A SELF-REFLECTION: DOES (THE) RACE (OF THE LAWYER) MATTER?

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WHITE LAWYERING: RETHINKING RACE, LAWYER IDENTITY, AND RULE OF LAW

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> The triumph of what might be termed the standard version of the professional project would, I believe, be the creation, by virtue of professional education, of almost purely fungible members of the respective professional community. Such apparent aspects of the self as one's race, gender, religion, or ethnic background would become irrelevant to defining one's capacities as a lawyer.
>
> - Sanford Levinson[1]

> I am one-of-a-kind as a person—as is everyone who reads this chapter. I am also a member of the white racial group—as everyone who reads this chapter is a member of a racial group. I am male—as everyone who reads this chapter has a gender-group membership. In these three psychological conditions, we all participate. Even if I were to try to escape my racial—or gender—group memberships, members of my own and other racial and gender groups would treat me as if I were a member of my groups.
>
> - Clayton P. Alderfer[2]

This Essay will explore what it means to be a white person in the legal profession[3] and how recognition of whiteness as racial identity[4] requires a

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1. Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 Cardozo L. Rev. 1577, 1578-79 (1993).

2. Clayton P. Alderfer, *A White Man's Perspective on the Unconscious Processes Within Black-White Relations in the United States*, *in* Human Diversity: Perspectives on People in Context 201, 202 (Edison J. Trickett et al. eds., 1994).

3. Although this Essay focuses on whiteness, it makes no claims—and indeed rejects the notions—that race is the only significant identity in lawyering or that racial identity does not intersect and interact with other identities. *See infra* Parts II, IV. A number of scholars have discussed how nonracial identities influence lawyering. *See, e.g.*, Carrie Menkel-Meadow, *Portia in a Different Voice: Speculating on a Woman's Lawyering Process*, 1 Berkeley Women's L.J. 39, 45-58 (1985) (gender); Russell G. Pearce & Amelia J. Uelmen, *Religious Lawyering in a Liberal Democracy: A Challenge and an Invitation*, 55 Case W. Res. L. Rev. 127 (2004) (religion); William B. Rubenstein, *In Communities Begin Responsibilities: Obligations at the Gay Bar*, 48 Hastings L.J. 1101 (1997) (sexual orientation). For a discussion of intersectionality, see, for example, Kimberle Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of*

dramatic rethinking of professional norms. As white people, we too often view racial issues as belonging to people of color.[5] We tend to do that in one of two ways. Some whites believe that race generally does not matter except in the rare case of an intentional racist. Other whites view whites generally as racists and look to people of color to tell them how to understand issues of race. This Essay rejects both of these approaches. The Essay argues that for white lawyers, as well as lawyers of color, increased "'competence [in] dealing with racial matters'" and "'speak[ing] openly, frankly, and professionally about relations'"[6] is necessary both to competent client representation and equal justice under law.

Applying the insights of intergroup theory, the Essay suggests that whether they view themselves as color-blind or racist, white lawyers understandably have a tendency to treat whiteness as a neutral norm or

Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. Chi. Legal F. 139 (1989); Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 Mich. J. Race & L. 285 (2001); Mari Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 Stan. L. Rev. 1183 (1991); Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship or Legal Scholars As Cultural Warriors*, 75 Denv. U. L. Rev. 1409 (1998). Many commentators have previously written on racial identity and lawyering, either generally, *see, e.g.*, Jean Koh Peters, Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions 241-327 (2001); Sue Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 Clinical L. Rev. 33 (2001); Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 Stan. L. Rev. 1807 (1993); Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 Clinical L. Rev. 373 (2002), or from the perspective of lawyers of color, *see, e.g.*, Melissa Harrison & Margaret E. Montoya, *Voices/Voces in the Borderlands: A Colloquy on Re/Constructing Identities in Re/Constructed Legal Spaces*, 6 Colum. J. Gender & L. 387, 410 (1996); David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 Md. L. Rev. 1502 (1998). Fewer commentators have examined the issue through the lens of the white lawyer. *See, e.g.*, Harrison & Montoya, *supra*, at 410; Marjorie A. Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 Fla. Coastal L.J. 219, 232 (2002).

4. There is an extensive literature on whiteness. *See, e.g.*, Critical White Studies: Looking Behind the Mirror (Richard Delgado & Jean Stefancic eds., 1997) [hereinafter Critical White Studies]; Ian F. Haney López, White by Law: The Legal Construction of Race (1996); Stephanie M. Wildman, Privilege Revealed: How Invisible Preference Undermines America (1996); Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 Yale L.J. 2009 (1995); Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707 (1993); Peggy McIntosh, *Unpacking the Invisible Knapsack: White Privilege*, Creation Spirituality, Jan.-Feb. 1992, at 33.

5. *See infra* Part III.A.

6. Alderfer, *supra* note 2, at 218. Organizational theorist Clayton Alderfer finds this framing more useful than liberal use of the term "racist." He argues that

> [t]he number of individuals who are deeply and profoundly racist characterologically is small in comparison to the amount of collective racism most of us participate in a good deal of the time. Moreover, labeling an individual serves mainly as a defensive function for the labeler and, if the expression is made directly to the individual, heightens resistance to learning by that person and by anyone who may observe the event.

Id. Alderfer instead advocates a "formulation emphasiz[ing] greater understanding and improved skill rather than blame." *Id.*

baseline, and not a racial identity, and tend to view racial issues as belonging primarily to people of color, whether lawyers or clients.[7] This approach is consistent with, and reinforces, the prevailing professional norm that lawyers should "bleach out" their racial, as well as their other personal, identities.[8]

As this Essay explains, this unfortunate symbiosis of whiteness and professionalism undermines the work of lawyers both in their representation of clients and in their systemic efforts to promote the rule of law.[9] The latest research in the field of organizational behavior suggests that the assumption of lawyer neutrality so central to lawyer professionalism is not only wrong descriptively, but that it also undermines the very goals it seeks to promote. In particular the pathbreaking research of Robin Ely and David Thomas demonstrates that in a diverse society and legal profession an integration-and-learning perspective that openly acknowledges and manages racial identity would far better promote excellent client representation and equal justice under law than the currently dominant commitment to color blindness.[10]

I. INTERGROUP THEORY

Intergroup theory offers a way to "understand, explain, and predict relations between groups . . . in organizations."[11] It suggests that group identities, such as racial identity, influence conduct in organizations.[12] The organizations comprising the legal system include the system itself, as well as constituent organizations such as law schools, law firms, courts, bar groups, and the profession as a whole.[13] Within these organizations, individuals "are shaped by at least three sets of forces: their own unique personalities, the groups with whom they personally identify to a significant

7. *See infra* Parts II, III.

8. *See infra* Part III.

9. *See infra* Parts III, IV.

10. *See infra* Part IV.

11. Clayton P. Alderfer, *Problems of Changing White Males' Behavior and Beliefs Concerning Race Relations*, *in* Change in Organizations 122, 137 (Paul Goodman & Assocs. eds., 1982). Intergroup theory defines a group as

> a collection of individuals (1) who have significantly interdependent relations with each other, (2) who perceive themselves to be a group by reliably distinguishing members from nonmembers, (3) whose group identity is recognized by nonmembers, (4) who, as group members acting alone or in concert, have significantly interdependent relations with other groups, and (5) whose roles in groups are therefore a function of expectations from themselves, from other group members, and from nongroup members.

Alderfer, *supra* note 2, at 222.

12. Russell G. Pearce, *Jewish Lawyering in a Multicultural Society: A Midrash on Levinson*, 14 Cardozo L. Rev. 1613, 1632 (1993); *see* Clayton P. Alderfer & David A. Thomas, *The Significance of Race and Ethnicity for Understanding Organizational Behavior*, *in* International Review of Industrial and Organizational Psychology 1, 6-7 (Cary L. Cooper & Ivan T. Robertson eds., 1988).

13. I have previously applied intergroup theory to the role of religious identity in the legal system. *See* Pearce, *supra* note 12, at 1631-34.

degree, and the groups with whom others associate them—whether or not they wish such an association."[14] The two major groups in organizations are "identity groups and organization groups."[15]

As I noted in an earlier article, "[p]rofessional socialization as a lawyer is an organizational group identification."[16] Membership in organizational groups is "based on task, function and hierarchy."[17] Persons in organizational groups share "similar primary tasks, participate in comparable work experiences and, as a result, tend to develop common organizational views."[18] Being a member of the lawyer organizational group "involves similar tasks, comparable experiences, and comparable organizational views. Among the factors that make law a particularly powerful group experience is the shared three years of law school, often at a young age, combined with a long and often continuous membership in the profession."[19]

While all lawyers are members of the lawyer organizational group, that group further divides into other organizational groups, such as partners and associates, or litigators and judges.

Identity group membership, such as race, derives from identities external to the organization. As a general matter, "[m]embers of identity groups share common biological characteristics, participate in equivalent historical experiences and, as a result, tend to develop similar world views."[20] Identity group membership is sufficiently powerful that it influences conduct within organizations.[21] Its power derives from its pervasive role in an individual's life. Identity group membership often begins at birth and continues throughout an individual's life "or, as in the case of age, changes as the result of natural development."[22] While powerful, organizational group memberships generally develop later than identity groups and "can change as people enter and leave organizations" or shift their role within organizations.[23]

According to intergroup theory, "individuals and organizations are constantly attempting, consciously and unconsciously, to manage potential

14. Alderfer & Thomas, *supra* note 12, at 7.

15. David A. Thomas & Clayton P. Alderfer, *The Influence of Race on Career Dynamics: Theory and Research on Minority Career Experiences*, *in* Handbook of Career Theory 133, 145 (Michael B. Arthur et al. eds., 1989). The original source for this theory is Clayton P. Alderfer & Ken K. Smith, *Studying Intergroup Relations Embedded in Organizations*, 27 Admin. Sci. Q. 35, 38 (1982).

16. Pearce, *supra* note 12, at 1633.

17. *Id.* at 1632.

18. Thomas & Alderfer, *supra* note 15, at 145.

19. Pearce, *supra* note 12, at 1633.

20. Thomas & Alderfer, *supra* note 15, at 145. Although not directly relevant to this Essay's analysis of racial identity, I have previously argued that biological characteristics are not necessary to the creation of an identity group. For example, "a religious identity group, such as Jews," can share "'equivalent historical experiences' leading to 'similar world views'" without sharing biological characteristics. Pearce, *supra* note 12, at 1632 n.122.

21. Pearce, *supra* note 12, at 1632.

22. Thomas & Alderfer, *supra* note 15, at 145.

23. *Id.*

conflicts arising from the interface between identity and organization group memberships."[24] As Clayton P. Alderfer has noted, "[r]elations among identity groups and among organizational groups are shaped by how these groups and their representatives are embedded in the organization and also by how the organization is embedded in its environment."[25] Embeddedness is congruent "where power relations at a particular level within an organization are similar to those at other levels of the organization, or in society as a whole," and incongruent where they are not.[26] Incongruent embeddedness causes increased strain for the individual and the organization.[27]

II. DRAWING A PICTURE OF THE WHITE LAWYER

In 1991, I was part of a team that created an intergroup theory exercise for the first-year class at the University of Pennsylvania Law School.[28] I use a version of this exercise in my ethics seminar as a way to begin a unit on lawyer identity and justice. The students' task is to work in identity groups to create a picture[29] describing their identity group's experience as law students.[30]

To facilitate the formation of identity groups, the exercise starts by dividing the students into four race- and gender-based groups: women of color, men of color, white women, and white men.[31] The basis for this division is the hypothesis that for most students, their race and gender are the most salient identities. I then suggest that the students consider dividing their groups further according to other identities that result in significantly different experiences. These identities could include the various subgroups within the people of color group, including Asian, Black, or Latino; as well as identities found in all groups, such as sexual orientation, class, disability, and whether the student went directly from college to law school.[32] When

24. *Id.*

25. Alderfer, *supra* note 11, at 142.

26. Pearce, *supra* note 12, at 1633 (citing Alderfer & Thomas, *supra* note 12, at 15-16).

27. Alderfer & Thomas, *supra* note 12, at 15-16.

28. The authors of the group were a four-person mixed-race and -gender team led by Professor David Thomas of Harvard Business School. The other members of the team were Professor Robin J. Ely of Harvard Business School, Professor Elaine Yakura of Michigan State University School of Labor and Industrial Relations, and me. The original exercise was a four-hour unit on diversity in the legal profession.

29. Students often object to drawing a picture, as did I originally as the only legal academic among the authors of the exercise. The rationale for drawing a picture, as well as for focusing on the student's personal experiences, is that law students are verbally talented people who are adept at using verbal strategies to avoid connecting their personal feelings to their intellectual inquiries. My experience has been that my first reaction was wrong and that the exercise of drawing a picture leads to extraordinarily valuable results.

30. This should include work experiences during law school.

31. Not all students readily fit themselves into one of these four groups. Mixed-race students have asked to create their own group and Arab-American students have struggled with their identity.

32. While the students in the first-year class at Penn readily divided themselves into subgroups, most students in my seminar decide to stay together and reflect their diversity in

the identity groups complete their pictures, they post them on the wall and describe them. The class discussion begins with the role of identity group differences in the law school experience and moves to the role of these differences in the legal system and their implications for the rule of law.[33]

For this Essay, I have essentially done what I have often asked my students to do. My picture of the law school offers a collage of views. To illustrate the ease I feel as a white person in a position of authority in a predominantly white institution, I would draw a picture of myself discussing the question of whether to invite students to call them by their first name in class with colleagues who are white women and people of color—I do and they do not. This ease sometimes makes me miss ways in which issues of race and gender influence my work. As I draw this picture, I realize that in recent years, I have become so complacent that I have not spent time thinking about how having a white man as the facilitator influences the students and me, and I am considering returning to a past practice of inviting faculty of color into the conversation with the students.

My picture will also identify how some students—usually but not always white—will reject identifying themselves on the basis of race and how some students—usually but not always students of color—will indicate that race is a significant part of their experience as law students. Students of color, but never yet a white student, will describe the experience, while working during the summer, of having lawyers mistake them for secretaries or messengers.

I would draw a similar picture of my Housing Rights Clinic. When the white students—or I—wear a suit and go to court to teach the Housing Rights Clinic, the first assumption of court personnel is that we are lawyers. Almost every year, we will have an incident where court personnel or opposing lawyers assume that a student of color is a party and not a legal representative.

These relations in the legal system mirror, in turn, relations in society as a whole. I would depict what I think of as well-dressed white man's privilege—the ability often (though less often since 9/11) to walk confidently past a security guard without being questioned, in contrast to friends of color who have had the opposite experience of more intense scrutiny. I would add to the societal section a picture of the judge of color who tells how white people assume he is a doorman when he holds a door for them as a courtesy.

My picture is informed both by my personal experience and by the literature on race relations. As a general descriptive matter, white people are the dominant racial group in legal organizations. They represent 83.2% of judges,[34] 89.2% of lawyers,[35] and 79.5% of law students,[36] percentages

their picture. I believe this occurs because the smaller number of students in the seminar makes it difficult for students both to separate into subgroups and to find colleagues with whom to share the exercise.

33. These classes are both pedagogically valuable and emotionally difficult.

34. Am. Bar Ass'n, Statistics about Minorities in the Profession from the 2000 Census.

which exceed the 75.1% of the American population that is white.[37] In elite legal jobs, the white domination is even greater. Whites represent almost 98% of partners in the 100 top law firms.[38]

As the dominant racial group, whites can view ourselves as having no particular racial identity. An African-American friend recently described his impression that newspaper stories describing lawyers usually identified the race of lawyers of color but mentioned no race for white lawyers. As a member of the dominant group in the legal profession, the white lawyer is the norm.[39] With regard at least to our race, we start by looking around the room and feeling like we belong, as is so often the experience of white students, particularly the men, in my seminar who do not see race as a useful way to discuss their experience. We feel comfortable with authority. Accordingly, I do not worry that my students will challenge my authority when I invite them to call me by my first name.[40]

Another aspect of viewing ourselves as having no particular racial identity is seeing issues of race as that of people of color and not of white people.[41] I represent this phenomenon in my picture through my white students who do not see themselves as having a white identity and who object to exploring issues of race. Clayton P. Alderfer has observed that "[w]hite people do not easily discuss race relations. For most whites, the range of feelings goes from uncomfortable to severely uncomfortable."[42] He finds that whites' "most common behavioral pattern is avoiding the issue, if at all possible. When that response is not feasible, the next line of defense is to deny the presence of racial dynamics."[43]

The experience of law students and lawyers of color is quite different. As a minority group in the legal profession, they have "no choice except to learn about white culture if they are to survive."[44] When people of color

at http://www.abanet.org/minorities/links/2000census.html (last visited Feb. 21, 2005).

35. *Id.*

36. Am. Bar Ass'n, Statistics of J.D. Degrees Awarded from 1984-2002, *at* http://www.abanet.org/legaled/statistics/jd.html (last visited Feb. 21, 2005).

37. U.S. Census Bureau, USA: People Quickfacts, *at* http://quickfacts.census.gov/qfd/states/00000.html (last visited Feb. 22, 2005).

38. Harvey Berkman, *Past Struggles Echo as Clinton Makes a Pitch for Pro Bono Work*, Nat'l L.J., Aug. 2, 1999, at A8. David B. Wilkins and G. Mitu Gulati have provided a comprehensive analysis of this phenomenon with regard to black lawyers. *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, 496 (1996) (noting that "[a]lthough the number of black students graduating from law schools has increased significantly in recent decades, blacks still make up a very small minority of the lawyers working in large corporate firms (emphasis omitted)).

39. *See, e.g.*, Wildman, *supra* note 4, at 14-20; Flagg, supra note 4, at 2013; McIntosh, supra note 4, at 33-34.

40. I have to admit, though, that I believe I am alone even among my white male colleagues in inviting students to call me by my first name although a number of faculty call students by their first name.

41. *See, e.g.*, Harrison & Montoya, supra note 3, at 410; *see also infra* Part III.A.

42. Alderfer, *supra* note 2, at 217.

43. *Id.*

44. Alderfer, *supra* note 11, at 144.

look around the room, they know they are not the dominant culture and do not necessarily assume the same fit and the same authority. Enhancing this effect is the congruence of white dominance in the legal profession with white dominance in a society where whites have a greater share of wealth and power.[45] When white lawyers, judges, and court personnel assume my students of color are tenants and not legal representatives, or assume a summer associate of color is a member of the support staff, they are applying generalizations about race relations congruent with the relative distribution of racial power found in society in general.[46] The incongruence of the authority position of being a lawyer, or of having a position of authority within the legal profession, complicates the organizational tasks of lawyers of color.

While race makes a significant difference in our experiences as lawyers, intergroup theory reminds us that it is not determinative.[47] These experiences, like those relevant to organizational groups and other identity groups to which we belong, provide us with data. How we manage that data—whether we acknowledge it consciously and how we respond to it—is a matter of choice on both an individual and group level.[48] One way I choose to manage my white identity is to acknowledge and discuss issues of race with my students and colleagues and, indeed, to write this Essay as a way of communicating with a broader group of legal academics, lawyers, and law students. Although this Essay represents a preliminary account of the white experience in the legal profession, this part offers at least two conclusions: White racial identity exists and whites tend to avoid acknowledging their identity.

III. THE SYMBIOSIS OF WHITENESS AND PROFESSIONALISM UNDERMINES WHITE LAWYERS' WORK

Despite the persistence of racial identity group influences, white lawyers tend to deny the influence of their racial identity group on their work as lawyers. When professionalism's ideological commitment to color blindness reinforces this tendency, the resulting symbiosis undermines the capacity of white lawyers to represent clients to the best of their ability.

