawyering strategies. It is doubtful that one could ever prove this intuition. Nevertheless, the growing number of black lawyers moving into mainstream areas of legal practice, combined with the unease that many African-American attorneys express about raising issues of race in their professional roles, suggests that the pressures and rewards associated with conformity are likely to dwarf those connected with racial solidarity.[52]

Simply noting that black lawyers face greater pressure to avoid conundrums than dilemmas, however, does not tell us whether we should view this trend with alarm.[53] It is possible that the white community's critique of black lawyers who play the race card is more legitimate than the black community's objection to African-American prosecutors who seek to put black defendants behind bars. Although race may frame the lens through which both the dilemma and the conundrum are constructed, it cannot by itself provide the answer to the normative question of how these two quandaries should be handled by black lawyers. To reach that determination, we must once again return to the merits of Darden's and Cochran's positions and the legitimate constraining effects of their respective professional roles.

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50. *See* Wilkins, *supra* note 16, at 1991 (discussing the benefits black lawyers receive from corporate practice). Needless to say, these rewards are not always realized in practice. *See* Wilkins & Gulati, *supra* note 2, at 568-84 (noting the problems faced by black lawyers in corporate law firms).

51. *See supra* note 42 and accompanying text.

52. On the trend towards blacks entering mainstream legal practice, see Wilkins, *supra* note 16, at 1982-83. On the pressure not to discuss race in professional settings, see *id.* at 2015. *See also* Russell, *supra* note 1, at 791-92 (noting "the far-reaching animus with which explicitly antiracist, race-conscious critiques are met in a variety of contexts").

53. The fact that black lawyers face greater pressures to avoid the Cochran Conundrum than the Darden Dilemma does not mean necessarily that black attorneys will act in accordance with these incentives. In other words, it is not clear that fewer black lawyers will be willing to raise racial issues explicitly — and risk being accused of playing the race card — than will be prepared to take positions that some blacks might view as being contrary to the interests of the black community — and risk being labeled sellouts. For example, the fact that many blacks enter the legal profession with the express goal of using their legal skills to improve the plight of the black community may make many more African-American attorneys willing to take on the risks associated with the Cochran Conundrum than one might otherwise expect.

B. *Race and the Adversary System*

In addition to being black men, both Darden and Cochran are, of course, lawyers. As I argued in Part I, this simple truth creates an additional set of obligations that each man must take into account in deciding the extent to which, as a black man, he inevitably "represents race." Moreover, both men occupied particular roles in the Simpson case — prosecutor and defense lawyer — that created their own unique obligations and commitments. Understanding these professional roles and obligations is essential to reaching a normative judgment about how each man resolved his respective dilemma or conundrum.

1. *Reconceptualizing the Darden Dilemma: When Race Shouldn't Matter*

Russell frames the Darden Dilemma in terms of the "[f]allacy of '[c]olorblind' [l]awyering."[54] This framing seems natural in light of the constant rhetoric emanating from the prosecutors that race was not an issue in the Simpson case.[55] To the extent that Gil Garcetti and others may have intended this statement to mean that race was *irrelevant* to the case, it was flatly false. Long before Mark Fuhrman's racism or the composition of the jury surfaced as issues in the case, the simple fact that a black man was accused of murdering his white (blonde, no less) former wife (along with her handsome white male companion) ensured that the perceptions and actions of at least some people both inside and outside the justice system would be influenced by race.

Nevertheless, as Russell acknowledges, the prosecution could legitimately have asserted that (to the best of their knowledge) race played no appreciable role in the initiation of the prosecution.[56] Nor, they could have argued, should it have affected the outcome of the case.[57] Our legal system is committed to the principle that neither the defendant's race nor the race of the victims should matter when assessing a defendant's guilt or innocence. As "officers of the court," both prosecutors and defense lawyers ought to view themselves as committed to this fundamental aspirational norm.[58]

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54. Russell, *supra* note 1, at 785.

55. *See id.* at 786.

56. *See id.*

57. *See id.* at 785.

58. Nor is there any compelling moral reason for either man to reject this fundamental aspirational goal. Unless one is willing to argue that race actually affects the moral worth of human beings — a position that to my knowledge no critical race theorist accepts — skin color should have no bearing on our determination of whether Simpson committed this terrible crime.

Darden's commitment to the aspiration that race should not affect the outcome of the Simpson prosecution does not necessarily commit him to what Russell refers to as the ideology of colorblind lawyering. The claim that race *ought not* to make a difference in cases of this kind[59] is not the same as the assertion that race *does not* make a difference in particular instances. Sometimes, to honor the ideal that race should not matter in assessing the defendant's guilt, we must look expressly at how racial stereotypes and biases might affect the actual or perceived fairness of the process.

Notwithstanding their repeated invocation of the "race is irrelevant" mantra, the prosecution frequently pursued a race-conscious strategy designed — when viewed in its best light — to protect the ultimate goal of race-neutral decisionmaking. Consider, for example, Garcetti's decision to bring the Simpson prosecution in L.A. County (where there probably would be many black jurors) as opposed to Santa Monica County (where the jury would be mostly white). Russell characterizes this decision as a hypocritical acknowledgment of the fallacy of colorblind lawyering.[60]

There is, however, a more benign interpretation.[61] Three hundred years of demonizing black male sexuality has left its mark on the consciousness of many whites, particularly in cases involving white women.[62] At the same time, the acquittal by an all-white jury in Simi Valley of four white police officers accused of beating Rodney King left many black Angelenos (and blacks elsewhere) with a deep suspicion about the fairness of trying racially sensitive cases before all-white juries. Given these factors, it was certainly plausible for Garcetti to believe that trying the case in L.A. County would emphasize the legal system's commitment — in practice, not

59. There are, of course, cases in which race *ought* to make a difference (e.g., discrimination and hate crime cases). This distinction underscores the danger of referring to all cases in which there is at least one black participant as a "race case," regardless of the particular manner in which race either will or should become a factor in the case. *See id.* at 787 (arguing that "every case argued by a Black attorney is at some level a 'race case' ").

60. *See id.* at 786 & n.56 (quoting Brent Staples as accusing Garcetti of playing the race card by bringing the case in L.A. County).

61. By constructing an interpretation of Garcetti's actions that is consistent with the fundamental ideal that race should not affect the determination of Simpson's guilt, I do not mean to suggest that this was Garcetti's actual motivation. As a politician — and a skillful one at that — Garcetti's motives were undoubtedly mixed. Indeed, it may very well be true that he was concerned more with avoiding civil unrest after a potential Simpson conviction than in ensuring that Simpson received a fair trial. Nevertheless, the fact that his actions are consistent with promoting the ideals of the justice system is relevant to understanding what Garcetti — and more important, Darden — meant when they asserted that race was not a factor in the Simpson prosecution.

62. For an excellent survey of the historical roots and continuing effects of myths about black male sexuality, see Erin Edmonds, *Mapping the Terrain of Our Resistance: A White Feminist Perspective on the Enforcement of Rape Law*, 9 HARV. BLACKLETTER J. 43, 49-67 (1992).

just in theory — to the norm that race should not affect the assessment of Simpson's guilt.[63]

One can make a similar argument concerning Garcetti's decision to add Darden to the prosecution team. The timing of Darden's appointment certainly raised a strong suspicion that Darden was added to the team in part for racial reasons.[64] At the time that Garcetti made this decision, it was already evident that the defense was going to raise serious allegations of police misconduct. Unfortunately, there is a long history of official bias and corruption in cases involving black defendants accused of raping or murdering white women.[65] Once again, given this history, it is plausible that adding a black prosecutor to the Simpson team — particularly one with a demonstrated commitment toward uncovering and prosecuting police misconduct[66] — would make it more likely that race would not affect the determination of Simpson's guilt.

The strength of the claim that these race-conscious lawyering decisions will promote the legal system's commitment to the ideal of colorblind decisionmaking depends upon these black participants honoring their institutional commitment not to inject race into the proceedings illegitimately. Black jurors are expected to bring their experience with, and ability to uncover, racism with them into the jury room.[67] They must not, however, ignore their sworn role-specific commitment to the ideal of race-neutral decisionmaking by allowing racial sentiment to influence their determination of Simpson's guilt or innocence. For his part, Darden promotes the ideal of race-neutral decisionmaking when he pays particular attention to issues of race that might adversely affect the trial process. In order

63. It is important to emphasize that this intuition need not rest on any essentialist claims about the "fairness" of black jurors. Rather, as a contingent historical fact, it is reasonable to believe that, on average, black jurors are more likely to be sensitive to the power of racial stereotypes regarding black men and white women.

64. *See* Russell, *supra* note 1, at 779-80. Below, I consider whether Cochran should have leveled this charge. *See infra* notes 100-03 and accompanying text.

65. *See* Edmonds, *supra* note 62, at 61-62 (noting a variety of injustices in cases involving black men accused of raping or murdering white women).

66. *See* Russell, *supra* note 1, at 779-80 (noting that "in his pre-Simpson prosecutorial career, [Darden] devoted considerable energies to investigating and prosecuting racist and other lawless behavior in the Los Angeles Police Department").

67. The fact that, because of their upbringing and experience, there are good reasons for believing that black jurors will be especially sensitive to these issues should not be interpreted as letting *white* jurors off the hook. They too have an ethical obligation to uncover and punish racist practices. Failing to note this simple truth leads to the perverse conclusion that the victims of racism have a greater obligation to fight this injustice than do those who are the system's beneficiaries (whether intentional or not). *See* Amy Gutmann, *Responding to Racial Injustice*, *in* COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 169-70 (K. Anthony Appiah & Amy Gutmann eds., 1996). Whatever one thinks of Paul Butler's controversial claim that racism in the administration of justice provides a legitimate reason for black jurors to nullify the convictions of nonviolent black offenders, by failing to urge *white* jurors to adopt this policy, Butler has fallen into this trap. *See* Butler, *supra* note 24.

not to undermine the ideal, however, he must also uphold the same basic level of commitment to the state's case that one would expect of someone who was not also charged with "representing race." Contrary to what Russell suggests, respecting these role-generated obligations requires someone in Darden's position to argue that race "*should be* characterized as irrelevant to a particular context, even if it has been otherwise raised in the proceedings."[68]

For the most part, I believe that Darden maintained this delicate balance.[69] Far from espousing the ideology of "colorblindness," Darden did his best, within the confines of his professional role as

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68. Russell, *supra* note 1, at 786 (emphasis added).