45. *See, e.g.*, Andrew Hacker, Two Nations: Black and White, Separate, Hostile, and Unequal (1995); CNN.com, *Wealth Gap Seen As Top Civil Rights Issue: Blacks Lag in Stock Market Investments, Home Ownership*, *at* http://www.cnn.com/2005/US/01/17/wealth.gap.ap/index.html (Jan. 17, 2005) (noting that "black families as a whole had only 10 cents in wealth for every dollar white families had").

46. For a more detailed description of experiences of lawyers of color, see Peggy C. Davis, *Law as Microaggression*, 98 Yale L.J. 1559 (1989), and for academics of color, see Cheryl I. Harris, *Law Professors of Color and the Academy: Of Poets and Kings*, 68 Chi.-Kent L. Rev. 331 (1992).

47. *See* Alderfer, *supra* note 2, at 202-03.

48. *See id.*

A. *The Symbiosis of Whiteness and Professionalism*

A dominant value common to the organizational identity of lawyers is professionalism's commitment to the color blindness of lawyers' conduct.[49] In Sandy Levinson's famous formulation, professional socialization "bleaches out" racial differences among lawyers, as well as other individual characteristics.[50] Under this view, all lawyers should be—and in most instances are—fungible. Not only should race play no role in how a lawyer approaches her work, but with few exceptions it will play no role. White lawyers who follow the dominant approach will actually believe that this is an accurate account and that they themselves are neutral as to race. Accordingly, they will reject the notion that they should examine the influence of their white identity on their lawyering.

Of course, in doing so, they are reinforcing their general tendency as white people to avoid issues of race. While a small minority of whites embrace their white racial identity, with both its positive and negative aspects,[51] most whites tend to see themselves as the neutral norm, rather than as a particular racial identity.[52] Race is for people of color.

Some whites with this perspective will view law practice, like society, as essentially color-blind.[53] In this world, racial influence is rare, generally extending only to those few whites who are openly racist. Accordingly, when people of color raise issues of race, they "play the race card"[54] and create phony issues to promote their own interests.

Other whites with a similar understanding of racial dynamics may reach an opposite conclusion. They believe that white racism is a significant societal problem. White people, lacking a proper claim to racial identity

49. An interesting illustration of this phenomenon is found in a study of the lawyers in the Civil Division of the Legal Aid Society. Roland Acevedo et al., *Race and Representation: A Study of Legal Aid Attorneys and Their Perceptions of the Significance of Race*, 18 Buff. Pub. Int. L.J. 1 (2000). Although white lawyers and lawyers of color differed markedly as to whether race was a factor in representation and whether "clients take the race of their attorney into account," a majority of lawyers of all races agreed that they personally did not "take the race of their client into consideration." *Id.* at 33-45, 53. Accordingly, with regard to how they understood their own thought processes, lawyers of all races shared a commitment to color blindness derived from membership in the lawyer organizational group that apparently trumped differences based on membership in different racial identity groups.

50. Levinson, supra note 1, at 1578-79; *see* Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 11 Am. B. Found. Res. J. 613, 616-18 (1986); Wilkins, *supra* note 3, 1503-06, 1514-50.

51. Alderfer, *supra* note 2, at 220-21.

52. *Id.* at 217-21; *see supra* note 39.

53. *See* Alderfer, *supra* note 2, at 217.

54. A famous example of this approach is found in the critique of Johnnie Cochran "playing the race card" in the O.J. Simpson trial. *See* Jeffrey Rosen, *The Bloods and the Crits: O.J. Simpson, Critical Race Theory, the Law, and the Triumph of Color in America*, New Republic, Dec. 9, 1996, at 27, 41-42. For responses to this critique, see Frank I. Michelman, Foreword: *"Racialism" and Reason*, 95 Mich. L. Rev. 723, 735 (1997); Margaret M. Russell, *Representing Race: Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straightjacket of Legal Practice*, 95 Mich. L. Rev. 766, 788-94 (1997); Wilkins, *supra* note 3, at 1514-50; David B. Wilkins, *Straightjacketing Professionalism: A Comment on Russell*, 95 Mich. L. Rev. 795 (1997).

and colluding in white racial dominance, have little to offer on racial issues. Under this view, people of color have—and whites lack—the ability to understand, or to engage in productive discussions regarding, race. White people should defer to people of color who are experts on race.[55]

Professionalism's "bleaching out" approach and these tendencies of white people mutually reinforce certain conduct. They discourage white lawyers from acknowledging that their race is an influence and from exploring the extent to which their white identity plays a role in their work settings. They further discourage white lawyers from engaging in dialogue regarding issues of race with each other, as well as with people of color. In a diverse legal system, where white lawyers work with colleagues, adversaries, judges, clients, and witnesses of color, the potential negative impact of these practices on a lawyer's work is quite significant.

B. How the Symbiosis Undermines Lawyer's Work: An Illustration

White law professor Clark Cunningham has provided an extraordinarily thoughtful and nuanced analysis of the representation he and two white students provided an African-American man facing a misdemeanor charge of disturbing the peace arising from a traffic stop.[56] The police officer had described the African-American client as having told the police he had been stopped "'because he was black'" and the Judge "described [the] client as 'hollering racism.'"[57] Nonetheless, even though Cunningham suspected that "what happened . . . was a 'racial incident,' . . . as a lawyer [he] did not talk about 'the case' that way, and therefore [he] ceased to think in terms of

55. *See, e.g.*, Alderfer, *supra* note 2, at 219-20 (describing white "true-believer antiracism"); *Treason to Whiteness Is Loyalty to Humanity: An Interview with Noel Ignatiev of Race Traitor Magazine*, *in* Critical White Studies, *supra* note 4, at 607, 609 (asserting that "[b]lackness means total, implacable, and relentless opposition to that system. To the extent so-called whites oppose the race line, repudiate their own race privileges, and jeopardize their own standing in the white race, they can be said to have washed away their whiteness and taken in some blackness"); Peter Halewood, *White Men Can Jump: But Must Try a Little Harder*, *in* Critical White Studies, *supra* note 4, at 627, 628 (asserting that the notion that white scholars can proceed with "a feminist or anti-racist" analysis is "fundamentally flawed" and that white scholars should instead study "[a] particular form of subordination . . . from those who actually live that perspective rather than attempting to master it in the abstract"); Harrison & Montoya, *supra* note 3, at 410 (observing that "[a]t first, . . . I thought no one was interested in hearing what I termed my 'white or Anglo angst,' but, among other things,] . . . by only seeing myself as white and privileged and Margaret as an oppressed person of color, I essentialized her and forced her to do most of the work"). Whites are not alone in taking this position. *See, e.g.*, Paul E. Lee & Mary M. Lee, *Reflections from the Bottom of the Well: Racial Bias in the Provision of Legal Services to the Poor*, Clearinghouse Rev., Special Issue 1993, at 311, 312-14.

56. Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 Cornell L. Rev. 1298 (1992). This article has been the subject of extensive commentary. *See, e.g.*, Anthony V. Alfieri, *Stances*, 77 Cornell L. Rev. 1233 (1992); Harrison & Montoya, *supra* note 3, at 420-21; Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 Golden Gate U. L. Rev. 345 (1997); Silver, *supra* note 3.

57. Cunningham, *supra* note 56, at 1370.

racial issues . . . ."[58] Accordingly, Cunningham and the students did not discuss with their client, or argue to the court, that the treatment of their client had a racial dimension.[59] After the prosecution dismissed the case, the client angrily assailed Cunningham and the students for patronizing him and treating him the same way that other white authority figures did.[60]

Cunningham attributes the failure to address the racial aspects of the case to two factors. First, the client never raised the claim with his white lawyers. Cunningham suggests that his African-American client might not have believed he could share with his white lawyers the view he expressed after the completion of the case—that the white lawyers would have been just as skeptical as other white authority figures were.[61] Second, Cunningham and his students did not reach the racial issue because as lawyers they turned first to readily available "race neutral" defenses.[62]

What Cunningham does not explore is the possibility that race influenced his own conduct and that of his students. Perhaps as whites and lawyers, they began assuming the norm that race is not a factor. Therefore, they would not on their own initiative raise the possibility that race played a role either in the matter or in their relationship with their client. Indeed, their expectation that the African-American client would raise issues of race if they existed suggests that the white lawyers might have applied the assumption that race is an issue for people of color and not for whites.

The lawyers' white identity could also have attributed to their failure to follow up on specific evidence indicating that they should explore how racial identities influenced the case. Here, the police report revealed that the African-American client had suggested that his race was a factor in his stop. When the white judge described the charge against the African-American defendant as an "attitude"[63] charge, he may very well have been signaling that the charge resulted from the defendant's inappropriate and racially based response to the police officers. Even though Cunningham as a progressive white person had an "impression" that the incident was racial, he may not have pursued this intuition[64] because the embeddedness of the authority relationship with his client was consistent with that of the white police officer and judge. After the case ended, the African-American client certainly noted that this was his perception—that the white lawyers had treated him in the same paternalistic way as the other white authority figures.

Last, Cunningham's explanation that the white lawyers naturally turned to a race-neutral strategy represents a symbiosis of whiteness and of professional values. The professional ideal that lawyers and law should be

58. *Id.* at 1370-71; *see also id.* at 1325-26, 1368.

59. Interestingly, even though they did not discuss with their clients whether the incident was a racial one, they did ask whether the officers were white. *Id.* at 1323.

60. *Id.* at 1329-30.

61. *Id.* at 1378.

62. *Id.* at 1371, 1377.

63. *Id.*

64. *See supra* note 58 and accompanying text.

neutral provides support for preferring a race-neutral strategy if readily available, as in this case. It also supports the tendency of whites to avoid confronting racial issues. In this way, whiteness and professional values are mutually reinforcing.

This example is but one illustration of how the symbiosis of whiteness and professionalism undermines white lawyers' ability to provide their clients with optimal representation. Of course, as intergroup theory suggests, quality lawyering requires attention to race on the part of all lawyers, not just white lawyers, and in all situations, not just cross-racial ones. The dominant professional paradigm of "bleaching out" race (and other differences) is wrong both as a matter of description and as a matter of maximizing the effectiveness of a lawyer's work.

IV. RETHINKING THE CONSTRUCTION OF PROFESSIONAL IDENTITY AND RULE OF LAW

Two central goals lawyers share through their organizational group identity as members of the legal profession are commitment as an individual or firm to excellence in representing clients, and commitment as a community to maintaining a legal system that adheres to the rule of law. In order for lawyers to improve their ability individually and communally to attain these goals, the legal profession should discard the bleaching out assumption in favor of an integration-and-learning perspective that acknowledges the influence of identity group affiliations on lawyers' work.[65]

A. *The Integration-and-Learning Approach Works Better Than a Color-Blind Model*

In two recent studies, leading organizational scholars Robin Ely and David Thomas have demonstrated that the "integration-and-learning" paradigm is more effective in achieving organizational goals than the "discrimination-and-fairness" model currently dominant in the legal profession.[66] In the integration-and-learning approach, members of a work

65. David Wilkins has eloquently argued that a lawyer can possibly reconcile race consciousness with prevailing professional norms. Wilkins, *supra* note 3, at 1567-94. Even if it were possible for most lawyers to "[l]earn[] to [l]ive in the [c]ontradictions," *id.* at 1569, as Wilkins urges, (and I am skeptical that it is), this Essay deals with a slightly different question—not whether consciousness of racial identity is permissible under professional norms but whether it is preferable in order to achieve professional goals. Wilkins seeks to delineate the moral obligations of black lawyers and to preserve a commitment to social justice amidst "market-based diversity arguments." David B. Wilkins, *From "Separate Is Inherently Unequal" to "Diversity Is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 Harv. L. Rev. 1548 (2004); *see also* David B. Wilkins, *Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*, 11 Geo. J. Legal Ethics 855 (1998) [hereinafter David B. Wilkins, *Do Clients Have Ethical Obligations?*]; Wilkins, *supra* note 3.

66. Robin J. Ely & David A. Thomas, *Cultural Diversity at Work: The Effects of Diversity Perspectives on Work Group Processes and Outcomes*, 46 Admin. Sci. Q. 229.

force "are receptive to the notion that racial differences may underlie team members' expectations, norms, and assumptions about work and that these differences are worth exploring as a source of insights into how the group might improve its effectiveness."[67] Co-workers "openly acknowledge and negotiate their differences in service of their goals."[68]

In contrast, in the discrimination-and-fairness approach, such as the "bleaching out" paradigm dominant in the legal profession,[69] "cultural diversity is a mechanism for eliminating racial injustice, and . . . is of no use in furthering the group's work."[70] Under this paradigm, "group members aspire to be color blind" and confine "discourse about race . . . to the possibility of racial biases in the group."[71]

Ely and Thomas found significant advantages for the integration-and-learning approach.[72] In one study, they examined organizations employing competing models. The integration-and-learning workplace benefited from "cross-cultural exposure and learning and . . . work processes designed to facilitate constructive intergroup conflict and exploration of diverse views"; while the discrimination-and-fairness workplace displayed "low morale of employees, lack of cross-cultural learning, and the inability of employees of color to bring all relevant skills and insights to bear on work."[73] In the integration-and-learning model, "all employees fe[lt] fully respected and

260-65 (2001) [hereinafter, Ely & Thomas, *Cultural Diversity*]; Robin J. Ely & David A. Thomas, Team Learning and the Racial Diversity-Performance Link 23-35 (2004) [hereinafter Ely & Thomas, Team Learning] (Harvard Business School Working Paper No. 05-026) (on file with author). David Wilkins has noted the importance of their work to lawyering. *See, e.g.*, David B. Wilkins, *Do Clients Have Ethical Obligations?*, *supra* note 65, at 861-67; Wilkins, supra note 3, at 1592.

67. Ely & Thomas, Team Learning, *supra* note 66, at 9. Applying intergroup theory, the integration-and-learning perspective recognizes the continuing influence of identity group membership and "assume[es] that cultural differences, such as those stemming from race, are useful to the group because they give rise to different life experiences, knowledge, and insights." *Id.*

68. *Id.*

69. *See* Sanford Levinson, *Diversity*, 2 U. Pa. J. Const. L. 573, 584 (1999) (observing that "bleaching out" is the Ely and Thomas "discrimination-and-fairness" paradigm).

70. Ely & Thomas, Team Learning, *supra* note 66, at 11.

71. *Id.* at 12. Ely and Thomas also explore a third perspective—"access-and-legitimacy." *Id.* at 11. Like the discrimination-and-fairness approach, the access-and-legitimacy model "assum[es] that cultural differences have limited value or are irrelevant to the group's work." *Id.* This model promotes "cultural diversity . . . insofar as it enables the organization to match market segments to parts of its workforce as a way to gain access and appear legitimate to those market segments." *Id.* Organizations following this model "do not incorporate the cultural competencies of their members into their core functions but, instead, define circumscribed roles for racial minorities that limit their contributions to market-interfacing functions." *Id.* This Essay will not examine this model in detail because it does not reflect the dominant approach of legal professionalism and because Ely and Thomas found it less effective than the integration-and-learning model. *See* Ely & Thomas, *Cultural Diversity*, *supra* note 66, at 261 tbl.3; Ely & Thomas, Team Learning, *supra* note 66, at 8-9. Nonetheless, it may very well be that some law firms apply this model in selecting lawyers of color to appeal to clients, adversaries, or juries of color, or that the selection procedures for judges might apply the model to selecting judges for communities of color.

72. *See* Ely & Thomas, *Cultural Diversity*, *supra* note 66, at 261.

73. *Id.* at 261 tbl.3.

valued for their competence and contributions"; this is in contrast to the discrimination-and-fairness workplace, where "[e]mployees of color fe[lt] disrespected and devalued."[74] Similarly, "racial identity at work" in the integration-and-learning model was "a source of value for people of color, a resource for learning and teaching, [and] a source of privilege for whites to acknowledge," while in the discrimination-and-fairness model, racial identity was a "[s]ource of powerlessness for people of color [and a] source of apprehension for whites."[75]

Although race-related conflicts occurred in both organizations, under the integration-and-learning model, members of different identity groups perceived themselves as having "equal power and status" and "open[ly] discuss[ed] differences and conflict."[76] In contrast, under the discrimination-and-fairness model, Ely and Thomas found "[i]ntractable race-related conflict stemming from entrenched . . . status and power imbalances; [with] no open discussion of conflict or differences."[77]

In another landmark study, Ely and Thomas compared the performance of more than "275 retail branches of a bank."[78] They found that the integration-and-learning branches "significantly outperformed" the discrimination-and-fairness branches in key work performance criteria—"in new sales revenue and in total performance."[79] Moreover, "racial diversity was negatively associated with all three performance measures in branches" with a color-blind approach, and "positively associated with them in branches with a positive racial learning environment."[80]

B. *Applying the Integration-and-Learning Model to Legal Practice*

The answer for the legal profession is to replace the "bleaching out" model, a discrimination-and-fairness approach, with an integration-and-learning strategy. As a preliminary step in this direction, this Essay will offer a framework for applying the teaching of Ely and Thomas to client representation and rule of law.

1. Integration-and-Learning in Client Representation

The integration-and-learning approach requires reflection and discussion in all aspects of client representation. As lawyers increase their "'competence [in] dealing with racial matters,'"[81] they should consider how their identity group, as well as the identity groups of others with whom they are working, influences their relationships with colleagues, clients,

74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. Ely & Thomas, Team Learning, *supra* note 66, at 25.
79. *Id.* at 23.
80. *Id.* at 25.
81. Alderfer, *supra* note 2, at 218.

adversaries, and court personnel. Lawyers should then, with their colleagues and clients, make explicit that issues of race are open for discussion and "'speak openly, frankly, and professionally about relations.'"[82] With this framework, lawyers will learn much more from their colleagues and clients, who in turn will learn much more from them.[83] As Ely and Thomas demonstrate, this framework will result in lawyers treating—and being perceived as treating—each other and their clients with more respect, moving beyond erroneous assumptions to more accurate analysis and more effective strategies, and working more successfully as a team with colleagues.[84]

Ely and Thomas remind us that these strategies do not avoid conflict. Rather, they offer a more effective way to manage conflicts that are likely to occur or to exist even without open acknowledgement. As Ely and Thomas advise managers, lawyers should seek to maintain the trust necessary to implementing the integration-and-learning approach "by demonstrat[ing] commitment to the process and . . . by setting a tone of honest discourse, by acknowledging tensions, and by resolving them sensitively and swiftly."[85]

If the white lawyers had applied this approach in the case study described above, they would have acted quite differently. First, they would have asked themselves whether their white identity influenced how they perceived and were perceived by their African-American client, the white police officer, and the white judge. Second, from the beginning of the relationship and continuing throughout, they would have invited their client to engage with them openly on issues of race. Had they done so, they might have recognized the racial issues in the case themselves, have learned of those implications from their client, and have examined those issues in cooperation with their client. They most likely would not have missed the racial tension with their client, which existed throughout the representation but was only revealed by the client after the case was over.

While resembling some of the approaches in the literature on "cross-cultural lawyering,"[86] this approach has a different emphasis. Like cross-cultural lawyering, it rejects color-blindness and encourages self-reflection.[87] Like the better work on cross-cultural lawyering, it rejects the notions that cross-cultural lawyering is exclusively an issue for white

82. *Id.*

83. For an example of such learning, see Harrison & Montoya, *supra* note 3, at 410. *See also* Wilkins, *supra* note 3, at 1592 (asserting that "[t]o the extent that black lawyers help to open up a dialogue about the role of race and other forms of contingent identity on professional practice, they will have performed an important service for their own workplaces and for the profession as a whole").