69. For what it is worth, I also believe that the black members of the jury upheld their role-specific obligation and acquitted Simpson on the basis of reasonable doubt, not racial sentiment. The subsequent finding of liability assessed against Simpson in the civil wrongful-death suit actually reinforces — rather than undermines — this conclusion. There are several plausible explanations for the different verdicts in the criminal and civil cases.

The most obvious explanation is the difference in burdens of persuasion: "beyond a reasonable doubt" in the criminal case compared with "preponderance of the evidence" in the civil suit. Following the civil verdict, at least one juror from each of the two juries stated publicly that, had she been sitting on the *other* jury with *its* burden of persuasion, she would have reached the opposite conclusion. The civil juror would have voted to acquit Simpson, and the criminal juror would have voted to find him liable. "[Lisa Michelle] Theriot [a juror in the civil case] said although she believed the plaintiffs had proved Simpson liable by a preponderance of the evidence . . . she did not think they had shown beyond a reasonable doubt that he killed the two victims." Peter Fimrite & Reynolds Holding, SAN FRANCISCO CHRONICLE, Feb. 11, 1997, at A1. "A white woman who served on the jury that acquitted Simpson in his criminal trial says she's delighted with yesterday's civil court verdict against the football legend. Anise Aschenbach tells the *L.A. Times* that she thought all along Simpson was guilty. She says she went along with the decision to acquit because of the requirement in a criminal trial that a case be proven beyond a reasonable doubt." City News Service of Los Angeles, Inc., February 5, 1997; *see also* Abigail Goldman & Mary Curtius, *Simpson Civil Case; For Many, It's As Simple as Black and White; Reaction: As With the First Trial, Public Opinions Often Follow Racial Lines. But African Americans Display a Greater Sense of Inevitability About New Verdicts,* LOS ANGELES TIMES, Feb. 5, 1997, at A14.

Moreover, the civil jury had access to two additional pieces of evidence — Simpson's testimony and the pictures of Simpson apparently wearing the now-infamous Bruno Magli shoes — that were unavailable to jurors in the criminal case. Press accounts report that following the introduction of this new evidence, the gap between the number of blacks and whites who believed that Simpson committed the murders narrowed appreciably. *See* Peter S. Canellos, *Gap Over Simpson Narrows: More Blacks, Whites Seen Doubting His Credibility,* BOSTON GLOBE, Jan. 25, 1997, at A1.

Finally, it is worth noting that by awarding punitive damages in an amount substantially greater than the plaintiffs' estimation of Simpson's net worth, a strong case can be made that the *civil* jury blatantly disregarded California law — and the judge's corresponding instructions — regarding how these damages should be assessed. *See, e.g.*, David Segal, *Verdict Stirs Debate on Punitive Awards; Lawyers Split on Whether Judge Will Reduce $33.5 Million in Damages*, WASH. POST, Feb. 12, 1997, at A4 ("[o]thers believe the jury's punishment would wipe out Simpson financially, an eventuality that California guidelines seek to prevent . . . . 'Even though the award is supposed to sting enough to deter, you're not supposed to bankrupt a defendant,' said Paul Rothstein, a professor at Georgetown University Law School. 'These damages might be considered excessive simply because they exceed the plaintiffs' bottom-line conclusions about Simpson's net worth.' ") The fact that this clear derogation of the (nearly all-white) civil jury's duty to follow the law has produced only a small fraction of the outrage in the popular and legal press that was visited on the (nearly all-black) jury in the criminal case provides further support for Russell's basic thesis that, when it comes to the public's reaction to the developments in the Simpson case, race matters.

the representative of the state, to uphold the institutional norm that race should not influence the determination of Simpson's guilt or innocence. The now infamous N-word exchange between Darden and Cochran[70] illustrates the balance Darden attempted to strike.

Russell is ambiguous as to whether she views Darden's argument regarding evidence of Fuhrman's past use of the N-word as an example of Darden's approach to colorblind lawyering or as an illustration of Darden's inability to stick to this strategy.[71] In my judgment, however, it was neither. Darden's argument for excluding Fuhrman's past racist statements was expressly color conscious. It called on his personal experience with race as a means of convincing a judge, arguably unfamiliar with the debilitating effects of this particular epithet, about the probable impact on black jurors of allowing it to be injected into the trial.[72] In essence, Darden argued that in order to prevent race from infecting the process, this explicit mention of race must be excluded.

On the merits, this was a plausible, although certainly not decisive, argument.[73] Exposing Fuhrman as a racist could easily have made it more difficult for black jurors to evaluate his testimony objectively. Moreover, the rules of evidence appear to support Darden's argument for exclusion. In general, lawyers are only allowed to use prior statements to attack a witness' credibility under certain narrowly-prescribed circumstances, and it was questionable whether the defense had met these requirements with respect to Fuhrman.[74] Darden, therefore, was justified in arguing that the

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I return to the difference in the media's reaction to the two cases in a related context below. *See infra* note 99.