84. *Cf.* David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, Harv. Bus. Rev., Sept.-Oct. 1996, at 79, 89.

85. *Id.* at 90.

86. *See, e.g.*, Koh Peters, *supra* note 3; Bryant, *supra* note 3; Silver, *supra* note 3; Tremblay, *supra* note 3.

87. *See, e.g.*, Bryant, *supra* note 3, at 37, 56; Tremblay, *supra* note 3, at 383.

lawyers or in cross-cultural situations.[88] Nonetheless, as a matter of emphasis, this rejection is much clearer under an integration-and-learning approach that views all lawyers and all clients as members of both organizational and identity groups at all times.[89]

In one respect, though, the integration-and-learning approach is irreconcilable with cross-cultural lawyering. Where cross-cultural lawyering seeks a "non-judgmental approach towards yourself and client,"[90] the integration-and-learning approach rejects this goal as a form of unrealistic and counterproductive color blindness or culture-blindness. It instead requires informed judgments, together with "open[],frank[], and professional[]" exchanges regarding those judgments.[91] These very different goals also result in a different emphasis with regard to learning. While both approaches value learning of all types, cross-cultural strategies place a greater relative emphasis on learning about different cultural styles, while the integration-and-learning model places a greater relative emphasis on learning between and among lawyers and clients themselves during their relationships.[92]

2. Rethinking Rule of Law

Intergroup theory also requires rethinking the connection between "bleaching out" and rule of law. As discussed above, the term "bleaching out," a term with obvious racial resonance,[93] describes professionalism's commitment that all lawyers are fungible[94] and therefore free of influence from aspects of the self external to organizational group identity, including race as well as gender, religion, and other identity group characteristics.[95] The organizational group value of professionalism requires that race and other aspects of the self "become irrelevant to defining one's capacities as a lawyer."[96]

This conception, in turn, derives from the mutually reinforcing perspectives of role morality and rule of law. Professional role morality presumes that "the professional's conduct is governed by the morality

88. *See, e.g.*, Koh Peters, *supra* note 3, at 251; Bryant, *supra* note 3, at 52-53, 57.

89. *See supra* Part I.

90. Bryant, *supra* note 3, at 49. To be fair, Koh Peters and Bryant argue for "nonjudgmentalism" as a way to reduce defensiveness as a lawyer becomes aware of her own biases and not as grounds for ignoring bias altogether. Koh Peters, *supra* note 3, at 251-53; Bryant, *supra* note 3, at 59. Nonetheless, as a strategy, it does counsel an "accepting" approach to recognizing biases and does not clearly demand judgments regarding those biases once they are acknowledged. Koh Peters, *supra* note 3, at 251-53; Bryant, *supra* note 3, at 59.

91. Koh Peters, *supra* note 3, at 251; Alderfer, *supra* note 2, at 218.

92. *Compare* Bryant, *supra* note 3, at 40-48, *and* Tremblay, *supra* note 3, at 380-81, *with supra* text accompanying notes 69-85.

93. Levinson, *supra* note 1, at 1578-79; Pearce, *supra* note 12, at 1628-29; Wilkins, *supra* note 3, at 1506-07.

94. Levinson, *supra* note 1, at 1578-79.

95. *Id.*

96. *Id.* at 1579.

dictated by the profession and not from outside the profession."[97]

The dominant conception of rule of law makes the command of role morality even stronger for lawyers than for other professionals. Under this view, "[r]ule of law implies that the quality of lawyering and of justice an individual receives does not depend on the group identity of the lawyer or judge."[98] This conception "posits that the clash of opposing views before a neutral fact finder is the best way to ascertain truth and justice."[99] For the system to work properly, "all parties [must] receive equal representation" and for that to happen, lawyers must "function as extreme partisans who should not bring their own [identity] to bear on their representation."[100]

The theory of organizational behavior implicit in the "bleaching out" paradigm runs directly counter to intergroup theory. The professional socialization of organizational group affiliation within the legal profession denies the very existence of identity groups. But, as intergroup theory reminds us, demanding the exclusion of identity group influence from the classroom, courtroom, and law firm will not make it so.[101] Individuals within organizations have both organizational group and identity group affiliations. No matter the organizational values, identity group influences persist.

Moreover, as an empirical matter, Ely and Thomas's findings demonstrate that "bleaching out" paradigms are less effective in promoting organizational goals than a perspective that acknowledges the persistence of identity group influences. They found, for example, that a color-blind approach tends to perpetuate imbalances and injustices between identity groups that exist within society as a whole and fails to encourage people to achieve the highest functioning in pursuing common goals.[102] In contrast, the integration-and-learning approach results both in a more equal distribution of "power and status" and a more effective strategy for achieving organizational goals.

The potential implications for the legal profession are profound. If our organizational goal is equal justice under law, an integration-and-learning approach will more likely have greater success than the dominant "bleaching out" paradigm. As Martha Minow has observed, in a world where differences matter, "a commitment to equality—to treating like[] [cases alike under the rule of law,]—will be caught in a contradiction."[103]

97. Pearce & Uelmen, *supra* note 3, at 143; *see also* Wilkins, *supra* note 3, at 1503. This is true not only of lawyers but also of professionals generally. *See, e.g.*, Alderfer, *supra* note 2, at 210-13.

98. Pearce, *supra* note 12, at 1629.

99. Pearce & Uelmen, *supra* note 3, at 143.

100. *Id.*

101. *See, e.g.*, Robert T. Carter & Ellen Gesmer, *Applying Racial Identity Theory to the Legal System: The Case of Family Law*, *in* Racial Identity Theory: Applications to Individual, Group, and Organizational Interventions 219 (C. Thompson & R. Carter eds., 1997).

102. Ely & Thomas, *Cultural Diversity*, *supra* note 66, at 261; *see also* Carter & Gesmer, *supra* note 101, at 219-30.

103. Martha Minow, Making All the Difference: Intrusion, Exclusion, and American

She, like Ely and Thomas, argues that "you cannot avoid trouble through ignoring difference; you cannot find a solution in neutrality."[104] The task for the legal profession is to promote equal justice in the best way in light of the persistence of group identities.

This effort has yet to be made on any significant scale. Existing efforts to promote equality, such as judicial commissions on the status of racial minorities, continue to work within the limited confines of the "bleaching out" paradigm. The task for the future is for the legal profession to replace "bleaching out" with the goal of creating an integration-and-learning community for lawyers, so that we can join to explore the potential for rule of law in light of how we are all different from one another, and yet how we are all the same in sharing the goal of equal justice under law.

CONCLUSION

As intergroup theory teaches us, race provides data essential to understanding and managing organizational goals. To be a responsible and constructive member of legal organizations, a white lawyer must therefore acknowledge that whiteness is a racial identity and not a background norm. This acknowledgement, in turn, has two major implications. First, in assessing the legal workplace and legal system, a white lawyer (like all lawyers) must assess the role race plays and engage in learning with people of all races to determine how best to further organizational goals in light of racial differences. Second, the persistent influence of identity group membership in legal organizations requires, on both practical and theoretical grounds, discarding the dominant "bleaching out" approach to professionalism and rule of law in favor of an integration-and-learning approach to representing clients and creating a community that recognizes racial identity as a strength and not a failing.

Law 374 (1990).

104. *Id.* at 374-75.

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Still Killing Mockingbirds: Narratives of Race and Innocence in Hollywood's Depiction of the White Messiah Lawyer

Abstract

Through a narrative analysis of movies confronting issues of race and racism in the post-civil rights era, we suggest that the movie *To Kill a Mockingbird* ushered in a new genre for movies about race which presented an image of a white male hero, or perhaps savior, for the black community. We suggest that this genre outlasted the era of the Civil Rights Movement and continues to impact popular cultural discourses about race in post-civil rights America. Post-civil rights films share the central elements of the anti-racist white male hero genre, but they also provide a plot twist that simultaneously highlights the racial innocence of the central characters and reinforces the ideology of liberal individualism. Reading these films within their broader historical context, we show how the innocence of these characters reflects not only the recent neo-conservative emphasis on "color blindness," but presents a cinematic analogue to the anti-affirmative action narrative of the innocent white victim.

Keywords
Race; Racism; Film; Popular culture; Whiteness

The film, *To Kill a Mockingbird*, based on Harper Lee's eponymous book, was produced in the early 1960s, in the midst of the civil rights movement. Its narrative focuses on the valiant efforts of a small town lawyer, Atticus Finch, who defends Tom Robinson, a black man wrongfully accused of rape, against the racism of the Jim Crow South. In doing so, it creates a representation of an honorable, upper-middle class, white man who becomes a hero to the black community. The movie industry paid great tribute to this white male hero. Gregory Peck, who played the role of Atticus Finch, won an Academy Award, a New York Film Critics Circle Award, and a Golden Globe for Best Actor for his portrayal of the white lawyer/hero and Mary Badham who played Scout was nominated for an Academy Award for Best Supporting Actress. The film's immense success – it won even more acclaim and awards than the Pulitzer prize-winning book – suggests that its portrayal of the white hero who fights against racial injustice was an appealing and popular one to many

white Americans at this historical moment.[i] Furthermore, the film's appeal has stood the test of time as the American Film Institute featured it one of the top 25 films of all time in 2007. What is the appeal of such a story?

In her analysis of Hollywood films in the 1980s and 1990s, media scholar Kelly Madison (1999) argues that the Civil Rights Movement created a crisis of identity for whites in the United States in that it largely redefined the image of the black self for white America. Blacks asserted themselves as a positive and powerful force against externally imposed oppression and publicly voiced the fact that that oppression was rooted in white supremacy. This, Madison suggests, led to a need among white Americans to redefine themselves in order to maintain the notion of whiteness as good, civilized, and just. In her view, the emergence of "anti-racist, white hero films" in the late 1980s and 1990s reaffirmed the fiction of a good white self by creating a new collective memory in which whites become the heroes of the Civil Rights Movement, the leaders in the historic fight for racial justice.

We concur with Madison's argument about the "legitimation crisis" the Civil Rights Movement posed for white America; however, we challenge her assertion that the anti-racist, white hero film genre emerged in the post-civil rights era. As the plot of *To Kill a Mockingbird* suggests, this project began at least as early as the 1960s. Further, as other scholars have pointed out, Hollywood has long produced the fiction of the white savior as the noble and kind, beneficent, all powerful, and usually male. For example, Hernán Vera and Andrew Gordon argue that even early movies like *Gone with the Wind* (1936) and *The Littlest Rebel* (1935), though steeped in "nostalgia for the antebellum South," present images of the courageous, just and kind white self –a white self that at once recognized and participated in structures of racial hierarchy (Vera and Gordon 2003: 23).

Consequently, we argue that *To Kill A Mockingbird* not only offered a racially divided nation a representation of anti-racist white male heroism, but it also set up a new genre, one that outlasted the Civil Rights Movement and continues to emerge in popular films in post-civil rights America. As our analysis will demonstrate, these post-civil rights films share the central elements of the anti-racist white male hero genre, but they also provide a plot twist that simultaneously highlights the racial innocence of the central characters and reinforces the ideology of liberal individualism.[ii] Reading these films within their broader historical context, we show how this genre is complicated over time by shifts in underlying discourses about racial inequality in the United States between 1950 and 2000. As we will argue, the innocence of these characters reflects not only the recent neo-conservative emphasis on "color blindness," but presents a cinematic analogue to the anti-affirmative action narrative of the innocent white victim.

Narratives, Sources and Method

Susan Chase (1995) notes that individuals draw on "cultural resources," as they construct their own narratives and that, "[c]ontrary to common sense, which assumes that our lives determine our stories, narrative scholars argue that our stories shape our lives and that narration makes self understanding possible" (Chase ibidem: 7). Serving as a powerful cultural resource, popular films offer a particular type of narration to a mass audience. As such movies serve as a powerful "mode of discourse" that at once tell us about our lives and those of others, but also shape the stories we might tell (Manley 1994: 134). In this way, films present us with stories

about who we are, provide information about what important social issues and historical events might be, and help us make sense of the world that we live in.

Furthermore, because of the popularity of movies as a source of entertainment and cultural expression, the reach of this discourse goes further than many other discursive forms (Feagin 2003; Entman and Rojecki 2001; Hooks; Wilson and Gutierrez 1985). As Joe Feagin (2003: vii) observes, "For the majority of Americans, Hollywood's movies are a constant source of images, ideas, and 'data' about the social world. Indeed, the average citizen spends about 13 hours a year at movie theaters, and half of all adults go to the movies at least once a month.... Almost all U.S. families now have a VCR, and watching movies is the top leisure-time activity."

The expansive reach of the narrative frames in movies make them a particularly important site for examining popular culture constructions of social issues such as race relations in American society. Because the United States is racially segregated nation, most Americans live in neighborhoods that are racially isolated (Massey and Denton 1993). The result of this spatial segregation is that most people spend the majority of their time socially interacting with people of their own race and little time with others of different racial or ethnic groups. This is particularly true for white Americans who, as a result of white flight and wealth accumulation, live and socialize within neighborhoods that are predominantly white (Massey and Denton 1993; Oliver and Shapiro 1997). As a result, popular films about race and racism offer many white Americans narratives for experiences they may not have had. In fact, as some scholars have noted, in the absence of lived experience, films may seem more "authentic" and "true." Historian George Lipsitz, for example, notes *Mississippi Burning* and other such films "probably frame memory [of the 1960s] for the greatest number of people" (1998: 219).

Given the power of popular films to construct such "authentic" narratives, we asked what movies produced in the post-Civil Rights era could tell us about race and racism, during an historical time period that many sociologists described as one in which racial prejudice has declined (See, for example, Bobo, Kluegel and Smith 1997; and Schuman, et. al. 1997). As part of a larger research project, we searched all movies made between 1980 and 2000 that explored issues of race and racism. Specifically, we searched and analyzed plot summaries of movies and selected those movies in which a main aspect of the plot engaged issues of race, racism or racial reconciliation. Plot summaries were obtained from Internet Movie Database, (www.imdb.com). Through this search, we located 174 movies. Next we examined the earnings of these movies, and kept only those movies that made at least 3 million dollars. Our rationale here was to include a wide range of films including those that were top grossing ($25 million) as well as those that had a substantial viewing audience, but were not block buster hits. This left us with 64 movies in our sample (see Appendix A for an excerpt of this list).

We watched the movies in our sample and conducted a narrative and frame analysis of each movie. The coding categories we employed in our discourse analyses derived from our theoretical questions about popular movie constructions of white male protagonists and innocence (Johnston 2002). In the end we produced an analysis of each movie which included a detailed plot summary (including relevant quotations from the movie's dialogue) and an analysis of analytical categories including: constructions of innocence and appeals to innocence in the movie; constructions of race and character development along lines of race; transformation or conversion narratives by characters in the movie; constructions of whiteness; and the convergence between constructions of race, class and gender.

Of those 64 films, approximately twenty-five percent focused on a white male hero battling racial injustice. This particular genre contains three main elements. First, as the central character in these films, the white savior's viewpoint becomes the narrative focus, while the perspectives of African American characters and their broader community are peripheral at best, if not entirely absent. Second, the white hero sacrifices a great deal at the hands of white racists to further the cause of African Americans and suffers terribly. Third, the white hero also appears in professionally prestigious and influential positions such as lawyer, law enforcement official or educator. The resulting "white Messiahs," as Vera and Gordon (2003) call them, appear to communities of color with a structural power that the community itself does not possess.

The Innocent White Messiah Lawyer

For the sake of brevity in this paper we focus on our analyses of three post-civil rights film presentations of the white Messiah lawyer to illustrate our broader findings. The films *Amistad*, *Ghosts of Mississippi*, and *A Time to Kill*, represent direct narrative parallels to the Civil Rights era film *To Kill a Mockingbird,* making a comparative analysis feasible. Yet in our broader analysis of post-civil rights films about race, we note that the figure of the white savior extends to roles beyond legal advocates. These heroic characters come in the form of law enforcement officials such as police officers or FBI officials (cf., *Mississippi Burning*). Or they appear as educators – teachers or high school principals (cf., *Dangerous Minds*).[iii] What these films all share with the film depiction of the white messiah lawyer is a narrative focus on a white hero who appears in a role with relative structural power vis-à-vis African Americans. Their authoritative positioning not only reifies white hegemonic power structures, but also silently suggests their entitlement to the story's central focus. One who possesses structural power and uses it with painful consequences to themselves and their loved ones in a battle against injustice is obviously deserving of focused and nuanced attention. In Madison's (1999) reading, these anti-racist white heroes become a trope, representing the goodness and valor of whiteness. At the same time, people of color are not represented in positions of authority, thus signaling them as powerless, passive or ineffectual.

While the portrayal of white involvement in struggles for racial justice is arguably progressive, the fact that this particular story becomes a dominant genre to the exclusion of those focusing centrally on people of color as agents of social change is problematic. The white experience and interpretation of racial struggles is repeated time and again in the movies of the post-civil rights era while films with people of color as central heroic characters are quite rare (cf., *Stand and Deliver*). Moreover, the post-Civil Rights era films create and sustain a new ideology based upon the notion of white innocence. As our analysis reveals, the white lawyer messiah in each of the three post-Civil Rights films we discuss below is initially represented as *innocent* of racism. In their innocence, these characters appear initially completely unaware of racial prejudice or hatred in society, and they rely upon narratives that minimize the relevance of racism by asserting that race does not matter because we live in a color-blind society.

White Innocence in Social Context

Within the broader context of post-Civil Rights United States society, the notion of white innocence has served as the basis for halting progressive reforms of the Civil Rights Movement. For example, affirmative action programs have been severely restricted based upon the notion that the state must protect "innocent white victims" (Ross 1990). For legal scholars, this framework derives from the 1978 U.S. Supreme Court *Bakke* decision wherein the Court ruled that the University of California, Davis had violated the equal protection clause of the Constitution by denying access to whites, or more specifically to Allan Bakke, "solely because of their race" (*Bakke v. Regents of the University of California* 1978; Schwartz 1988; Ball 2000. Bakke claimed that he had been discriminated against in medical school admissions because he was white. As historian Mathew Frye Jacobson (2006: 100) points out, the Court's ruling "created a new class of victims" – the innocent white male.

Legal scholar Thomas Ross has suggested the notion of innocence is not only an element of legal rhetoric, but a powerful ideological image in American culture. He (Ross 1990) states:

> the argument for white innocence in matters of race connects with the cultural ideas of innocence and defilement. The very contrast between the colors, white and black, is often a symbol for the contrast between innocence and defilement. Thus, the theme of white innocence in the legal rhetoric of race draws its power from more than the obvious advantage of pushing away responsibility... White and black often symbolize some form of good and bad. (p. 34)

Stories of innocence have long been part of the mythology about America's history and heritage. In American Studies, the theme of "innocence" is central in the early historiography of America as an exceptional nation, a nation uncorrupted by the forces of feudalism and aristocratic excess, as "innocent" and unmarked by history, and as "innocent" of imperialism and fascism (Marx 1964; Perry 1960; Smith 1950). And stories about racism and genocide are profoundly shocking, as Coco Fusco (1995) reminds us, because they deeply upset white Americans' notion of self as good and tolerant people. As a result, as Kelly Madison (1999) suggests, the Civil Rights Movement presented a stark challenge to the historical rhetoric of American innocence by making visible the violent story of white racism.