70. *See* Russell, *supra* note 1, at 787 n.58 (describing the exchange).

71. *Compare id.* at 787 (suggesting that "Darden undermined his own 'colorblind' lawyering strategy" in the exchange) *with id.* at 788 (suggesting that lawyers like Darden who adopt colorblind strategies "must deny the realities of racism in order to appear balanced and fair in advancing the case of the client").

72. *See id.* at 789-90 (summarizing Darden's argument).

73. I argue below that Cochran's argument to the contrary was equally plausible. *See infra* notes 87-89 and accompanying text.

74. In general, evidence that a person has a bad character trait (e.g., that Fuhrman is a racist) is not admissible to prove that on a particular occasion the person *acted* in conformity with that bad trait (e.g., that Fuhrman consequently planted evidence to frame a black suspect). *See* CAL. R. EVID. 1101 ("[E]vidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."); *cf.* FED. R. EVID. 404(a) ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith . . . .").

There are two widely recognized exceptions to this rule. First, certain kinds of prior bad acts can be introduced to impeach a witness's *truthfulness*. *See* CAL. R. EVID. 780(e) (allowing evidence of a witness's character for honesty, veracity, or their opposites); *accord* FED. R. EVID. 608. However, at the time that the defense first sought to cross-examine Fuhrman on his use of racial epithets, Fuhrman had not yet *denied* using these words either during his direct testimony, or, so far as I am aware, on any other occasion. As a result, the defense could not argue — at least at that point in the proceedings — that evidence of Fuhrman's

Fuhrman statements should be excluded *even if* — were he the judge — he would have been inclined to let the statements into evidence.

Of course, the strength of Darden's argument for excluding Fuhrman's past racist statements would have been largely beside the point if Darden believed that the Simpson prosecution was fundamentally racist or that Fuhrman had planted the bloody glove. The claim that Darden "sold out" the black community when he argued against admitting evidence of Fuhrman's past racism implicitly rests on something like one or the other of these premises. Unless the Simpson prosecution was deeply infected by racism, it is difficult to conceive of why the black community would have had an interest in stopping a black prosecutor from making a factually and legally plausible argument in favor of Simpson's guilt.

Needless to say, Darden himself never entertained any such reservations. To the contrary, Darden continues to express strong belief in Simpson's guilt.[75] Apart from Darden's subjective belief, there is not a shred of credible evidence to support the charge that the decision to *prosecute* Simpson was racist, or that Darden or any other prosecutor had persuasive evidence that police planted or

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prior racist statements proved he was dishonest for denying that he made them. Therefore, Darden had a very strong argument that questions about Fuhrman's prior use of the N-word did not go to his veracity, because using racial slurs or even being a racist does not necessarily make one *untruthful*.

Second, evidence of a witness's character or actions can be introduced to prove "the existence or nonexistence of a bias, interest, or other motive." CAL. R. EVID. 780(f); *accord* FED. R. EVID. 404(b). Therefore, the defense had a good argument that Fuhrman's hatred for blacks (as evidenced by his use of racial slurs, particularly with respect to black men who date white women) established a motive for planting evidence, or, alternatively, demonstrated Fuhrman's bias against Simpson. However, the problem with this argument was that at the time that Fuhrman initially took the stand, the defense had very little evidence *corroborating* their theory of a police conspiracy to frame Simpson. Nor did they have any evidence linking Fuhrman's alleged racism to the performance of his official duties. (At this point, the Laura McKinny tapes had not yet surfaced. *See infra* note 76 and accompanying text.) As a result, Darden had a strong argument that claims about motive or bias were too speculative to justify the substantial danger that introducing Fuhrman's prior statements would divert the jury's attention from evidence relating to Simpson's guilt or innocence. *See* CAL. R. EVID. 352 (authorizing the trial judge to exclude evidence "if its probative value is substantially outweighed by the . . . danger of undue prejudice, of confusing the issues, or of misleading the jury"); *see also* People v. Kronemyer, 234 Cal. Rptr. 442, 460-61 (Cal. Ct. App. 1987) (affirming the exclusion of the cross-examination of a witness regarding his twenty-year friendship with an interested party because the allegation of bias was too speculative).

Taken as a whole, these evidentiary principles provide strong support for Darden's argument that the defense should have been prohibited from cross-examining Fuhrman about his prior use of racial slurs *during his initial appearance on the stand*. Once Judge Ito allowed the defense to pursue this line of questioning — and once Fuhrman emphatically denied under oath that he had made any such statements in the last ten years — the argument for admissibility changed dramatically. I return to this issue below. *See infra* note 76.

75. *See* CHRISTOPHER A. DARDEN WITH JESS WALTER, IN CONTEMPT 4 (1996).

otherwise manufactured evidence at the time Fuhrman initially testified.[76]

This does not mean that everything that Darden said during his exchange with Cochran was justified by the legitimate demands of his professional role. For example, Darden accused Cochran of "'play[ing] the race card'" when he sought to introduce Fuhrman's past racist statements.[77] For the reasons set out below, given the merits of Cochran's argument for introducing Fuhrman's statements, Darden's accusation was unfounded. Darden, one suspects, was fully aware of the plausibility of Cochran's position. His attempt to level this explosive charge against Cochran therefore appears to have been little more than a smokescreen to divert Judge Ito's attention from the merits of Cochran's argument.[78] By making this charge (unlike the rest of his argument about Fuhrman's statements), Darden undermined rather than promoted the legal system's commitment to evaluate the arguments of counsel (and therefore the fate of the defendant) on the merits, not on the basis of race. This brings me to the Cochran Conundrum.

2. *Reaffirming the Cochran Conundrum: Defining When and How Race Should Matter*

Russell defines the Cochran Conundrum as the set of obstacles "encountered most frequently by Black lawyers who openly articulate issues of racism as relevant to a particular case."[79] Those who do so, Russell asserts, risk being accused of "'playing the race card' and therefore unfairly skewing reasonable debate on the 'merits' of

76. It is a much closer question whether Darden was correct in opposing the introduction of the McKinny tapes. Laura McKinny was an aspiring screenwriter who conducted tape-recorded interviews with Fuhrman as part of her research for a screenplay. In the course of these interviews, Fuhrman not only used the N-word dozens of times, but he also boasted that in the past he had planted evidence in order to convict black defendants. By the time the dispute over these tapes erupted, there was no longer any question that Fuhrman was a perjurer as well as a racist, so lack of corroboration was not an issue. Moreover, these tapes contained specific indications that Fuhrman either did or would plant evidence to frame black defendants, particularly those seen in the company of white women. A prosecutor's duty is to seek justice, not just to obtain convictions. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. (1995) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."). Given this responsibility, it is far from certain that a prosecutor in Darden's position was ethically required to seek to exclude evidence so directly relevant to the credibility of such a key prosecution witness.

77. *See* Russell, *supra* note 1, at 789 (quoting Darden).

78. It is possible that Darden simply wanted to impress on Judge Ito that the Simpson defense was attempting to use Fuhrman as a means of distracting the jury's attention from the evidence pointing to Simpson's guilt. Criminal defense lawyers, of course, routinely attempt to shift the jury's attention away from evidence harmful to their client's case. Although Darden was certainly entitled to call Cochran on this standard defense tactic, he should have done so in a way that did not suggest that Cochran's attempt to introduce Fuhrman's statements was outside the bounds of acceptable advocacy.

79. Russell, *supra* note 1, at 788.

a case by insisting that racism is a relevant issue in an otherwise 'raceless' context."[80]

This definition, although illuminating in many contexts, is nevertheless too narrow. It is quite possible to play the race card[81] *illegitimately* in circumstances where race is clearly acknowledged by everyone to be a factor in the case. In the not too distant past, such blatant appeals to race — and more specifically to white racism — were quite common.[82] For example, in 1922, a white prosecutor implored a jury to convict a black man under a liquor law by asking, "Are you gentlemen going to believe that nigger sitting over there . . . in preference to the testimony of [white] deputies?"[83] More recently, in a similar interracial sexual assault case tried in 1978, a white prosecutor attacked the credibility of the defendant's consent defense by arguing "'that the average white woman abhors anything of this type in nature that has to do with a black man. It is innate within us.' "[84] Certainly these blatant appeals to racist sentiment in racially charged cases constitute playing the race card.

By the same token, one can play the race card by insinuating that a reasonable argument that race is relevant to a particular case is actually being deployed only to promote illegitimate racial solidarity. As I argued above, I believe that Darden's allegation that Cochran was playing the race card when he initially sought to introduce Fuhrman's prior racist remarks falls into this category.

What unites the multiple ways in which one can play the race card is not that a lawyer has introduced race into an otherwise raceless proceeding. Instead, what makes each of these uses of race troubling is the extent to which they undermine the legal system's ability to make good on its aspirational norm that race should not determine a defendant's guilt or innocence.[85]

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80. *Id.* at 789.

81. Because she focuses on how the master narrative of race produces unjustified claims of playing the race card against black attorneys, Russell does not articulate the circumstances in which this charge is properly applied. It is this focus, I believe, that causes her to overlook the quite different examples of playing the race card discussed below. *See infra* notes 82-85 and accompanying text. In addition, Russell's focus on unjustified allegations of playing the race card frequently makes it unclear whether she intends to endorse the pejorative connotations generally associated with this term or to highlight the difficulty black attorneys encounter when they attempt to raise legitimate racial issues. In order to avoid this ambiguity, I use the phrase solely in its pejorative capacity.

82. *See* Debra T. Landis, Annotation, *Prosecutor's Appeal in Criminal Case to Racial, National, or Religious Prejudice as Ground for Mistrial, New Trial, Reversal, or Vacation of Sentence — Modern Cases,* 70 A.L.R. 4TH 664 (1989).

83. James v. State, 92 So. 909 (Ala. Ct. App. 1922).

84. Miller v. North Carolina, 583 F.2d 701, 704 (4th Cir. 1978).

85. *Racism,* for example, in cases involving police brutality or hate crimes, may legitimately affect the determination of a defendant's guilt or innocence. This is another example of the important differences among different kinds of "race cases." *See supra* note 59.