Trina Grillo and Stephanie Wildman (1991: 400) note that, "when people who are not regarded as entitled to the center move into it, however briefly, they are viewed as usurpers." The Civil Rights Movement functioned to center the experiences of African Americans, and in doing so, blatantly challenged notions of the innocent and beneficent white community. As a result, the cinematic emergence of an empathic white civil rights hero during this era corresponds to the process of re-establishing a dominant narrative that registered with traditional cultural conceptions of goodness and innocence, while simultaneously de-centering, once again, the histories and experiences of African Americans (Delgado 1996). But, more important for our analysis, in the post-civil rights era white Americans acted to retrench white power through the halting of racially progressive reforms, and in doing so constructed an even more virulent narrative of white innocence (Crenshaw 1988). The development of the *innocent* white male hero in post-civil rights era Hollywood films, along with their emphasis upon heroic individual solutions not only registers with dominant cultural conceptions of innocence, it also functions to distinguish these

films from their earlier anti-racist white hero cinema counter-parts like Atticus Finch in *To Kill A Mockingbird.*

The White Messiah Lawyer of the Civil Rights Era

In *To Kill a Mockingbird* Atticus Finch (as portrayed by Gregory Peck) is a noble and selfless lawyer who justly takes on the case of a black man wrongly accused of raping a white woman despite the fact that representing this man is a clear violation of racial norms in the Jim Crow South.[iv] When Finch takes the case of Tom Robinson, he fully understands that he and his family will be the target of racial hatred in the small, Depression era, Southern town of Maycomb, Georgia. Because he understands the racial dynamics of his community, he not only anticipates potential harassment, but responds to these incidents with dignity. Part of what makes his character heroic is that despite his awareness of the consequences of taking the case, he does it because it he considers it his moral obligation. As a consequence, he endures insults and threats from neighbors and a violent attempt on his children's lives at the hands of the father of the woman who accused Robinson of raping her.

Throughout the movie, Finch never questions his decision to represent Robinson. Nor does he complain about the negative consequences he suffers as a result of his decision. Finch maintains his belief that justice will prevail through his commitment to the legal process, the hegemonic white legal power structure of the Jim Crow South, and remains optimistic about the possibility of legal justice with a higher court even after the Maycomb jury convicts Robinson of the rape he did not commit. As such, Atticus Finch personifies a Messiah role. A major element of this role is his expectation of suffering and the fact that he does not falter in his commitment throughout the film. Moreover, his character is portrayed not as innocent of power, but rather as knowledgeable about racism, courageous, and selfless. Innocence in this film is instead represented by his young daughter, Scout, who does not understand the racial dynamics of her girlhood town, and continually violates racial norms without being aware that she has done so. Scout's youth makes her a perfect innocent, because as a child she is not yet expected to understand the racial taboos of her social world. Thus the film pushes against these taboos, directly, with Finch publicly rejecting them by taking the case, and more subtly, with young Scout who violates racial norms because they do not make sense to her.

Scout's innocence, however, is betrayed by the conclusion of the trial. Finch cannot save Robinson from conviction by the racist, all white jury. And, when Robinson attempts to escape from jail and is shot by the guards, the possibility of appealing to a higher court is lost, and white racism prevails. The death of Robinson captures the film's central metaphor. Mockingbirds represent, as Finch tells Scout early in the film, goodness (read innocence), and killing them constitutes a cruel and senseless act. In this light, killing mockingbirds becomes a metaphor for the violent consequences of racism.

Like the post-civil rights films we analyze below, *To Kill a Mockingbird* is told from the perspective of the white male hero. We never learn what Tom Robinson is thinking. In fact, we rarely see him for much of the film. As for the larger Black community, all we are shown is their gratitude for Atticus. His perspective thus becomes normative. His perspective, however, is not uncritical and presumably appeals to a white audience's sense of fair play. The film highlights injustice – in personal terms with respect to Atticus and his family and, more generally, with

respect to white racism in his community. Further, and in a significant twist that differentiates this film from later ones, Atticus is never innocent of racism or its consequences, and though he is valorized as the beneficent white hero, he cannot prevail against its intractability. His failure suggests that despite his goodness, his hard work, and his commitment to justice through the legal system, one individual can not solve this larger social problem.

The genre of the male white hero saving African Americans through the legal system reappears in post-Civil Rights films; however, there are a number of subtle, but important differences in these more recent depictions. In the post-civil rights era, the white savior is initially represented as innocent of racism. Interestingly, their innocence of racism at once mirrors the viewpoint of the young ingénue Scout in *To Kill a Mockingbird*, but their actual role as adult lawyer saviors reproduces Finch's commitment to the legal system in obtaining justice. Further, their savior role is enhanced by the fact that unlike Atticus Finch, they actually win their cases in court. As a result, they are vindicated as morally righteous when the juries or judges rule in their favor. The storyline then becomes a conversion narrative in which these lawyers were once blind to racism, but over time become advocates for racial justice through the legal system, a system that now gets portrayed as fundamentally fair.[v]

The Cinematic Narrative of White Innocence

In our first film, *Amistad*, a Steven Spielberg film released in 1997, the audience is transported to the early 1800s to witness the legal battle that surrounded the infamous ship Amistad. The film is loosely based upon the actual case of the Amistad ship, in which a revolt occurred upon a Spanish ship, illegally engaged in the transportation of Africans into slavery from the British protectorate Sierra Leone. The movie opens with melancholy music as we see Cinque (portrayed by Djimon Hounsou), an African man shackled aboard the ship break free from his bonds and revolt against the white crew of the ship. The scene of the revolt is dark and ends with a close-up shot of Cinque brutally stabbing a white crewman, stepping on his neck to pull out the knife, and then stabbing him again and again while shrieking. The camera pans back to the name on the front of the boat: Amistad. Following this dramatic opening, the Amistad floats into American waters and the Africans who revolted against their captors are taken into custody to be prosecuted for murder. After setting us up with this image of a black man that expressly illustrates defilement, the ensuing legal drama unfolds.

Although the movie *Amistad* has more than one lawyer, the white lawyer who becomes the savior in the legal battle is Mr. Baldwin (played by Mathew McConaughey). Baldwin is an eager real estate attorney who approaches two abolitionists, Mr. Tappan, a white man (portrayed by Stellan Skarsgard) and Mr. Johnson, a black man (played by Morgan Freeman) who are working together to find legal representation for the African men and women who were aboard the Amistad. On their first meeting Baldwin tells the two men that he is perfect for the case because "all of the claims [in the case] speak to the issue of property and ownership," and in a later meeting he says that it is really a simple case, "It's like anything, land, livestock, [etc.]...." After he makes this point, the camera dwells on the shocked face of the white abolitionist. Baldwin goes on to make his legal argument: If the men and women from the Amistad are slaves, then they must be viewed as possessions, and therefore, may not be tried for murder; but if they are not slaves, then they were illegally obtained and were justifiably defending themselves. The white abolitionist responds with outrage, "This fight must be waged on the battlefield of

righteousness... these are people... not livestock." He adds that his cause is in the name of Christ himself, and Baldwin responds, "But Christ lost."

Here, Baldwin presents us a discursive framework based upon legal formality, one without emotion or moral judgment that the white abolitionist finds dehumanizing and offensive. In addition to emphasizing the differences between a dispassionate legal rationality and a Christian moral righteousness, this scene also provides a subtle but important message about race relations and the law. Matters of race and racial justice are to be sorted out by white men and the perspective of white men in regard to these issues is of the utmost importance (Morgan Freeman's character is silent throughout this exchange). As the movie progresses however, Baldwin becomes less reliant on cold legal logic and more emotionally invested in the lives of the people he represents suggesting that the arguments he began with are indeed offensive and dehumanizing. Baldwin's conversion from racial innocence to recognition of the humanity of the black people whom he represents becomes the film's central focus.

Baldwin's loss of innocence and growing awareness of racism is revealed in multiple scenes. For example, after successfully arguing his case to the district court where he proves that the ship Amistad came from Sierra Leone, a protectorate of Great Britain where slavery is outlawed, he leaves the courtroom and a white man comes up behind him and hits him over the head. Baldwin falls to the floor and when he gets up he asks in deep confusion, "What did I do to deserve this?" Mr. Johnson, the black abolitionist involved in the case responds, "You took the case sir, you took the case." Here, Baldwin's portrayal is one of a white man who is naïve about the racial norms of the time who become the unwitting victim of discrimination and harassment.

As Baldwin's case progresses he meets with lawyer, Congressman, and former President, John Quincy Adams (portrayed by Anthony Hopkins), who convinces Baldwin that he must get to know the African men and woman better in order to tell their story in higher court. After finding a Mende translator, Baldwin talks through this interpreter with Cinque about his capture and the abuses of his journey. Throughout this process, Baldwin becomes more personally invested in the human issues of the case. Yet, after winning his case at the court of appeals, Baldwin learns that it will be appealed to the United States Supreme Court. Here again, he appears completely taken aback that this would happen – despite the fact that from the perspective of an advocate in our legal system who understands the appeal process this should have been fully anticipated. When he reports this news to Cinque in his jail cell, Cinque expresses disgust by the outcome and refuses to talk further with Baldwin. To this Baldwin responds with anger, "Has it occurred to you that I'm all you've got? Because as it happens, since my practice has deteriorated, you're all I've got." Then he shows Cinque the death threats he has received since he took the case and tells him that one benefit to having no business it that, "I am now free to sit here as long as it takes for you to talk to me." In this moment, Baldwin becomes the Messiah, one who has forsaken his own livelihood in order to save the men and women of the Amistad. In this scene and throughout the film, Baldwin's suffering becomes the central frame of the story despite what we learn about the abuses Cinque and other Africans suffered on the Amistad.

In sum, Baldwin becomes a Messiah, through his conversion from a rationalistic lawyer, naïve about racial politics, to an advocate for racial justice. Given that Baldwin is ultimately successful in his endeavor, the film also suggests that the white legal structure is the appropriate route to racial justice, a paradoxical fact given that at this historical moment the United States legal system was an expressly white racist

system in which the institution of slavery was its defining characteristic. In this way, *Amistad* echoes *To Kill a Mockingbird*'s emphasis on the legal system as a route to social justice, but unlike Finch Baldwin actually prevails.

In our second film, director Rob Reiner's *Ghosts of Mississippi* (1996), we are faced with a brutal crime against a black civil rights advocate at the hands of white men. The movie opens with scenes of the Civil Rights Movement in the 1960s set to protest music of the era. Documentary footage from the era shows black protestors being beaten by white police, black soldiers fighting in Viet Nam, black athletes winning major competitions, Martin Luther King Jr. giving a speech, black women picking cotton, and then ominously, crosses burning in the yards of people's home. In a caption, the screen notes "Mississippi Delta in 1963," followed by the line, "This story is true." In the next scene, a white man murders black civil rights worker Medgar Evers in front of his home and as the murder unfolds, we hear John F. Kennedy's Civil Rights speech in the background. Then, we see the white man who shot Evers, Byron De La Beckwith (portrayed by James Woods), in the courtroom. White law officials shake his hand and are friendly toward him as he enters the court for his hearing, and as Myrlie Evers (portrayed by Whoopi Goldberg) testifies on the witness stand, the former governor of Mississippi walks up to Beckwith in front of the court, and jury. After two hung juries, Beckwith is released, and we see him being greeted by a street full of white people, celebrating his acquittal. Juxtaposed against this celebration, Myrlie Evers is shown trying to scrub the blood off of the car port cement outside her home where her husband was shot.

These snapshots of the 1960s murder of Medgar Evers set up the historical background for *Ghosts of Mississippi*. The film jumps forward in time with the screen signaling a different date: 1989. Here we meet Bobby De Laughter (portrayed by Alec Baldwin), a prosecutor for the district attorney's office. Bobby's boss asks him to check on the files of the Medgar Evers case. Initially, he resists, explaining that the murder case is over 25 years old, but his boss responds, "Sure it is, but if we try to bury this, Myrlie Evers is gonna have every black politician in Jackson climbing all over me." Thus, the audience is set up to watch our Messiah transform into a reasonable attorney who will eventually do good in the world. By contrast, Merlie Evers's character is thrust into the background as a nagging voice unreasonably focused on the racism of the past who will manipulate politicians to achieve her own ends.

Although De Laughter initially looks into the Evers' murder case file to appease Evers, as time goes on he discovers evidence of corruption in the first trial. His expression of disgust with the case's blatant racism and corruption mark a shift in his viewpoint from his original blindness to racism (read innocence) to his ultimate conversion as an advocate for racial justice when decides to re-open the case and re-prosecute Beckwith for the murder of Medgar Evers. Like Finch in *To Kill a Mockingbird* and Baldwin in *Amistad*, De Laughter experiences injury at the hands of other whites as a result of his decision. His wife leaves him in disgust, his family tells him they are embarrassed by his actions, and he becomes the target of hate crimes: His van is vandalized, he receives threatening phone calls, and his son gets in a fight with a boy who calls De Laughter a "nigger lover." Yet, like Baldwin and unlike Atticus Finch, De Laughter expresses surprise and confusion about these events, he is completely bewildered that such things would happen to him when he is simply trying to be a good advocate.

Near the conclusion of the film, the press learns through their investigation that De Laughter has found the original murder weapon. When they publish this information, Myrlie Evers is furious with De Laughter because he had not told her. In

a scene of a press conference with two black men standing at a podium, one of the men says, "...as far as I'm concerned they're [referring to Bobby De Laughter and his boss] nothin' but a pair of lying racists who never, I repeat never, had any intention of prosecuting the case." The next day, De Laughter's boss tells him that he is taking him off the case and he is to be replaced by a black prosecutor. Like earlier attributions to Myrlie Evers as a manipulator, here the black community leaders are represented as irrational and quick to wage claims about racism. Because De Laughter's story is central to the film, and he has been represented thus far as the all-sacrificing hero, the threat to dismiss him appears incredibly unjust. He is innocent of accusations of racism and is represented as being unfairly replaced by a black attorney, a portrayal which silently echoes broader narratives of the innocent white victim unfairly harmed by affirmative action.

The night after his boss takes him off the case, De Laughter calls Myrlie Evers from a pay phone at a movie theater. He tells Evers that he is committed to the case, and he wants her to make a commitment to him by telling his boss to leave him on the case. The next day at De Laughter's office, Myrlie Evers shows up and gives him the transcript to the original trial—noting that she has kept it for many years, and tells him he will not find any more opposition to his handling the case. After this final exchange, De Laughter goes forward to win the case with the full trust and support of Merlie Evers thus solidifying his role as the white Mesisah lawyer. Here again, as in *Amistad,* through a conversion narrative from innocence to advocate for racial justice, De Laughter prevails as an heroic individual.

The third and final movie we discuss, *A Time to Kill* (1996) directed by Joel Schumacher, opens with the same dramatic set-up for the legal challenge the white Messiah lawyer will face. Foreboding music plays as we see a group of white men in a pick-up truck with a confederate flag on it riding around talking and laughing loudly, while making dirt fly off the road with their truck. This is juxtaposed with a scene of a young black girl, ten year old Tonya, buying groceries at a small groceries store. After Tonya leaves the store, we see one of the white men throw a can of beer at her head and hit her as she walks down the road. Then we hear her screaming and see the face of one of the white men, and then blood on Tonya's feet. Tonya has been raped by these white men, and when her father, Carl Lee Haley (played by Samuel L. Jackson), comes home from work, and sits beside his daughter on the couch. Her face is badly swollen and bloody. In a scene invoking deep emotion, Tonya says to her father, "Daddy, I'm sorry I dropped the groceries."

The white men who raped Tonya are soon arrested and in the next scene Carl Lee Haley, a janitor, talks to Jake Brigance (portrayed by Mathew McConaughey), a white lawyer. He asks Brigance what sentence the young men who raped his daughter are likely to receive. Brigance responds with uncertainty, but acknowledges that in a nearby town a white man who raped a black girl got off. Haley then says to Brigance, "If I was in a jam, you'd help me?" Brigance says that he would. On the following day of the arraignment of the white men, Haley shoots and kills them. He is arrested and charged with the murder, and then, requests that Brigance represent him.

Here again, the central focus of the story is on the personal growth of Brigance from racial innocent into anti-racist white hero. We learn very little about Haley or his perspective. And, we learn almost nothing of the 10 year old Tonya, who is objectified as the victim of a horrible violence in a scene at the beginning of the movie. Jake's innocence of racism is established early in the film when the press asks him whether Haley can get a fair trial in Mississippi. Brigance replies, "Some folks believe Black folks can't get a fair trial, but in the New South justice will be color

blind." And, like the other films discussed, because Brigance agrees to take the case, he is punished for doing so. The Ku Klux Klan begins a spree of hate crimes against his home, his family, and his colleagues. The Klan burns a cross in front of his home and his daughter comes home crying every day from school because she gets taunted as a "nigger lover." Throughout Brigance appears confused and stunned that such things could happen. When his secretary tells him that she has been getting death threats on the phone, he responds with concern and confusion, "I'm sorry. Why didn't you tell me?" She responds indignantly, "Why? Would you have dropped the case?"

As the film progresses, the violence against Brigance and his friends escalates. First, the Klan attacks and beats his secretary's husband, while they hold her down forcing her to watch. Her husband later dies as a result of the attack. Finally, toward the end of the film, the Klan burns Brigance's home to the ground. His friend (an alcoholic divorce attorney) tells him, "Your marriage is on the rocks... Your career is ruined if you're lucky. And, if you're not, you're dead. Do everyone a favor and quit the case." He ignores the advice and sits forlornly in the smoldering rubble of his house, calling for his dog.

Despite his enormous suffering, Brigance as the white Meissah lawyer moves forward just as the central characters do the other post-civil rights films do and ultimately wins his case in the end. However, over the course of the trial, it begins to look increasingly difficult to secure an acquittal. The night before the last day of trial, Brigance goes to the jail to see Haley and suggests that he try to negotiate a plea bargain. Haley refuses to let Brigance give up and explains that he picked Brigance, a white lawyer, because he, Brigance, is "one of them." Brigance protest that this is not true, suggesting that he and Haley are friends. Haley challenges Brigance's professed color-blindness saying,

> We ain't no friends... America is a war, and you on the other side. How a black man ever gonna get a fair trial? You, you one of the bad guys. You see me as different. You see me as that jury sees me. If you was on that jury, what would it take to convince you to set me free?"

Brigance leaves looking stunned – his innocence about color-blindness shattered.

The next day, in Brigance's dramatic final summation to the jury he tells them that "the eyes of the law are human eyes" and that the racial differences we see mean that Blacks often cannot get a fair trial. He urges them to seek the truth with their hearts. Asking the jury to close their eyes, he slowly and dramatically retells the story of the beating and rape of the little girl that shattered "everything innocent and pure..." Finally he says, "I want you to picture that little girl... Now, [I want you to] imagine that she's white." Brigance is nearly crying as he speaks, and the faces of the jurors are lined with tears. In the next scene, the doors of the courthouse open, and a young black boy yells "Innocent. He's innocent."

Like *To Kill a Mockingbird*, the central narrative focus in *A Time to Kill* is on a white lawyer who fights for racial justice on the behalf of an African American man. African American perspectives are marginalized in the film, and the abuses suffered by African Americans in the story serve merely to set the stage for a story about the white male hero. Here too, the exceptional heroism of the white hero and their encounters with white racism on the behalf of African Americans suggests that whites also suffer and perhaps have done more than their fair share to aid Blacks. And finally, power is rightfully executed in the hands of a white man suggesting at once his beneficence and paternalism toward the African American community.

Despite these similarities, *A Time to Kill* differs in significant ways. Unlike Atticus Finch, Jake Brigance is initially presented as an innocent who is unaware of racism who becomes transformed during the process of defending Carl Lee Haley. While Finch fully anticipates the negative consequences of his decision to take the case for Tom Robinson, Brigance is surprised and confused when he finds himself the target of hate crimes. Like the roles of Baldwin and De Laughter, his role presents the cinematic analogue of Bakke as the innocent white victim. His transformation from color-blindness to an anti-racist consciousness becomes the central focus of the film. Furthermore, while Finch may be portrayed as a hero to the Black community, he is not a savior – he cannot rescue Tom Robinson from prison or prevent his death. By contrast, the more recent anti-racist heroes we discussed, like Brigance, do prevail – often against tremendous odds – and win their legal cases. How do we account for these differences? To answer this question, we suggest that these films must be read within the historical context of their production.

Racial Narratives and White Messiahs

In 1962, in the midst of the Civil Rights Movement, dominant narratives about racial inequality were shifting and changing. As Richard Pride (2002) argues in the *Politics of Racial Narratives*, notions of Black biological inferiority were being supplanted by narratives that highlighted the historical and contemporary effects of white discrimination against African Americans. While such narratives arose in the civil rights movement, he suggests that white liberals also espoused such stories to explain racial inequality. In this light, Finch's initial understanding of racism reflects this broader historical narrative. He begins with an awareness of the consequences of white discrimination. Further, his failure to save Tom Robinson confirms this larger narrative. Despite his goodness, his hard work, and his commitment to justice through the legal system, the film suggests that individual solutions will not solve this larger social problem. Remedies for the historical burdens of discrimination will not come about through individual effort, but entail instead government policies and programs that will ultimately restructure political power.

As historian Angela Dillard argues, in the 1980s neo-conservatives began to reject what they saw as the excessive egalitarianism of American culture and stood in staunch opposition to programs such as affirmative action and many of the Great Society program's federal initiatives which, in their view, constituted government interventions in the "free market" and undermined the importance of individual achievement, responsibility, and hard work. Similarly, Pride argues that in the 1980s and 1990s, another narrative emphasizing individualism and the lack of the Black work ethic to explain racial inequality becomes dominant. During this time period, remedial programs and policies such as affirmative action designed to ameliorate Black disadvantage come under attack by conservatives and, as other sociologists have noted, the ideology of color blindness begins to emerge (Flagg 1993; Bonilla-Silva 2001, 2003). Within this framework, race no longer matters and discrimination is a relic of the past. African Americans are to be judged according to their hard work, individual effort, and merits. If they don't succeed, it's because they haven't worked hard enough, taken initiative, and so forth. The racial innocence of the heroes in the films of the 1990s captures these themes. They do not expect to find discrimination, and when they do, they are completely surprised.

As we have shown, the focus of the narrative then becomes the protagonist's transformation from innocence to anti-racist white hero who battles against the odds and ultimately triumphs in the courtroom. Whereas Atticus Finch's efforts may be

regarded as heroic, these newer anti-racist heroes are saviors. As the ideology of liberal individualism would predict, their hard work and suffering are rewarded in the end with success.

Conclusion

Portraying white men in these post-civil rights films – *Amistad*, *Ghosts of Mississippi*, and *A Time to Kill* – as saviors rather than oppressors of other races serves to assuage white guilt by reassuring white viewers that white people are not bad, they simply may not know about racism. These white male saviors are also differentiated from "bad" white people as the narrative of racism is framed as explicit racial violence. They are innocents, color-blind. And, when they lose their innocence, they become heroic figures who fight against injustice. Here, we see a theme common to many Hollywood movies, collective endeavors, such as the Civil Rights Movement, are transformed into the battle of a lone individual who triumphs against evil, in this case, racism (cf., Vera and Gordon 2003). Further, while this narrative purports to be anti-racist, it also serves to reinforce white paternalism. Whites are presented in these films as saviors rather than oppressors of other races and people of color are passive or ineffectual victims who cannot save themselves. In comparing these more recent films with *To Kill a Mockingbird*, we are not suggesting that the former is a radical film and the others are not. As we have argued, all these films all share problematic elements – particularly their narrative focus on the white male hero which serves to create the fiction that whites, rather than people of color, are heroes in historic struggles against racial injustice. Rather, our point is that the ideology of innocence and liberal individualism has become a dominant motif in these more recent films.

This subtle shift in the anti-racist hero genre has several effects. First, the focus on the main character's transformation from innocence to consciousness about racism suggests the possibility of such a transformation for white America. By contrast, both survey data and qualitative research demonstrate the majority of white Americans believe that African Americans no longer experience discrimination (Schuman et al.1997). In fact, as Jennifer Pierce (2003) finds in her research with highly educated white professionals, these white men are often "racing for innocence," that is, they disavow discrimination and exclusion at the same time that they practice it. In this way, the films provide a convenient fiction which serves to gloss over the actual beliefs of most white Americans.

Second, by emphasizing the victimhood of white men, these films also play into and reinscribe the broader narrative of the innocent white male from contemporary debates about affirmative action. While anti-affirmative action rhetoric paints white men as unfairly victimized by such policies, the films portray the central characters as victims in their relentless pursuit of racial justice. While the source of their injury differs in each case, what is central to both is a narrative focus on the benevolent white male who is innocent of racism (at least initially in the films), and has been treated unfairly. By making white male victimhood the central focus, the films obscure the long history of discrimination and violence directed against communities of color in the United States. Indeed, if these films had focused instead on the suffering of Cinque in *Amistad*, or Medgar Evers (or Merlie Evers) in *Ghosts of Mississippi*, or Tonya in *A Time to Kill* within a larger genre of films of the same type, they would not only tell a story that is more true to the experiences of people of color historically and contemporarily in the United States, but they would also decenter the innocent white male victim of contemporary public rhetoric.

Finally, by focusing on the white savior's heroic and individual efforts to combat racism, these films also celebrate and reinforce the ideology of liberal individualism. The triumph of the individual not only masks and obscures the collective exercise of power that relentlessly channels rewards, resources, and opportunities to white Americans, but silently suggests that government programs and policies such as affirmative action are unnecessary. As Bonilla- Silva (2003) points out, this new individualistic, color-blind perspective, which fails to account for racialized practices and structural racism, results in consequences strikingly similar to earlier periods in which black biological inferiority was professed. If killing mockingbirds serves as a metaphor for the violent consequences of racism in the movie *To Kill a Mockingbird*, we suggest that popular movies in the post-civil rights era are, perhaps metaphorically, still killing mockingbirds.

Appendix A: Films Included in the Study

The full list of 64 movies included in our sample include: *American History X*, American Me, Amistad, *Amos and Andrew*, *BAPS*, *Black and White*, *Bonfire of the Vanities*, *Bullworth*, *City Hall*, *The Color Purple*, *Cop and a 1/2*, *Cry Freedom*, *Dances with Wolves*, *Dangerous Minds*, *Deep Cover*, *Dead Presidents*, *Devil in a Blue Dress*, *Do the Right Thing*, *Driving Miss Daisy*, *Dry White Season*, *A Family Thing*, *The Five Heartbeats*, *Gattaca*, *Get on the Bus*, *Ghosts of Mississippi*, *The Glass Shield*, *Glory*, *Heart Condition*, *Higher Learning*, *Hoodlum*, *The Hurricane*, *Joy Luck Club*, *Jungle Fever*, *The Last of the Mohicans*, *Liberty Heights*, *Long Walk Home*, *Losing Isaiah*, *Malcolm X*, *Men of Honor*, *Mi Vida Loca*, *Mississippi Burning*, *Mississippi Massala*, *Panther*, *Posse*, *Remember the Titans*, *Rising Sun*, *Romeo Must Die*, *Rosewood*, *Round Midnight*, *Set it Off*, *She's Gotta Have It*, *Stand and Deliver*, *Surf Ninjas*, *Surviving the Game*, *Tales for the Hood*, *Thunderheart*, *A Time to Kill*, *True Identity*, *Two Family House*, *A Walk in the Clouds*, *White Man's Burden*, *White Nights*, *The Wood*.

Films identified in the anti-racist white hero genre include: *Amistad*, *Bullworth*, *Cry Freedom*, *Dances with Wolves*, *Dangerous Minds*, *Dry White Season*, *Ghosts of Mississippi*, *Long Walk Home*, *Losing Isaiah*, *Mississippi Burning*, *Thunderheart*, and *A Time to Kill*.

Endnotes

i The movie received rave reviews, as well as winning substantial movie industry nominations and awards including: Best Actor (win) - Gregory Peck - 1962 Academy, Best Adapted Screenplay (win) - Horton Foote - 1962 Academy, Best Art Direction (win) - Oliver Emert - 1962 Academy, Best Art Direction (win) - Henry Bumstead - 1962 Academy, Best Art Direction (win) - Alexander Golitzen - 1962 Academy, Best Cinematography (nom) - Russell Harlan - 1962 Academy, Best Director (nom) - Robert Mulligan - 1962 Academy, Best Picture (nom) 1962 Academy, Best Score (nom) - Elmer Bernstein - 1962 Academy Best Supporting Actress (nom) - Mary Badham - 1962 Academy, Competing Film (win) - Robert Mulligan - 1963 Cannes Film Festival, Gary Cooper Award

for Human Values (win) - Robert Mulligan - 1963 Cannes Film Festival, Best Actor (win) - Gregory Peck - 1963 New York Film Critics Circle, Best Film (win) - Robert Mulligan - 1963 New York Film Critics Circle, Best Screenwriting (win) - Horton Foote - 1963 New York Film Critics Circle, U.S. National Film Registry (win) 1995 Library of Congress, 100 Greatest American Movies (win) 1998 American Film Institute, Best Director (nom) - Robert Mulligan - 1962 Directors Guild of America, Best Picture - Drama B (nom) 1962 Golden Globe, Best Actor - Drama (win) - Gregory Peck - 1962 Golden Globe, Best Director (nom) - Robert Mulligan - 1962 Golden Globe, Best Original Score (win) - Elmer Bernstein - 1962 Golden Globe, Motion Picture Promoting International Understanding (win) 1962 Golden Globe.

ii As George Lipsitz reminds us, the language of liberal individualism serves to recast long standing, systematic racist practices such as discrimination against African Americans and other people of color in employment and housing into seemingly individual, isolated incidents of personal prejudice. "Collective exercise of power that relentlessly channels rewards, resources, and opportunities from one group to another will not appear 'racist' from this perspective because they rarely announce their intention to discriminate against others" (Lipsitz 1998: 20-21).

iii We also note that while our period of examination ended in 2000, the recent (2006) film Freedom Writers, which parallels the plot line of Dangerous Minds, suggests that the white Messiah image in post-civil rights film continues to proliferate.

iv As in many screenplays, the plot for the film *To Kill a Mockingbird* deviated from the book's original storyline. Harper Lee's (1960) book takes the perspective of Scout, the young girl, while the film centrally on her father Atticus Finch. For an interesting discussion of how and why this change was made, see Shields 2006.

v As literary scholar Ann DuCille argues, "The I was blind, but now I see" script among white feminists who claimed to be anti-racist serves to mask responsibility for racist practices.

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I Want a Black Lawyer to Represent Me: Addressing a Black Defendant's Concerns with Being Assigned a White Court-Appointed Lawyer

Kenneth P. Troccoli

"I Want a Black Lawyer to Represent Me": Addressing a Black Defendant's Concerns with Being Assigned a White Court-Appointed Lawyer

Kenneth P. Troccoli*

"[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."

- The U.S. Supreme Court in *Gideon v. Wainwright*[1]

"Beggars can't be choosers."

- Old adage[2]

Introduction

"I want a Black lawyer to represent me." These are the first words you hear after you introduce yourself to your new client. You have been appointed to represent this man on a criminal charge. You are white. He is Black.[3] You answer that you are an

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1. 372 U.S. 335, 344 (1963).

2. *See* Wayne D. Holly, *Rethinking the Sixth Amendment for the Indigent Criminal Defendant: Do Reimbursement Statutes Support Recognition of a Right to Counsel of Choice for the Indigent?*, 64 BROOK. L. REV. 181, 182 (1998) ("[T]he familiar adage that 'beggars can't be choosers' has uniformly been incorporated into Sixth Amendment jurisprudence . . . .").

3. Throughout this Article, "Black" and "African-American" are used interchangeably, as are "white" and "Caucasian." "Black" is also capitalized throughout to acknowledge the status of African Americans as a distinct cultural group. *See* Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV.

experienced criminal lawyer and will represent him to the best of your ability, regardless of his or your race. He responds that he too is experienced with the criminal justice system—a system that targets Black men, like himself, for prosecution far more than whites, that sentences Black men to prison more frequently and for a longer duration than whites, and that fails to acknowledge or address the role that race and racism play in the development, enforcement, and execution of the criminal laws established by "the system." You explain that the law does not allow the client, as an indigent, to choose his own lawyer. "You can hire whomever you want to handle your case," you say, "if you have the financial ability to do so. Otherwise, the court chooses your lawyer for you, and there is little you can do about it, other than to decide to represent yourself."

Your client is not satisfied with this response. He explains that an African-American lawyer will be better able to understand and appreciate the circumstances that resulted in the bringing of these charges and that he, the client, can trust a Black lawyer more than a white one. You agree that trust is indispensable to an effective attorney-client relationship, but you disagree that trust is unobtainable merely because you are white, and that you, as a white lawyer, cannot be as effective as a lawyer who is African-American. Sensing that you and your client have reached an impasse, you suggest that both of you give this matter more thought and discuss it further at your next meeting. Your client assents and you leave.

* * *

Under the federal Constitution, an indigent criminal defendant has a right to appointed counsel to represent him in his criminal case.[4] Typically, such a defendant has little or no say in who that lawyer will be. If the appointed lawyer is of a different race than the defendant, the latter may worry that the lawyer will be unable to understand or fully appreciate his circumstances. He may worry that the lawyer's judgment and advice cannot be

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1331, 1332 n.2 (1988) (stating her view that "[w]hen using 'Black,' I shall use an upper-case 'B' to reflect my view that Blacks, like *A*sians, *L*atinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun"). Further, the use of masculine pronouns throughout this Article, when feminine pronouns could just as well apply, is merely the stylistic preference of the author.

4. *See* U.S. CONST. amends. VI, XIV, § 1; *see also Gideon*, 372 U.S. at 345 (holding that an indigent criminal defendant in state court is constitutionally entitled to court-appointed counsel at his trial).

trusted. He may worry that his relationship with the lawyer will be less than what it could be. In sum, he may be concerned that the lawyer will not be able to represent him as effectively as a lawyer whose race is the same as his.

These concerns can seriously impede the building of trust between the attorney and client. Trust is essential to establishing rapport[5] and is hard enough to come by in the appointed attorney-indigent client context, even without the issue of race.[6] Trust and rapport, in turn, enhance attorney effectiveness which, correspondingly, promotes justice, both for the individual defendant and the larger criminal justice system. Indeed, as the opening quote from *Gideon v. Wainwright* suggests, establishing a just and fair system is the key reason for requiring appointed counsel in the first place.[7]

Yet despite the importance of trust and rapport in the attorney-client relationship, and their impact on justice, scant attention has been paid to the effect race has on that relationship.[8]

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5. *See* Morris v. Slappy, 461 U.S. 1, 21 n.4 (1983) (Brennan, J., and Marshall, J., concurring in the result) ("'Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence.' . . . 'Basic trust . . . is the cornerstone of the adversary system and effective assistance of counsel.'" (quoting ABA STANDARDS FOR CRIMINAL JUSTICE Standard 4-3.1 cmt. (2d ed. 1980) and Linton v. Perini, 656 F.2d 207, 212 (6th Cir. 1981))); *see also id.* at 24 (stating that the attorney-client relationship "'involves not just the casual assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney'" (citation omitted)); ABA STANDARDS FOR CRIMINAL JUSTICE Defense Function Standard 4-3.1(a) (3d ed. 1993) ("Defense counsel should seek to establish a relationship of trust and confidence with the accused . . . ."); Holly, *supra* note 2, at 187 ("[F]ulfillment of counsel's role as an advocate largely depends upon a basic trust between attorney and client . . . ."); *cf.* Roland Acevedo et al., *Race and Representation: A Study of Legal Aid Attorneys and Their Perceptions of the Significance of Race*, 18 BUFF. PUB. INT. L.J. 1, 40 (2000) ("Communication is probably the most important part of the attorney-client relationship. In order for an attorney to effectively advocate for her client, she must first establish a relationship with that client, and she must obtain the necessary information.").

6. *See* ABA STANDARDS FOR CRIMINAL JUSTICE Defense Function Standard 4-1.2 cmt. (3d ed. 1993). This standard observes that:

> A lawyer who is privately retained generally has the confidence of the client, who after all has made a conscious choice of counsel . . . . By contrast, the lawyer who is appointed or who serves in an organized defender office must win the confidence of the client, who usually has had no say in the choice of an advocate.

Id.

7. *See Gideon*, 372 U.S. at 344 (noting that the Sixth Amendment right to appointment of counsel is a constitutional principle "established to achieve a fair system of justice").

8. *See* Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1354-55, 1354 n.154 (1992) (noting the rarity of "empirical studies of how attorneys talk

This is remarkable considering the prevalence of cross-racial representation. Statistics show that most criminal defendants rely on court-appointed counsel.[9] Black defendants are more likely than their white counterparts to need such counsel given that people of color are poor at a higher rate than whites.[10] Conversely, the lawyers representing these Black defendants tend to be white given the relatively small percentage of African Americans in the legal profession.[11] Thus, the concerns of our hypothetical defendant are likely to be widespread given that cross-racial representation is the norm, not the exception. And whether accurate or not, these concerns can produce the very ineffectiveness that our defendant fears and that the system

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with their clients in private" and citing one study that observed that "'[o]ne of the reasons that data about lawyers and dispute transformation are so incomplete and theoretical is the paucity of observational studies of lawyer-client relationships . . . .'" (citation omitted)); *see also* David A. Thomas, *Racial Dynamics in Cross-Race Developmental Relationships*, 38 ADMIN. SCI. Q. 169, 169 (1993) ("[O]rganizational research has rarely focused on the dynamics of interracial work-centered relationships.").

9. *See* Holly, *supra* note 2, at 220 ("[S]tatistics reveal that approximately seventy-five to eighty percent of criminal defendants are indigent."); OFFICE OF THE U.S. COURTS, FEDERAL DEFENDER SERVICES: A STATUS REPORT 1 (1993) ("About 85% of criminal cases prosecuted in the federal courts require the services of court-appointed counsel, either private attorneys or staff of federal defender organizations."); *see also* Fox Butterfield, *Texas Nears Creation of State Public-Defender System*, N.Y. TIMES, Apr. 6, 2001, at A14 (stating that nationwide, "82 percent of defendants in felony cases are now represented by publicly financed lawyers, according to the Bureau of Justice Statistics at the Justice Department").

10. Acevedo et al., *supra* note 5, at 20 ("People of color continue to be poor at a higher rate than whites."); *see also id.* at 29 (noting that ninety percent of the clients in the Civil Division of New York's Legal Aid Society are people of color).