Given this definition, neither of the two instances where Cochran most often has been accused of "playing the race card" supports this serious charge. As I mentioned above, Cochran made a plausible — although certainly not dispositive — argument that the defense should be allowed to cross-examine Fuhrman about his prior racist statements even in the absence of significant corroborating evidence.[86] Although the weight of precedent was against him, Cochran made a reasonable argument that the jury was entitled to know about Fuhrman's racist views when weighing the credibility of his testimony, including the testimony that he found the second glove on Simpson's property.[87]

In essence, Cochran argued that a public law enforcement official's racist comments ought to be treated more like false statements under oath (which are admissible to impeach a witness's credibility) than like general allegations of bad character (which are not admissible). After all, Fuhrman took an oath "to serve and protect" all of Los Angeles' citizens, an oath that is at least rendered problematic by evidence that he regards some of those citizens as less human than others. Moreover, Cochran's claim that the black jurors would be able to evaluate Fuhrman's racism without losing their objectivity was also reasonable.[88]

Once again, the point is not whether from our neutral perspective we find Cochran's argument convincing. So long as his arguments were factually and legally reasonable, Cochran was obligated as Simpson's lawyer to present them in their best light, just as Darden was equally obligated by his role to present reasonable arguments for excluding Fuhrman's prior racist statements.[89]

Nor is it clear that Cochran played the race card in his closing argument. Cochran urged jurors to "send a message" by their verdict that racist police tactics would no longer be tolerated. Despite

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86. *See supra* note 74.

87. *See* CAL. R. EVID. 780(f) (allowing evidence of the "bias, interest, or other motive" of any witness); *see also* GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 297-98 (1978) (discussing impeachment of a witness by exposing her bias concerning the outcome of a case).

88. *See* Russell, *supra* note 1, at 787 n.58 [29-30] (quoting Cochran as responding to Darden by arguing "[i]t's demeaning to our jury . . . to say that African-Americans who've lived under oppression for 200-plus years in this country cannot work in the mainstream" (quoting Kenneth B. Noble, *Issue of Racism Erupts in Simpson Trial,* N.Y. TIMES, Jan. 14, 1995, at A7)).

89. In light of the fact that criminal defendants have the right to challenge each and every element of the state's case regardless of their factual guilt, it is doubtful whether Cochran (in contrast to Darden) would have been prevented from seeking to introduce Fuhrman's statements even if Cochran knew that Simpson had committed the murders. The point, however, is largely of academic interest since Cochran reports that he has never wavered in his belief in Simpson's innocence. *See* JOHNNIE L. COCHRAN, JR. WITH TIM RUTTEN, JOURNEY TO JUSTICE (1996).

the furor that Cochran's remarks have generated in the press,[90] Cochran's use of this rhetorical device is not unprecedented. To the contrary, prosecutors frequently ask jurors to convict defendants of serious crimes in order to send a message to both law abiding and lawless citizens that criminal activity will not be tolerated.[91]

It is possible to object to this standard bit of prosecution rhetoric with the same fury that greeted Cochran's argument. Both Cochran and the prosecutor can be portrayed as inviting the jury to disregard the particular facts of the case and base their decision on some more general community interest: deterring either police misconduct or future criminal acts.[92] This, however, is not the way in which judges and the general public seem to regard the prosecutors' standard send a message argument. Instead, the prosecutor is interpreted as simply reminding jurors of their power to act as the conscience of the community in letting criminals know that *guilty* defendants will be severely punished for their crimes.[93] One can interpret Cochran's closing argument[94] as asking jurors to play a similar role by "sending a message" to law enforcement officials that racist or otherwise inappropriate police tactics create *reasonable doubt* about a defendant's guilt.[95]

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90. *See, e.g.*, Russell, *supra* note 1, at 788 n.59.

91. *See* James Joseph Duane, *What Message Are We Sending to Criminal Jurors When We Ask Them to "Send a Message" with Their Verdict?*, 22 AM. J. CRIM. L. 565, 570 (1995) ("[P]rosecutorial appeals to convict a defendant in order to 'send a message' to other criminals, or to the community in general, that a certain crime 'will not be tolerated' in that community . . . [have] been used in a striking number of reported cases . . . .").

92. *See id.* at 635-74 (arguing that appeals to send a message, whether offered by prosecutors or defense lawyers, should almost always be considered reversible error). Not everyone agrees with this assessment. *See* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?* 44 VAND. L. REV. 45, 97 (1991) ("For every commentator who concludes that prosecutors commit misconduct by appealing to emotion, another can be found who suggests that arousing jurors is the role of summation.").

93. *See* Duane, *supra* note 91, at 622 ("[T]he 'majority rule' of law, which has been accepted without question by every circuit to consider the question, is that requests for a jury to send a message — like any other appeal to the jury to act as the 'conscience of the community' — are proper as long as they are [not] intended or calculated to inflame the jury . . . .").

94. Once again, by constructing this account of Cochran's argument, I do not mean to suggest that these were his actual motives. As with Garcetti's decision to prosecute Simpson in L.A. County, Cochran's motivations for employing the "send a message" argument were undoubtedly complex. It is likely, as some of his critics have asserted, that Cochran hoped that this argument would divert the jury's attention from evidence pointing to Simpson's guilt. It is also possible that Cochran understood, or perhaps even intended, that some jurors would take his remarks as an invitation to *disregard* evidence of Simpson's guilt. The same claim, however, could be made about any tactic used by a defense lawyer when there is strong evidence of the defendant's guilt. Nevertheless, so long as Cochran's argument falls within the zone of legitimate advocacy, the fact that he may have offered it for the purpose of helping his client escape punishment is insufficient to support the charge that he played the race card.

95. Such an appeal rests on two closely related grounds. First, Cochran might have been arguing that, because the police planted or tampered with some evidence in the case (according to the defense theory), the jury should have reasonable doubt about the trustworthiness of the remaining evidence. In addition (or in the alternative), Cochran might have been

To be sure, the message Cochran asked jurors to send is controversial.[96] One can certainly take the position that racism (let alone sloppy police work) does not invariably create reasonable doubt as to a defendant's guilt. The fact that there are reasonable responses to Cochran's position, however, does not render his argument outside the boundaries of acceptable advocacy. As Simpson's lawyer, Cochran was entitled to raise all reasonable arguments on his client's behalf. By asking the jurors to "send a message" about racism and corruption inside the Los Angeles Police Department, Cochran did not imply that the jury should disregard the evidence.[97] To the contrary, the force of Cochran's claim comes from evidence (according to the defense) of racism and corruption in *this* case. Nor was Cochran's argument directed solely at black jurors. Although it is likely that Cochran believed that black jurors might on average be more sympathetic to this argument, his request that jurors "send a message" about the dangers of allowing official corruption to taint the trial process is one that ought to appeal to all Americans regardless of race.[98]

Once again, one can certainly take the position that the jury's only legitimate role is to find the facts, and that appeals by either prosecutors or defense lawyers for juries to "send a message" serve

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urging jurors to send a message to the government that certain kinds of governmental misconduct essentially forfeit the state's right to a conviction. This last sentiment finds support in doctrines such as the exclusionary rule. As the Supreme Court has repeatedly made clear, the fact that strict application of this doctrine often results in guilty defendants being set free is the price that must be paid to send a message to law enforcement officials and to the public at large that governmental misconduct will not be tolerated. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 659 (1961) (justifying allowing guilty criminals to go free on the ground that "[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence").

96. Indeed, one court has taken the position that send a message arguments are more objectionable when made by defense lawyers than when made by prosecutors. *See* United States v. Cheung Kin Ping, 555 F.2d 1069, 1073-74 (2d Cir. 1977) (upholding a trial judge's instructions telling the jury to disregard defense counsel's appeal to "send a message" that the government should not make deals with convicted felons, because such an argument "urged the jury to acquit . . . on the basis of extraneous public policy considerations"). As one commentator has noted, it is "odd . . . that federal appeals courts have so consistently approved such prosecutorial comments at the same time they have denied defendants the liberty to make nearly identical appeals." Duane, *supra* note 91, at 581-82. I would go further. Given the strong presumption in favor of protecting the rights of the accused, it is hard to fathom why prosecutors should be able to call on jurors to act as the "conscience of the community" while defense lawyers are denied the same right.

97. Cochran's argument is therefore distinguishable from Paul Butler's contention that black jurors should nullify the convictions of nonviolent black offenders even in the absence of any evidence that the prosecution of this particular black defendant was in any way tainted by racism or official corruption. *See* Butler, *supra* note 24.

98. As Justice Brandeis said more than a half-century ago: "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

to distort the trial process. Given existing advocacy standards, however, the furor over Cochran's argument is unfounded. Indeed, as Russell notes, those claiming that Cochran was not entitled to implore the jury to "send a message" are actually the ones playing the race card by seeking to delegitimate Cochran without having to meet the merits of his arguments.[99]

The two examples most often cited by Cochran's critics, therefore, fail to substantiate the charge that he overstepped the boundary between legitimate arguments about the importance of race and playing the race card. There is, however, at least one example where Cochran attempted to use race to obtain an illegitimate advantage. Ironically, it involves neither Fuhrman nor the black jurors, but Darden. As I indicated above, Cochran opposed Darden's addition to the prosecution team on the ground that the prosecution was attempting to gain an unfair advantage because of Darden's race. As I argued, Cochran seems correct in surmising that Darden's race was a relevant (if not dispositive) criterion for his addition to the team.[100]

Nevertheless, this does not make Darden's selection illegitimate from the standpoint of the normative goals of the legal system. There were, as I argued, legitimate reasons for adding a black prosecutor with Darden's experience to the team — reasons that made it more, not less, likely that Simpson would receive a fair trial.[101]

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99. *See* Russell, *supra* note 1, at 792 (arguing that denunciations of playing the race card themselves "function as trumps" by implying that talking about race is never meritorious and is always little more than lawyerly gamesmanship). The stark contrast between the fierce reaction in the media to Cochran's send a message summation on the one hand, and the lack of reaction to arguably similar closing arguments made in Simpson's civil trial on the other, supports the conclusion that accusations of playing the race card tend to distort or ignore the merits of lawyers' arguments. In his impassioned summation to the jury, Goldman family attorney Daniel Petrocelli made an explicit send a message plea by shouting to the jurors that "you must send [Simpson] a message as loud as humanly possible, so he can hear it on whatever golf course he is hiding out on right now." Adam Pertman, *Plaintiffs Laud Simpson's Marketability, Assets; Jurors Deliberate on Punitive Award, Break for Weekend*, BOSTON GLOBE, Feb. 8, 1997, at A3.