11. *See id.* at 29 n.119 (citing *Affirmative Action on the Edge*, U.S. NEWS & WORLD REPORT, Feb. 13, 1995, at 35, 37 (reporting that "whites account for over 94% of all admitted attorneys")); Alex M. Johnson, Jr., *The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist's Perspective*, 95 MICH. L. REV. 1005, 1008 n.7 (1997) ("According to the *U.S. Bureau of Labor Statistics*, 123,060,000 members of the civilian noninstitutional population sixteen years old and over were employed in 1994. Of that total, 821,000 were lawyers. Only 3.3% of the lawyers were black." (citation omitted)); *see also* Margaret M. Russell, *Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straitjacket of Legal Practice*, 95 MICH. L. REV. 766, 767-68 (1997). Russell observes that:

> [M]inority attorneys still suffer from severe underrepresentation in the legal profession. At the beginning of this decade, Blacks, Asian Americans, Latinos and Latinas, and Native Americans comprised only twelve percent of the nation's law students, less than eight percent of lawyers, eight percent of law professors, and two percent of the partners at the nation's largest law firms. When compared with the overall percentage of people of color in the national population—approximately twenty-five percent—these paltry figures illustrate the extent to which attorneys of color are still very much a token presence in the legal system.

Id. (citations omitted). When her essay appeared, Russell was Associate Professor of Law at Santa Clara University Law School. *Id.* at 766 n.*.

strives to avoid.

This Article looks at this issue in the context of an African-American defendant and a white court-appointed lawyer.[12] More specifically, this Article describes the potential concerns an indigent Black defendant could have when appointed a white lawyer, the lawyer's possible responses to those concerns, and ways those concerns may be addressed by the larger judicial system.

As background, this Article first examines the Sixth Amendment right to appointed counsel in a criminal case with an emphasis on that Amendment's goal of furthering justice, both for the individual defendant and for the entire criminal justice system.[13] The nature and scope of the right to counsel is reviewed, as well as how the U.S. Supreme Court has attempted to make that right effective.[14] This review shows that the Court has achieved mixed results in its Sixth Amendment[15] quest to see that "justice . . . 'be done."'[16]

Part II relates the potential concerns a Black defendant may have about being appointed a white lawyer. These concerns are encompassed within three arguments that separately address issues of racism, attorney effectiveness, and the practical difficulties in educating the white lawyer on the impact race has on the defendant's case.[17]

The white lawyer's possible responses to the Black

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12. For purposes of this Article, "court-appointed lawyer" means a lawyer appointed by the trial court and paid for by the government, and "indigent" means that the defendant is unable to afford private counsel. For an excellent discussion of the definitions of "indigent" under federal and state law, see Craig P. Gaumer and Paul R. Griffith, *Presumed Indigent: The Effect of Bankruptcy on a Debtor's Sixth Amendment Right to Criminal Defense Counsel*, 62 UMKC L. REV. 277, 286-90, 294-95 (1993).

13. The focus of this Article is on the Sixth Amendment right to counsel given that Amendment's specific applicability to criminal cases. Conversely, the Fourteenth Amendment, which has also been interpreted as mandating a right to appointed counsel, applies to criminal and civil cases alike. *See, e.g., In re* Gault, 387 U.S. 1, 34-41 (1967) (Due Process right to counsel in a civil juvenile delinquency hearing); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31-32 (1981) (Due Process right to counsel may exist in a civil parental status termination hearing); Vitek v. Jones, 445 U.S. 480, 496-98 (1980) (plurality opinion) (Due Process right to counsel for civil hearing regarding an inmate's involuntary transfer from prison to a state mental hospital).

14. *See infra* notes 26-98 and accompanying text.

15. U.S. CONST. amend. VI.

16. Johnson v. Zerbst, 304 U.S. 458, 462 (1938) ("The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'" (citation omitted)).

17. *See infra* notes 99-129 and accompanying text.

defendant's concerns are the subject of Part III. Three broad responses, with some variants, are identified. These responses either deny the existence of racism, refute the relevance of the defendant's race to the attorney-client relationship, or, conversely, acknowledge race and racism's relevance to that relationship.[18] As explained more fully below, this last response incorporates elements of what is called the "Race Consciousness Model of Lawyering," which posits that personal identifying characteristics, such as race and ethnicity, impact attorney effectiveness and the way that a lawyer and client relate to each other.[19]

Finally, Part IV suggests three ways to ameliorate the racial friction (and further justice in the process) that may arise in the white appointed lawyer-Black indigent defendant relationship.[20] First, as the Race Consciousness Model recommends, greater and better communication should be promoted between the accused and his lawyer about the issue of race.[21] Such communication should also take place within law schools and between other actors in the criminal justice system, including prosecutors, judges, and legislators. Second, courts should accord greater weight to the importance of a meaningful attorney-client relationship and be more receptive to appointing substitute counsel when the issue of race impedes the development of such a relationship.[22] Finally, the procedures for initially selecting the appointed lawyer should be revised to give the accused the option to choose his own counsel.[23] Alternatively, the defendant should be assigned two alternate counsel in addition to his appointed lawyer and given the right to substitute in one of these alternates.[24]

This Article concludes with a call for all actors in the criminal justice system to acknowledge the influence of race in the appointed attorney-indigent client relationship and for better education for, and communication between, these parties about this issue. Improved race consciousness may redress our hypothetical defendant's concerns and the powerlessness he feels in being unable to realize *Gideon's* promise of justice for all.[25]

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18. *See infra* 130-184 and accompanying text.
19. *See infra* notes 175-178 and accompanying text.
20. *See infra* notes 185-225 and accompanying text.
21. *See infra* Part IV.A.
22. *See infra* Part IV.B.
23. *See infra* Part IV.C.
24. *See infra* Part IV.C.
25. Gideon v. Wainwright, 372 U.S. 335 (1963).

I. The Federal Constitutional Right to Appointed Counsel in Criminal Cases

It is hard to overstate the importance of the right to court-appointed counsel to the American adversary system of criminal justice. The goal of our system is to see that justice is done. This goal is important for the accused, who is entitled to be treated fairly during the course of his prosecution, and it is important for the larger judicial system, which must ensure reliable results to maintain credibility. For the system to work, justice must exist on both the micro-level (for the defendant) and on the macro-level (for the system). In interpreting the Sixth Amendment right to counsel, the Supreme Court has been mindful of these interests, as the following summary of Sixth Amendment jurisprudence shows.

A. The Nature of the Right

The Sixth Amendment states, in pertinent part, that "[i]n all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defence."[26] Initially, it was thought that this requirement applied only to federal courts and, moreover, that it meant merely that a criminal defendant had the right to employ a lawyer to assist in his defense.[27]

It was not until 1932 that this view began to change and "the language of the Sixth Amendment [began expanding] well beyond its obvious meaning."[28] The change started with the Supreme

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26. U.S. CONST. amend. VI.

27. JOHN R. VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789–1995, at 277 (1996) ("Originally, [the Sixth Amendment right to counsel] was interpreted merely to guarantee that an individual had the right to employ an attorney."); 3 DAVID S. RUDSTEIN ET AL., CRIMINAL CONSTITUTIONAL LAW 13-2 (1990 & Supp. 2000) ("Congress enacted two statutory provisions [around the time the Sixth Amendment was adopted] suggesting that this guarantee might be limited to a right to retained counsel."); *see also* Scott v. Illinois, 440 U.S. 367, 370 (1979) ("There is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense." (citation omitted)).

28. Nichols v. United States, 511 U.S. 738, 746 (1994) (stating that by 1979, the Court "had already expanded the language of the Sixth Amendment well beyond its obvious meaning"); *see also* CONG. RESEARCH SERV., LIBRARY OF CONG., THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION 1430 (Johnny H. Killian & George A. Costello eds., 1996). The Congressional Research Service has explained that:

> Contemporaneously with the proposal and ratification of the Sixth Amendment, Congress enacted two statutory provisions which seemed to indicate an understanding that the [Sixth Amendment guarantee of the assistance of counsel] was limited to assuring that a person wishing and

Court's decision in *Powell v. Alabama*,[29] in which the Court, for the first time, interpreted the U.S. Constitution, and specifically the Sixth and Fourteenth Amendments,[30] to require the appointment of counsel in certain circumstances.[31]

Powell v. Alabama, otherwise known as the "Scottsboro Boys Case," concerned nine Black youths, including Ozie Powell, who were charged with raping two white girls in 1931 on a freight train while traveling near Scottsboro, Alabama.[32] The girls were with a group of white boys who, with one exception, were thrown from the train during an altercation with the Black youths.[33] The suspects were arrested the same day, before the train reached Scottsboro, where a mob had formed.[34] At or before the arraignment six days later, the trial judge appointed "all the members of the [local] bar" to represent the defendants.[35] However, at the trials held on April 6, 1931 (a mere six days after the arraignment), no one definitively stepped forward to take responsibility for the defense of the boys.[36] In four separate one-day trials, eight of the boys were found guilty and sentenced to death.[37] All but one of the convictions were affirmed by the Alabama Supreme Court.[38]

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able to afford counsel would not be denied that right. It was not until the 1930s that the Supreme Court began expanding the Clause to its present scope.

Id.

29. 287 U.S. 45 (1932).

30. U.S. CONST. amend. XIV. The Due Process Clause of the Fourteenth Amendment prohibits a state from depriving any person of "life, liberty, or property, without due process of law." *Id.* at § 1.

31. *Powell*, 287 U.S. at 71-72; *see also* 2 CHESTER J. ANTIEAU & WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW 521 (2d ed. 1997) (noting that prior to *Powell*, "there was no right to an appointed counsel in an indigent case"); RUDSTEIN ET AL., *supra* note 27, at 13-2 (stating that *Powell* was "[t]he first Supreme Court case to address the right of an indigent to appointed counsel"); Brian L. McDermott, *Defending the Defenseless*: Murray v. Giarratano *and the Right to Counsel in Capital Postconviction Proceedings*, 75 IOWA L. REV. 1305, 1309 (1990) ("The Court in *Powell v. Alabama* first established the right to counsel . . . .").

32. *See Powell*, 287 U.S. at 49-51; *see also id.* at 74 (Butler, J., dissenting) (describing the four trials in which the nine youths were tried).

33. *See id.* at 50-51.

34. *See id.* at 51 (noting that the defendants were "met at Scottsboro by a large crowd. It does not sufficiently appear that the defendants were seriously threatened with, or that they were actually in danger of, mob violence; but it does appear that the attitude of the community was one of great hostility").

35. *Id.* at 49, 53.

36. *See id.* at 53, 56; *cf.* Powell v. State, 141 So. 201, 203 (Ala. 1932) (stating that the joint trial of five of the defendants—Ozie Powell, William Roberson, Andy Wright, Olen Montgomery, and Eugene Williams—was held on April 8, rather than April 6, 1931), *rev'd*, 287 U.S. 45 (1932).

37. *See Powell*, 287 U.S. at 50; *id.* at 74 (Butler, J., dissenting).

38. *Id.* at 50; *id.* at 74 (Butler, J., dissenting).

In reversing those convictions, the U.S. Supreme Court held that the Sixth Amendment requires that counsel be appointed at state expense to assist an indigent defendant at trial.[39] The Court based its holding on that Amendment's requirement that the accused "have the Assistance of Counsel for his defence."[40] Finding that "the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel," the Court ruled that the trial court erred in failing to appoint specific counsel to assist the defendants.[41]

Although the Sixth Amendment formed a basis for the Court's decision in *Powell*, the principal rationale for that decision rested on the Fourteenth Amendment's Due Process Clause.[42] Moreover, in *Powell*, the Court emphasized the importance of appointed counsel to the goal of justice, calling the necessity of such counsel an "immutable principle[] of justice which inhere[s] in the very idea of free government."[43] The Court reiterated this point a mere six years later in *Johnson v. Zerbst*,[44] when it wrote that the Sixth Amendment "stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'"[45]

Johnson v. Zerbst is also significant because it more fully explained the Sixth Amendment underpinning of the right to appointed counsel, and it expanded that right to include all felony prosecutions.[46] *Zerbst*, however, only applied to federal courts.[47]

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39. *See id.* at 71-72 (holding that where the defendant is unable to employ counsel in a capital case, due process of law requires that counsel be assigned for him).

40. *Id.* at 66 (citation omitted).

41. *Id.* at 72.

42. *Id.* at 71 ("[T]he necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was . . . a denial of due process within the meaning of the Fourteenth Amendment . . . .").

43. *Id.* at 71 (stating that the failure to appoint counsel under the circumstances of that case "would be to ignore the fundamental postulate, already adverted to, 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard'" (quoting Holden v. Hardy, 169 U.S. 366, 389 (1898))).

44. 304 U.S. 458 (1938).

45. *Id.* at 462 (citation omitted).

46. *See id.* at 467-68. The Court stated:

> Since the Sixth Amendment constitutionally entitles one charged with [a] crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. . . . If the accused . . . is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or liberty.

It was not until twenty-five years later that the Court, in the seminal case of *Gideon v. Wainwright*,[48] extended *Zerbst*'s holding to the states.[49]

In *Gideon*, the Supreme Court ruled that the Sixth Amendment right to court-appointed counsel applied to the states through the Fourteenth Amendment.[50] In reaching that decision, the Court relied not only on *Powell* and *Zerbst*, but also on "reason and reflection [that] require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[51]

Gideon is also notable because it rejected the case-by-case approach for Sixth Amendment court-appointed counsel analysis, in which counsel is appointed only in certain circumstances after balancing the competing interests.[52] For the first time, it adopted a per se approach for deciding whether a criminal defendant is entitled to appointed counsel.[53] Crucial to the Court's decision was the "obvious truth" that a fair trial cannot be assured unless counsel is made available to a poor defendant.[54] Thus, in officially embracing the view that under the Sixth Amendment all indigent criminal defendants at trial are per se entitled to court-appointed counsel, the Court once again paid heed to the overarching goal of "achiev[ing] a fair system of justice."[55]

Id. The *Zerbst* Court was unequivocal in its holding that the Sixth Amendment requires that an indigent federal defendant be offered appointed counsel. *Id.*

47. *Id.*

48. 372 U.S. 335 (1963).

49. *Id.* at 344-45.

50. *Id.*

51. *Id.* at 344.

52. The case-by-case approach, exemplified by the holding in *Betts v. Brady*, 316 U.S. 455 (1942), initially held sway with the Supreme Court. *Betts*, decided a mere four years after *Johnson v. Zerbst*, held that the Sixth Amendment right to the appointment of counsel in state prosecutions should be decided on a case-by-case basis and was necessary only where it "seem[ed] to be required in the interest of fairness." *Id.* at 471-72. In so holding, the Court affirmed Betts' pro se robbery conviction and concluded that the appointment of counsel was "not a fundamental right, essential to a fair trial." *Id.* at 471. *Gideon* overruled *Betts*, calling it "'an anachronism when handed down.'" *Gideon*, 372 U.S. at 345 (quoting amici curiae).

53. *See* ANTIEAU & RICH, *supra* note 31, at 522 (noting that *Gideon* rejected the case-by-case approach for appointing counsel in criminal cases); William L. Dick, Jr., *The Right to Appointed Counsel for Indigent Civil Litigants: The Demands of Due Process*, 30 WM. & MARY L. REV. 627, 627-28 (1989) (stating that *Gideon* adopted the per se approach for criminal cases).

54. *Gideon*, 372 U.S. at 344.

55. *Id.* (stating that a constitutional principle behind the Sixth Amendment right to appointed counsel is "to achieve a fair system of justice").

B. The Scope of the Right

The Sixth Amendment right to appointed counsel applies only to "criminal prosecutions."[56] More specifically, it only applies to criminal cases in which actual imprisonment will be imposed.[57] The Supreme Court made this limitation clear in two cases after *Gideon*. First, in *Argersinger v. Hamlin*,[58] the Court clarified that the right to appointed counsel applies to misdemeanor prosecutions.[59] Assuring just outcomes was one of the principal reasons for that decision.[60] In so concluding, however, the Court left open the question of whether the right to appointed counsel applied to cases in which the authorized penalty included incarceration, but where no actual incarceration would be imposed.[61] That question was answered in the negative by the second case, *Scott v. Illinois*, in which the authorized penalty for defendant Aubrey Scott's crime (shoplifting) included up to one year in jail.[62] Given that Scott's actual sentence consisted of a fine rather than jail time, the Court held that he had not been entitled to a court-appointed lawyer.[63] "[A]ctual imprisonment [is] the line defining the [Sixth Amendment] constitutional right to appointment of counsel," the Court stated.[64]

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56. U.S. CONST. amend. VI.

57. *See* Scott v. Illinois, 440 U.S. 367, 373 (1979).

58. 407 U.S. 25 (1972).

59. *Id.* at 36-37.

60. *See id.* at 31 ("The assistance of counsel is often a requisite to the very existence of a fair trial . . . ."); *see also id.* at 34 (observing that even in cases that do not go to trial, counsel is needed "so that [the accused] is treated fairly by the prosecution").

61. *See Scott*, 440 U.S. at 379 (Brennan, J., joined by Marshall, J., and Stevens, J., dissenting) (noting that "[t]he question of the right to counsel in cases in which incarceration was authorized but would not be imposed was expressly reserved [in *Argersinger*]").

62. *Id.* at 368.

63. *See id.* at 373-74.

64. *Id.* at 373; *see also id.* at 374 (finding that the Sixth and Fourteenth Amendments require that "no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense"). The holding in *Scott* was reaffirmed in 1994 in *Nichols v. United States*, 511 U.S. 738 (1994), in which the Court held that a prior uncounseled conviction valid under *Scott* can be used to enhance the sentence in a subsequent conviction.

Recently, the Supreme Court granted certiorari to review an Alabama Supreme Court case that held that the right to appointed counsel is triggered where a suspended term of incarceration is imposed conditioned on probation and other terms. *See Ex parte* Shelton, No. 1990031, 2000 WL 1603806, at *5 (Ala. May 19, 2000) (holding that "a defendant who receives a suspended or probated sentence to imprisonment has a constitutional right to counsel"), *cert. granted*, 121 S.Ct. 1955 (May 14, 2001) (No. 00-1214). As of November 19, 2001, oral argument had

The right to appointed counsel, moreover, extends beyond the trial phase of the criminal case.[65] Such non-trial phases covered by the right, known as "critical stages," include preliminary hearings, court proceedings after formal charges have been filed, and certain pre-indictment procedures, such as line-ups.[66] A right to counsel also may exist after the trial.[67]

Extending the right to appointed counsel to non-trial phases furthers the Sixth Amendment's aim of ensuring just procedures and outcomes. Conversely, and as discussed more fully below, this aim has been undermined when it comes to selecting that counsel.[68] More specifically, although the Sixth Amendment has been interpreted to guarantee the right to court-appointed counsel, it has not been construed to guarantee the right to a specific lawyer. When counsel is appointed, "normally the accused will not be heard to object to the attorney assigned."[69] Indeed, "[c]ourts generally hold that the initial selection of counsel to represent an indigent is a matter resting within the almost absolute discretion of the trial court."[70] This means as well that an indigent

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not been scheduled. *See* U.S. SUPREME COURT, ARGUMENT CALENDARS (OCTOBER TERM 2001), http://www.supremecourtus.gov/oral_arguments/argument_calendars.html (last updated Nov. 19, 2001).

65. Under the Sixth Amendment, court-appointed counsel is also required for other non-trial phases of a criminal prosecution. *See* ANTIEAU & RICH, *supra* note 31, at 524-27 (reviewing Supreme Court cases stating that under the Sixth Amendment, court-appointed counsel is required during non-trial phases of a criminal prosecution). *See generally* RUDSTEIN ET AL., *supra* note 27, at 13-38 (listing some of the phases of the criminal case where the right to counsel has been found to be constitutionally required).

66. *See* RUDSTEIN ET AL., *supra* note 27, at 13-46 (stating that the determining factor is whether the phase of the case is a "critical stage" of the proceeding); *see also* Kirby v. Illinois, 406 U.S. 682, 688 (1972) (stating that the Sixth Amendment right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated against [the accused]"); Coleman v. Alabama, 399 U.S. 1, 9-10 (1970) (at preliminary hearing); United States v. Wade, 388 U.S. 218, 336-37 (1967) (at post-arrest lineup); Massiah v. United States, 377 U.S. 201, 205-06 (1964) (after formal charges have been filed). *But see* 2 JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED 8-11 (3d ed. 1996) (stating that a right to counsel has generally been found not to exist at the evidence-gathering stage).

67. *See, e.g.*, Mempha v. Rhay, 389 U.S. 128, 137 (1967) (at sentencing); Douglas v. California, 372 U.S. 353 (1963) (at the first appeal as of right). *But see* Ross v. Moffitt, 417 U.S. 600, 617-19 (1974) (finding no constitutional right to appointed counsel to pursue discretionary appeals).

68. *See infra* Part IV.C.

69. COOK, *supra* note 67, at 8-55.

70. 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 549-50 (2d ed. 1999); *see also* Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 102-03 (1993) ("[V]irtually every American court considering the issue has held that refusal to

defendant does not have the right to replace his appointed lawyer with other appointed counsel of his choice.[71] Conversely, subject to few limitations,[72] a defendant with money can hire whomever he wants as his lawyer.[73]

Despite the absence of input from the defendant regarding the choice of appointed counsel, a defendant does have the constitutional right to waive counsel altogether and represent himself.[74] To do so, the defendant must be competent, fully aware of the right being waived, and informed of the "dangers and disadvantages" of waiver.[75] Thus, the waiver must be knowing and intelligent, a determination the trial court must make based on the particular facts and circumstances of the case.[76]

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accept the indigent's choice of counsel is permissible and constitutional . . . ."). For the reasons for allowing the trial judge to appoint counsel without input from the defendant, see 3 LAFAVE ET AL., *supra*, at 550-51.

71. *See* 3 LAFAVE ET AL., *supra* note 70, at 555 (stating that an accused "has no right to replace one appointed counsel with another even if that can be done without causing any delay in the proceedings").

72. For example, a defendant cannot be represented by a disbarred lawyer, or one who is not licensed to practice in the jurisdiction in which representation is sought, or by one who has a conflict of interest. *See generally* Holly, *supra* note 2, at 190-98 (discussing some of the reasons a court might prohibit a retained lawyer from handling a defendant's case).

73. *See* Powell v. Alabama, 287 U.S. 45, 53 (1932) (noting that a defendant who hires counsel should have "a fair opportunity to secure counsel of his own choice"); *see also* 3 LAFAVE ET AL., *supra* note 70, at 557 ("Where defendant has a Sixth Amendment or due process right to the assistance of counsel, that constitutional guarantee encompasses the 'right to retained counsel of his choosing' as an aspect of his 'right to spend his own money to obtain the advice and assistance . . . of counsel.'"(citation omitted)); COOK, *supra* note 67, at 8-46 ("The right to counsel includes the right of the accused to select counsel subject to certain limitations.").

74. *See* Faretta v. California, 422 U.S. 806, 807 (1975) (holding that an accused has a constitutional right to represent himself at trial). The right to self-representation may also be protected by statute. *See, e.g.*, 28 U.S.C. § 1654 (1994) ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel . . . ."). *But cf.* Martinez v. Court of Appeal of Cal., 528 U.S. 152, 154 (2000) (finding no constitutional right to self-representation on appeal).

75. COOK, *supra* note 67, at 8-37 to 8-38 ("For the waiver to be effective, the prosecution must show that the accused was competent to make a waiver and that the accused was fully aware of the right being waived."); *Faretta*, 422 U.S. at 835 (holding that before waiving counsel, the defendant must be informed of "the dangers and disadvantages of self-representation"); *see also* RUDSTEIN ET AL., *supra* note 27, at 13-53 to 13-72 (describing the general principles that apply to waivers of counsel); 3 LAFAVE ET AL., *supra* note 70, at 574-81 (explaining in detail the requisite warnings and judicial inquiry associated with counsel waivers).

76. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (stating that the waiver of counsel must be intelligent and intentional and that the court should consider the totality of the circumstances in considering a waiver request); *Faretta*, 422 U.S. at 835 (waiver must be knowing and intelligent); *see also* RUDSTEIN ET AL., *supra* note 27, at 13-53, 55 (noting that waiver must be competent and determined on a case-by-case basis); COOK, *supra* note 67, at 8-37 to 8-41 (discussing the requirements of

C. Making the Right Effective

Consistent with the goal of achieving justice, the Sixth Amendment right to counsel has been interpreted to include the right to "effective" assistance of counsel.[77] For many years, courts believed that the constitutional standard for effective assistance differed depending on whether counsel was retained or appointed.[78] The Supreme Court laid that issue to rest in 1980 when it ruled in *Cuyler v. Sullivan*[79] that there is "no basis for drawing a distinction between retained and appointed counsel."[80] Four years later in *Strickland v. Washington*,[81] the Court, for the first time, provided a thorough analysis of what it means to be "ineffective."[82]

According to *Strickland*, establishing ineffectiveness requires proving that counsel's performance was deficient and that the defense was prejudiced as a result.[83] To establish prejudice, the defendant must show that there is a reasonable probability that the result in the case would have been different but for counsel's

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an effective waiver and citing relevant cases); 3 LAFAVE ET AL., *supra* note 70, at 538-39, 574-81 (discussing waiver of the Sixth Amendment right to counsel).

77. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel.").

78. *See* COOK, *supra* note 67, at 8-64 to 8-65 ("For many years, lower courts had disagreed on whether the same constitutional standard for effective assistance of counsel applied when counsel was appointed as when counsel was retained . . . . [Indeed, some believed that] the burden of proof resting with the accused would be greater in [cases where counsel had been retained].").

79. 446 U.S. 335 (1980).

80. *Id.* at 344-45 ("Since the State's conduct of a criminal trial itself implicates the State in the defendant's conviction, we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers."); *see also* COOK, *supra* note 67, at 8-65 (stating that the controversy regarding whether the effectiveness standard was different for retained versus appointed attorneys was resolved in *Cuyler v. Sullivan*).

81. 466 U.S. 668 (1984).

82. *Id.* at 683 (noting that the case "presents a type of Sixth Amendment claim that this Court has not previously considered in any generality"); *see also* 3 LAFAVE ET AL., *supra* note 70, at 621 (observing that prior to *Strickland*, the Supreme Court "had not sought to articulate a comprehensive conception of ineffective assistance of counsel," and stating that *Strickland* focused on the Sixth Amendment, but that the ineffectiveness standard articulated therein has "apparent applicability as well to those stages of the process in which due process or equal protection establish a constitutional right to counsel").

83. *Strickland*, 466 U.S. at 687 ("A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient . . . . Second, the defendant must show that the deficient performance prejudiced the defense.").

deficient performance.[84] A reasonable probability "is a probability sufficient to undermine confidence in the outcome."[85]

In delineating a performance standard to which all attorneys must adhere, *Strickland* sought to maintain an adversarial system that was just: one that ensured fairness for the accused and reliable results for society at large. In the Court's own words:

> The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.[86]

The standard *Strickland* established, however, is very deferential to counsel's performance.[87] Indeed, as the Court made clear in that case and in another case decided the same day, there is a presumption that counsel's performance is effective.[88] This deference undercuts the pursuit of justice, because it means that, for all intents and purposes, attorney decisions regarding trial strategy and tactics are largely immune from attack from a defendant claiming ineffectiveness.[89] Such deference, in Justice

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84. *See id.* at 694 (stating the test for prejudice as: "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). With regard to the burden of proof, see *United States v. Cronic*, 466 U.S. 648, 658 (1984) (stating that the burden of proving a constitutional violation of the right to effective assistance of counsel rests with the defendant).

85. *Strickland*, 466 U.S. at 694.

86. *Id.* at 685; *see also id.* at 684 ("[T]his Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial."); *id.* at 686 (stating that producing a "just result" is the purpose of the constitutional requirement of effective assistance of counsel).

87. *Id.* at 689. ("Judicial scrutiny of counsel's performance must be highly deferential.").

88. *See id.* at 689 (noting that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance"); *Cronic*, 466 U.S. at 658 (stating that "we presume that the lawyer is competent to provide the guiding hand that the defendant needs").

89. *See* COOK, *supra note* 67, at 8-92 ("Tactical and strategic decisions which might have been handled differently by many or even most attorneys will not establish incompetence."); *cf.* 3 LAFAVE ET AL., *supra* note 70, at 717-18. Professor Wayne LaFave observes, however, that:

> [A] decision apparently based on a tactical judgment is not therefore rendered immune from an incompetency challenge . . . . Speaking to the interplay between an attorney's duty to investigate and the making of strategic decisions, the *Strickland* Court did note that 'strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.' This [standard] obviously requires great deference for strategic choices, but it comes with the important prerequisite of a 'complete investigation.'

Id.

Marshall's words, "covertly . . . legitim[izes] convictions and sentences obtained on the basis of incompetent conduct by defense counsel."[90]

Also problematic for the pursuit of justice is *Strickland*'s requirement that prejudice be shown before a defendant who is the victim of incompetent counsel can obtain relief.[91] So long as counsel's errors do not have a "reasonable probability" of casting "reasonable doubt" on the defendant's guilt, the Court said, those errors can be ignored.[92] Due process, however, in this instance, should not depend on proving injury. The absence of fair procedures itself should be sufficient to establish a constitutional violation.[93]

Finally, the Supreme Court has also made clear that the right to effective counsel does not mean that a defendant has the right to "meaningful" counsel. In *Morris v. Slappy*,[94] decided one year before *Strickland*, the Court reviewed a ruling by the Ninth Circuit Court of Appeals that the Sixth Amendment right to counsel "include[s] the right to a meaningful attorney-client relationship."[95] The Court summarily rejected any such notion, saying that "[n]o court could possibly guarantee that a defendant will develop the kind of rapport with his attorney—privately retained or provided by the public—that the Court of Appeals thought part of the Sixth Amendment guarantee of counsel."[96]

As explained below, the language used in *Slappy* conveys the message that the Court does not really care about the nature of the relationship between the appointed lawyer and the poor client.[97] Indigent clients care deeply about that relationship because, most significantly, they have little or no say in who their lawyer will be. In employing uncaring language and by sanctioning procedures that the indigent sees as fundamentally unfair, the Court in *Slappy*, like some aspects of the *Strickland* opinion, undermined the Sixth Amendment's call for justice.[98]

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90. *Strickland*, 466 U.S. at 713 (Marshall, J., dissenting).

91. *See supra* notes 83-85 and accompanying text.

92. *Strickland*, 466 U.S. at 695 (1984) ("[T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.").

93. *See id.* at 710-12 (Marshall, J., dissenting) (arguing that *Strickland*'s prejudice standard is erroneous and that the right to effective counsel guarantees "fundamentally fair procedures" irrespective of the outcome in the case).

94. 461 U.S. 1 (1983).

95. *Id.* at 10-11.

96. *Id.* at 13-14.

97. *See infra* Part IV.B.

98. *See Strickland*, 466 U.S. at 668; *infra* Part IV.B.

II. An Indigent Black Defendant's Concerns About Having a White Court-Appointed Lawyer

As can be seen from the foregoing discussion, while the Supreme Court's right to counsel cases acknowledge the importance of ensuring justice, some of those cases do a better job than others in furthering that goal. With that goal in mind, this Article now turns to the concerns an indigent Black defendant may have in being appointed a white lawyer.[99] For ease of reference, these concerns have been incorporated into three broad arguments: the Racism Argument, the Effectiveness Argument, and the Expediency Argument. A Black defendant may rely on one or a combination of these arguments in justifying his concerns over having a white lawyer.[100] Each of these three arguments will be discussed in turn.

A. The Racism Argument

The Racism Argument is predicated on a profound distrust of the entire criminal justice system. It posits that racism infects most, if not all, of the nation's criminal laws and the actors who create, enforce, and interpret them. A defendant making this argument believes either that his white appointed lawyer is racist or that the criminal justice system, of which the appointed lawyer is a part, is racist. In the defendant's mind, therefore, the lawyer cannot be trusted. The result is that the defendant may refuse to meaningfully communicate with the lawyer or rely on the latter's judgment and advice. "I don't want to participate in this sham representation," the defendant may say, "since this racist system is already rigged against me, and you (the lawyer), whether racist or not, are part of that system."

The concerns expressed in the Racism Argument may constitute a fundamental impediment to establishing an effective attorney-client relationship. These concerns may be based on

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99. The focus here is on race-based concerns. Moreover, the purpose of this section is not to examine whether the defendant's concerns are valid, but merely to elaborate on what some of those concerns may be. This purpose is important to remember, considering that some of the defendant's arguments may be racist or predicated upon inaccurate racial stereotypes. Some of those stereotypes, for example, that a white lawyer cannot be as effective as a Black lawyer, can also work in the converse.

100. There may, of course, be other race-based concerns and arguments that a Black defendant may have. This Article focuses only on those that the author has been able to identify. These arguments also assume that the appointed lawyer is competent to handle the defendant's case according to the standard established in *Strickland*. *See generally Strickland*, 466 U.S. at 668 (1984).

overt acts of racial discrimination, by the police for example, inflicted upon or witnessed by the defendant personally. Or, they may be based on racist acts that have been brought to the accused's attention by family, friends, or the media. Such overt acts, even just one, can produce a profound skepticism in the fairness of "the system." "Justice is for white people," he may believe, "not for a Black defendant like me."[101]

The defendant's concerns also may be based on the existence of a form of racism that is less overt, more subtle, but more prevalent.[102] This racism is a product of what Professor Charles Lawrence terms "unconscious racial motivation."[103] Racism, according to Professor Lawrence, is embedded in our culture and is part of a shared "common historical and cultural heritage."[104] This shared cultural experience undergirds our thoughts and actions, and influences our feelings about race.[105] Many of these feelings cast people of color in a negative light, assume that whites are somehow superior, or attach irrational significance to the color of a person's skin.[106] According to Lawrence, most people are unaware

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101. One USA Today/CNN/Gallup poll conducted in 1995 found that "sixty-six percent of blacks believe that the criminal justice system is racist and only thirty-two percent believe it is not racist." Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 699 (1995); *see also id.* at 699 n.115 (stating the results of another poll that showed "that 54% of blacks thought [the] criminal justice system was biased against blacks"); *cf.* Alexandra Walker, *Conversation in Black and White*, WASH. POST, Sept. 2, 2001, at B8 (revealing that "[i]n June [2001], a Gallup Poll reported that 66 percent of black Americans believe race relations always will be a problem in this country," and that a "survey, conducted by Harvard University, the Henry J. Kaiser Family Foundation and The Post, found that eight in 10 blacks say they occasionally experience incidences of racism").

102. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 335 (1987) ("Increasingly, as our culture has rejected racism as immoral and unproductive . . . hidden [racial] prejudice has become the more prevalent form of racism."). When he wrote that article, Lawrence was Professor of Law at Stanford University. *Id.* at 317 n.*. Currently, he is Professor of Law at the Georgetown University Law Center. *See* GEORGETOWN UNIVERSITY LAW CENTER, http://www.law.georgetown.edu/index.html (last visited Nov. 30, 2001).

103. Lawrence, *supra* note 102, at 322.

104. *Id.*

105. *See id.* at 330 ("[R]acism in America . . . is part of our common historical experience and, therefore, a part of our culture. It arises from the assumptions we have learned to make about the world, ourselves, and others as well as from the patterns of our fundamental social activities.").

106. *See id.* at 322 ("Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites."). Lawrence adds:

> For many whites, the explanation [for Black inequality] lies in the inherent inferiority of blacks. Few will express this belief openly. It is no longer consistent with American ideology to speak in terms of inherent

of the influence these unconscious racist feelings have in their everyday actions with minority groups.[107] "We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions," Lawrence explains, "[because] [w]hen an individual experiences conflict between racist ideas and the societal ethic that condemns those ideas, the mind excludes his racism from consciousness."[108]

Thus, a white lawyer may not be conscious of the racism that hangs like a cloud over the defendant's case. A Black defendant making the Racism Argument, however, will be aware of this racism or at least suspect its existence. Without studies or statistics, and in the face of denials by "the system," this defendant, in the words of Professor Paul Butler, "knows what he knows":[109] that his race has been, and will be, an impediment to retaining his liberty.[110]

In sum, the Racism Argument is rooted in concerns Professor Butler labels the Racial Liberal Critique and the Racial Radical Critique.

> American criminal justice is racist because it is controlled primarily by white people, who are unable to escape the culture's dominant message of white supremacy, and who are therefore inevitably, even if unintentionally, prejudiced. These white actors include legislators, police, prosecutors, judges, and jurors. They exercise their discretion to make and enforce the criminal law in a discriminatory fashion.

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racial traits. But the myth of racial inferiority remains embedded in the fabric of our culture.

Id. at 375.

107. *Id.* at 322 ("Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role . . . . To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism.").

108. *Id.* at 323.

109. In his article, *The Evil of American Criminal Justice: A Reply*, George Washington University Law Professor Paul Butler describes the concept of "knowing what you know" to establish the existence of some fact, like racism, that is not readily provable. *See* Paul Butler, *The Evil of American Criminal Justice: A Reply*, 44 UCLA L. REV. 143, 143-44 (1996). "Knowing what you know," writes Butler, "refers to those beliefs, often emotional, that are at the core of one's being and that precede or subvert education and other formal ways of knowing." *Id.* at 143.

110. *See id.* at 143-44 ("I think that knowing what you know informs the perspective of many African Americans when they consider the ugly statistic that one out of three young black men [as opposed to one in fourteen white men] are under criminal supervision . . . ."); *id.* at 145 n.8 (noting the statistic that "[i]n the United States, there are more young black men in prison than in college . . . [and] there are more African-American men, in absolute numbers, in prison than whites, even though white men outnumber African-American men more than five to one").

> Sometimes the discrimination is overt . . . and sometimes it is unintentional . . . . [Further, the] criminal law is racist because, like other American law, it is an instrument of white supremacy. Law is made by white elites to protect their interests and, especially, to preserve the economic status quo, which benefits those elites at the expense of blacks, among others. Due to discrimination and segregation, the majority of African Americans receive few meaningful educational and employment opportunities and, accordingly, are unable to succeed, at least in the terms of the capitalist ideal.[111]

Finally, the indigent defendant's poverty may exacerbate his feelings of alienation and powerlessness. Not only does a poor defendant not have any say in who his appointed lawyer will be, but, like the defendant in *Morris v. Slappy*,[112] whose counsel announced that he was ready for trial over his client's objection, he also may be thwarted from controlling the conduct of his own defense.[113] As some commentators have observed:

> Indigents commonly mistrust the public defender assigned to them and view him as part of the same court bureaucracy that is "processing" and convicting them. The lack of trust is a major obstacle to establishing an effective attorney-client relationship. The problem was captured in a sad exchange between a social science researcher and a prisoner: "Did you have a lawyer when you went to court?" "No. I had a public defender."[114]

B. The Effectiveness Argument

This argument is more practical than the Racism Argument. It focuses not on the prevalence of racism, but on the effectiveness of counsel. It asserts that a white court-appointed lawyer cannot be as effective on behalf of a Black defendant as an African-American lawyer.[115]

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111. Butler, *supra* note 101, at 692-93. For commonly cited examples of racism in the criminal justice system, see *id.* at 695-697.

112. 461 U.S. 1 (1983).