Granted, one can certainly distinguish Petrocelli's use of the send a message trope from Cochran's, because the former was directed at Simpson himself, whereas the latter spoke to the police and the broader community. However, the fact that Petrocelli's argument has been greeted with silence — or even praise — in the media despite the fact that it arguably invited the jury, in the words of a *New York Times* editorial condemning Cochran's send-a-message argument, "to look beyond the specifics of the O.J. case and send a broader message," *Race Cards and Rebuttals*, N.Y. TIMES, Sept. 30, 1995, at A18, once again speaks volumes about the way race colors perceptions of this case.

100. To say that Darden's race was one reason he was added to the team does not imply that it was the *only* reason. After all, there were many blacks in the prosecutor's office. Obviously, there are other reasons — most likely relating to Darden's talents as a prosecutor — that caused Garcetti to select Darden over other available black prosecutors.

101. Ironically, Cochran's own argument underscores at least one of these potential benefits. Cochran argued that Darden was being added to the team " 'just to show that if a black prosecutor sees O.J. guilty, he is being judged by the evidence at hand not for some deep seated bias.' " Russell, *supra* note 1, at 789 (quoting Maxwell, *supra* note 41). This, of

Nor can Cochran claim that the norms of zealous advocacy required him to attack the integrity of the prosecutor's staffing decision (and by implication Darden's personal credibility). If anything, the canons of professional responsibility frown on *ad hominem* attacks on a lawyer's fitness to engage in a particular professional role.[102] Finally, Cochran's position seems tainted by hypocrisy, since it is likely that Simpson and Robert Shapiro took Cochran's race into account in deciding to hire him to be the lead lawyer in the case. As a result, although we might excuse Cochran for pointing out the obvious when he noted that Darden was being added in part because he was black, Cochran's attempt to keep Darden off the case ultimately accomplished little except to reinforce the kind of divisive racial rhetoric that Russell rightly condemns.[103]

III. Conclusion: Toward a Race-Conscious Account of Legal Ethics

Russell concludes her important Essay by urging black attorneys to move beyond the narrow categories of "sellouts" and "race cards." Her goal is to help African-American lawyers move toward a race-conscious account of lawyering capable of providing the "critically needed latitude" they need to serve their communities through their chosen profession.[104] I share this objective. As the door of opportunity slowly creaks open for a few blacks — while countless others remain mired in poverty — it is critical that black lawyers find creative ways to balance their competing commitments to their communities, to their jobs, and to their unique aspirations as human beings.[105] This task, however, cannot be left to the black bar alone. White lawyers also must learn how to talk about the reality of race openly and intelligently without undermining the legal system's fundamental commitment to the norm that race should not affect the determination of a defendant's guilt or innocence.

This will surely be a difficult task. However, we should not despair that it is Sisyphean.[106] Sixty years ago, Charles Hamilton

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course, is exactly what we want the jury to do: judge Simpson's guilt or innocence according to the evidence, not on the basis of some deep-seated bias. To the extent that Darden's presence made that result more likely, it furthered, rather than undermined, the legitimate goals of the justice system.

102. *See* Model Code of Professional Responsibility EC 7-37 (1980) ("A lawyer should not make unfair or derogatory personal reference to opposing counsel.").

103. *See* Russell, *supra* note 1, at 793.

104. *Id.* at 794.

105. For a detailed account of the relationship among these three moral spheres, see David B. Wilkins, *Identities and Roles,* 56 Md. L. Rev. (forthcoming 1997).

106. *But see* Russell, *supra* note 1, at 792 (arguing that "race-conscious lawyering [is] a Sisyphean task"). Given her call for further reflection and dialogue, I do not believe that Russell considers the task truly impossible.

Houston and Thurgood Marshall created an entirely new approach to lawyering, one that was as radical in their day as the idea of race-conscious lawyering is in our own.[107] Not only did Houston and Marshall create a winning strategy to topple *de jure* segregation, they also paved the way for the modern public interest law movement.[108]

In constructing the country's first legal campaign to achieve social justice, however, Houston and Marshall never lost sight of the legitimate normative constraints on their activities imposed by their professional roles and by the norms of the legal system more generally. As we work to fashion a new model of race-conscious lawyering for the twenty-first century, we must do the same.

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107. *See* Wilkins, *Social Engineers*, *supra* note 28.

108. *See* Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 209 (1976), *quoted in* MARK V. TUSHNET, THE NAACP's LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950, at 144 (1987).