113. In contrast, a retained lawyer who disobeys his client's wishes can be summarily fired and replaced. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.16 cmts. 4 & 5 (2001) ("A client has a right to discharge a [retained] lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services . . . . Whether a client can discharge appointed counsel may depend on applicable law . . . .").

114. Schulhofer & Friedman, *supra* note 70, at 86.

115. The assumption in this section is that the defendant's objective is to "win" his case, i.e., obtain a dismissal of the charge(s), an acquittal of same, or an acceptable sentence. *See id.* at 77 ("Criminal defendants, we may assume, are ordinarily interested in winning acquittal, or if that fails, the lowest possible sentence."). This Article does not address the concerns of a criminal defendant with a different objective, e.g., a political activist who orchestrates his arrest and

The basis for this argument is not that the appointed lawyer or the system is racist per se, but that the lawyer, being a member of the majority, cannot or will not fully understand or appreciate what it means to be Black in America. Consequently, the lawyer cannot or will not accept or truly understand the prevalence of racism in the criminal justice system; the interplay between race and poverty; and the effects racism plays in the upbringing of African-American youth in this country, including how and why race contributed to the defendant facing these particular criminal charges. Given this lack of acceptance and understanding, the argument goes, a white lawyer may "[fail] to take racial differences into account [and thereby miss] a large part of the client's story and problem."[116]

The reason a defendant of color may have this concern is the unique but shared effect race has on his life. As Professor David Wilkins has written:

> Race exerts a major influence over every significant aspect of the lives of black Americans. It literally colors the way that we are perceived by the world at the same time that it shapes our self-perceptions. As a result, blacks are inextricably bound together, both in the sense that the actions of individual blacks impact the opportunities of other blacks, and in the manner in which the opportunities available to all blacks are tied to the fate of the black community as a whole. Consequently, race is likely to be an important aspect of a black American's identity, if only to the extent that blacks seek to protect black identity from negative attacks by others. The essential point is that in today's America, *race matters* in ways that inevitably structure identity.[117]

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wants a trial to showcase his cause, or a defendant who wants to hire an African-American lawyer to support the advancement of Black lawyers in the legal profession.

116. Acevedo et al., *supra* note 5, at 15 ("[W]hites may be unaware and unfamiliar with the lives of their clients of color to such an extent that failure to take racial differences into account may mean missing a large part of the client's story and problem.").

117. David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1532-33 (1998). When his article appeared, Wilkins was Kirkland and Ellis Professor of Law and Director of the Program on the Legal Profession at Harvard Law School. *Id.* at 1502 n.*. One observer has noted that:

> [R]ace 'transcends place, creating a community that has little to do with geography but everything to do with the larger political and cultural community of color.' This larger community, 'generally recognizes the reality of racism, the pleasure of a common culture, and the need to act together to effectuate common interests and to remedy common problems that repeat themselves across geographical divides.'

Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293, 1351 (1998) (quoting Lisa A. Kelly, *Race and Place: Geographic and Transcendent Community in the Post*-Shaw

Thus, a Black indigent defendant may feel more comfortable with a lawyer of his own race. He may believe that a Black lawyer will be less critical and more sensitive, accepting, knowledgeable, and empathetic than a white attorney.[118] In sum, he may make assumptions about the lawyer's ability based on the latter's race.

A recent written survey of lawyers in the Civil Division of the New York City Legal Aid Society illustrates this point.[119] When asked, "Do you believe your clients take the race of their attorney into consideration?" a majority of the white female lawyers and lawyers of color (male and female) answered in the affirmative.[120] One Black attorney stated that "clients often make assumptions about the ability of their lawyer to identify with their concerns based on whether or not their attorney is of the same race."[121] A Latino lawyer wrote, "I sense a certain degree of apprehension and confusion when the attorney of record lacks the necessary sensitivity with minority clients."[122] As the authors of this survey concluded:

> Those who share a common identity group factor such as race, should feel better able to communicate their needs and their feelings to others of the same race. Their shared identity would facilitate understanding and allow for more productive counseling. What little scholarship there is in this area seems to support this theory.[123]

Based at least in part on the assumption that race affects ability, an accused of color making the Effectiveness Argument

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Era, 49 VAND. L. REV. 227, 234-35 (1996)).

118. *See* Acevedo et al., *supra* note 5, at 56 ("Clearly, a Black Latina attorney who was raised in poverty and experienced discrimination firsthand will view racism differently than a white male raised in affluent suburbs who has been taught to disregard the 'invisible package of unearned assets.'" (citation omitted)).

119. The survey sent out ninety-seven anonymous questionnaires to staff and managing attorneys in the Civil Division of the Legal Aid Society of the City of New York. *See id.* at 25. "The Civil Division is the largest provider of civil legal services to the poor in New York City." *Id.* at 28. Whereas some ninety percent of the Division's clients are people of color, sixty-three percent of the attorneys on staff are white. *Id.* at 29. The purpose of the survey was to test the Neutrality and Race Consciousness models of lawyering. *Id.* at 3-4.

120. *Id.* at 33-34. Interestingly, a majority of white male attorneys answered "no" to this question, "indicating that they do not believe that their clients take the race of their attorney into account." *Id.* at 33.

121. *Id.* at 34.

122. *Id.*; *see also id.* at 37-38 (noting in the same survey that "the majority (59%) of all people of color believed that their race had a positive effect, indicating that they felt that the race-based commonality they have with their clients facilitates representation of those clients" and that, in contrast, "as a group, [71% of] white attorneys believe that race does not play a part in the attorney-client relationship").

123. *Id.* at 18.

believes that a white lawyer will be less effective than a Black attorney.[124] Four areas in particular may be of concern. First, the accused may be concerned about the lawyer's effectiveness in the courtroom. He may believe that a white lawyer will not relate as well to the judge, jury, or prosecutor, or that they will not relate as well to him. This concern may be general or it may relate to a specific issue in the defendant's case. For instance, the accused may want his race or racism to be a central part of his defense. He may want to "play the race card," and he may feel that it will be done more effectively by a lawyer of color.[125] Examples of such a defense include arguing to the fact-finder that it should disregard some key piece of evidence because it is tainted by racism, that it should return a not guilty verdict because the entire prosecution is racist, or that it should nullify the verdict because of the defendant's race.[126]

Second, the defendant may be concerned with the lawyer's effectiveness in negotiations with the prosecutor. The accused may feel that a white lawyer cannot negotiate for a plea bargain as effectively because, as noted, he does not fully understand a Black defendant's situation, background, or perspective. In this sense, an African-American lawyer may be able to negotiate with more credibility and authority than his white counterpart. This is particularly true, the defendant may believe, in cases where race or racism is an issue in the case, which it frequently is. Indeed, a Black accused may legitimately believe that race is always an issue in the case, most notably in sentencing where sentencing guidelines disparately impact Black offenders. Likewise, arguments to the prosecutor that a particular police officer targeted the defendant because of his race or that some key piece

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124. The *defendant's* race also may be a factor in the lawyer's effectiveness. Many lawyers, Black and white, believe that people of color are not treated as fairly by the courts as whites. *See, e.g., id.* at 48 (reporting that a majority of the attorneys surveyed (Black and white) in the Civil Division of New York City's Legal Aid Society believe that their clients of color are treated less favorably than their white clients).

125. This argument assumes that there is a legitimate basis for the "race card" defense in the facts of the case.

126. *See, e.g.*, Butler, *supra* note 101, at 677 (arguing that African-American jurors should take race into account in deciding whether to nullify a verdict); *see also id.* at 705 (stating that "[a]ny juror legally may vote for nullification in any case, but, certainly, jurors should not do so without some principled basis"); *cf.* John W. Bissell, *Comments On Jury Nullification*, 7 CORNELL J.L. & PUB. POL'Y 51, 55-56 (1997) (stating that nullification is a violation of the juror's sworn oath to return a verdict consistent with the evidence and the law, and quoting one federal judge as saying, "[jury nullified] verdicts are lawless, a denial of due process and constitut[e] an exercise of erroneously seized power" (citation omitted)).

of evidence should be discredited because of racism may fare better coming from an African American. Finally, the prosecutor himself may be a person of color, and the defendant may believe that having a lawyer of the same race will result in better rapport between the two.

A third area in which effectiveness may be a concern is investigation and trial preparation. A defendant making the Effectiveness Argument could claim that a Black lawyer can get greater and better access to some African-American witnesses or be more likely to succeed in obtaining relevant information from them. He may feel, for instance, that some witnesses will be more likely to cooperate with a Black lawyer than a white one. Access to predominately Black neighborhoods may also be viewed as easier for a Black lawyer, who may be welcomed as a "brother helping a brother."[127]

Finally, our hypothetical defendant could argue that a Black lawyer will be more effective at gaining the trust and confidence of the accused's family and friends. These groups may be more apt to trust such a lawyer, who is "one of them," than a white attorney who could be viewed as being aligned with the very system that is responsible for prosecuting the defendant. The appointed lawyer's effectiveness within this milieu may be of paramount importance to the accused, as the accused may be relying on advice from his family and friends during the progression of the case.

Regardless of whether the defendant is concerned with courtroom effectiveness or his counsel's effectiveness outside the courtroom, a defendant making the Effectiveness Argument believes that race matters in his counsel's performance. Perhaps this is why, as one attorney in the aforementioned Legal Aid survey noted, "there are . . . clients who specifically request a 'black attorney.'"[128]

C. The Expediency Argument

Like the preceding argument, the Expediency Argument focuses on the practical. It starts from the same premise as the Effectiveness Argument: that a white attorney, being an "outsider," does not fully understand or appreciate what it means to be Black in America. Because of this deficiency, both of these arguments would say, the white lawyer is handicapped,

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127. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 284 (1981) (defining "brother," among other definitions, as "a person regarded as sharing a common national or racial origin with the user of the word").

128. Acevedo et al., *supra* note 5, at 35 n.142.

detrimentally affecting his performance on behalf of his client.

But, whereas the Effectiveness Argument claims that the white lawyer cannot be as effective as his Black counterpart, the Expediency Argument says that he can. In other words, the white lawyer's deficiency in knowledge, understanding, and sensitivity can be rectified. He can be re-educated and re-indoctrinated to think as a Black lawyer, at least to the extent that he can be as effective as one. Accomplishing these tasks, however, would require substantial time and effort, commodities that the indigent defendant has in short supply. Thus, the bottom line of the Expediency Argument is the same as the Racism and Effectiveness Arguments: a Black lawyer is preferable to a white one.

The Expediency Argument represents a fallback position of sorts for an African-American client defending his desire for a Black lawyer. "I concede that you, the white lawyer, are not racist, and can be as effective as a Black attorney," the client would say, "but, you must concede that your performance on my behalf may not be as effective as your Black counterpart given the effects race has played and will play on my case (see Effectiveness Argument)." "To rectify this problem," the client continues, "I, at a minimum, will have to spend many hours educating you, and sharing with you my experiences and insights about race. Neither you nor I have the time or willingness to undertake this enormous task, so I tell you again, I want a Black lawyer to represent me."

In the final analysis, the Expediency Argument takes a pessimistic view of the white appointed attorney-Black indigent client relationship. It acknowledges that there is a problem with that relationship, but that the problem is beyond repair given the practicalities of the "real world." Much of this pessimism is well-founded, being based on the "real world" indigent defense phenomena of inadequate defense funding and resources, appalling attorney-to-client ratios, and insensitive judges who are often more interested in moving cases along than doing justice.[129]

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129. One example of this insensitivity can be found in the state and federal criminal courts in Alexandria, Virginia. Both of these courts utilize what is euphemistically called "The Rocket Docket," under which criminal cases, even very serious ones, must go to trial or plead out within a certain accelerated time period, often sixty days, after indictment. For overworked public defenders, this rush to trial puts an enormous strain on the already stressed attorney-client relationship. This kind of scheduling is particularly egregious when the defendant's case enters the system though an indictment rather than an arrest warrant. Such cases generally have already been "worked up" and investigated by the government prior to the indictment so that the prosecutor is, for all practical purposes, ready for trial before the court-appointed lawyer has even received the case. Of course,

Some of this pessimism is also grounded in laziness and inertia. After all, creating a better racial relationship with the lawyer requires hard, sometimes painful work. Overcoming that inertia is difficult, to say the least, especially given the deservedly fatalistic approach to which most Black indigent defendants are inclined. In this sense, then, the Expediency Argument is similar to the Racism Argument, as both see "the system" as the source of the problem.

III. The White Court-Appointed Lawyer's Possible Responses

Like the defendant's arguments, the white lawyer's responses will be dictated by his perspective, a perspective that may view racism differently given his upbringing, education, and enjoyment of the majority's "'invisible package of unearned assets.'"[130] The key is for the lawyer to see all perspectives, to step outside of himself, as it were, so that he can bring to the table a more informed view. Of course, some of the following responses will do that better than others, and some not at all.

Some of the responses also contain elements of what Professor Alan Freeman has described in the context of racial discrimination law as the Perpetrator Perspective and the Victim Perspective.[131] As Professor Freeman sees it, anti-discrimination law can take either of these two perspectives, the latter perspective being the more desirable of the two.[132]

The Perpetrator Perspective views the underlying cause of racial discrimination not as a systemic problem, but as the

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defendants with means are not as prejudiced by such scheduling, as they can hire their retained lawyers well before arrest/indictment.

130. Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondence Through Work in Women's Studies, in* CRITICAL WHITE STUDIES, LOOKING BEHIND THE MIRROR 291 (Richard Delgado & Jean Stefancic eds., 1997). McIntosh writes:

> I have come to see white privilege as an invisible package of unearned assets which I can count on cashing in each day, but about which I was 'meant' to remain oblivious. White privilege is like an invisible weightless knapsack of special provisions, assurances, tools, maps, guides, codebooks, passports, visas, clothes, compass, emergency gear, and blank checks.

Id.; see also id. at 293-94 (listing forty-six privileges that whites enjoy merely because of their skin color, including Caucasians' assurance "that if [they] need legal or medical help, [their] race will not work against [them]").

131. *See* Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1049 (1978). When his article appeared, Freeman was Professor of Law at the University of Minnesota Law School. *Id.*

132. *See id.* at 1052-57.

individual action or actions of a perpetrator on a victim.[133] Its focus is to stop the particular perpetrator, not to address the underlying conditions that cause the discrimination.[134] Thus, for instance, the solution under the Perpetrator Perspective for an act of discrimination by a waiter in a restaurant would be to fire the waiter rather than to address the hiring and training practices of the waiters restaurant-wide.

The Victim Perspective, on the other hand, views discrimination as more than just the individual acts of some bigots. This perspective says that the root causes of discrimination lie deeper, in the structure of our laws and in the societal conditions that treat African Americans as "member[s] of the perpetual underclass."[135] Under this perspective, racial discrimination will persist until conditions like unemployment, inferior schools, and inadequate housing are eliminated.[136]

Freeman argues that anti-discrimination law is "hopelessly embedded in the perpetrator perspective."[137] As will be seen, that perspective also permeates some of the responses a white appointed lawyer may have to our hypothetical African-American client. And to the extent that those responses are infused with the Perpetrator Perspective, the cause of justice—a key principle behind the Sixth Amendment—is undermined.

Generally, the lawyer responding to a Black defendant's concerns can take two broad approaches: he can dispute the defendant's concerns, or he can agree with them in whole or part. The responses in these two approaches can be categorized into

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133. *See id.* at 1053.

134. *See id.* Professor Freeman writes:

> The perpetrator perspective sees racial discrimination not as conditions, but as actions, or series of actions, inflicted on the victim by the perpetrator. The focus is more on what particular perpetrators have done or are doing to some victims than it is on the overall life situation of the victim class.

Id.

135. *Id.* at 1052-53. Freeman further states:

> From the victim's perspective, racial discrimination describes those conditions of actual social existence as a member of a perpetual underclass. This perspective includes both the objective conditions of life—lack of jobs, lack of money, lack of housing—and the consciousness associated with those objective conditions—lack of choice and lack of human individuality in being forever perceived as a member of a group rather than as an individual.

Id.

136. *See id.* at 1053 ("The victim . . . conception of racial discrimination suggests that the problem will not be solved until the conditions associated with it have been eliminated.").

137. *Id.*

three groups: the Denial or the No Racism Response, the Irrelevance Response, and the Relevance Response. The lawyer may rely on one of these individually or in combination in addressing the defendant's concerns over having a white lawyer.[138] Each of these three responses and their variants will now be discussed in turn.[139]

A. Denial or the No Racism Response

The thrust of this response is to deny that racism exists or is still a problem. It attempts to answer the charge made in the Racism Argument that either the white court-appointed lawyer is racist or the system, of which he is a part, is racist. The Denial or No Racism Response asserts simply that the defendant is wrong; that is, it is inaccurate to say that the white lawyer and/or the system as a whole are racist. "You are mistaken," the lawyer may say to his African-American client, "racism is no longer a problem, and you should therefore trust me/the system."

1. The "not us" variant

One variant of the No Racism Response is to deny the continued existence of racism in both the individual lawyer and the system as a whole. "Racism was at one time a serious problem," the lawyer might say, "but it is now a thing of the past, and neither I nor the police, prosecutors, judges, or jurors are racists."

This variant attempts to address the defendant's charge of racism in one broad and swift stroke by grouping together the individual lawyer and "the system." Its purpose is to get past the charge, to dismiss it, so that the lawyer can move on to other

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138. Like the indigent Black defendant's concerns, the white appointed lawyer's responses may be based on racist beliefs or inaccurate racial stereotypes. Again, this Article does not examine the validity of these responses, but merely elaborates on what some of the responses may be. There may, of course, be other responses that a white lawyer may have. This Article focuses only on those which the author has been able to identify. Moreover, as before, these responses assume that the appointed lawyer is competent to handle the defendant's case according to the standard established in *Strickland*. *See supra* notes 82-85 and accompanying text. These responses also assume that the lawyer shares the same objective as the defendant, i.e., to "win" the case as defined by the defendant.

139. One other approach, not discussed in this Article, is for the lawyer purposely to divert the defendant's attention away from racial concerns by discussing other concerns, for example, the defendant's poverty, that also could have a tremendous impact on the lawyer's effectiveness. Again, the focus of this Article is on race-based concerns and the responses thereto, and not on other concerns.

issues that he feels are more germane to the defendant's case. A lawyer employing this approach refuses to engage substantively the defendant on the issue of race. It is an approach that is condescending, not to say naïve, for in its summary dismissal, it does not respect the defendant's feelings or intellect.

As such, the "not us" variant falls clearly within Freeman's Perpetrator Perspective. As with that perspective, this variant "'declare[s] that the war is over,'" that "the problem of racial discrimination . . . has been solved."[140] "But for an occasional aberrational practice," the lawyer might say parroting Freeman, "future society [in which racial discrimination no longer exists] is already here and functioning."[141] Put another way, the lawyer might simply say, "don't worry, be happy."

2. The "not me" variant

Another variant of the Denial Response is to concede that the system may be racist, but assert that the particular appointed lawyer is not. Like the first variant, this falls within the Perpetrator Perspective because of its "no problem" approach. It attempts to separate the lawyer from the system, hoping that it will allay the defendant's concern that racism is everywhere. In the manner of the Perpetrator Perspective, the lawyer hopes to separate himself from "those blameworthy individuals who are violating the otherwise shared norm."[142] Thus, the white lawyer in this variant, like the Wizard of Oz, asks the accused to ignore what is behind the curtain.[143] "I am a good person," the lawyer would say, "and my intent is good and my motives pure, and that should be good enough for you."

By focusing the dialogue on his own good intentions, the lawyer in this variant echoes the views of what Butler calls, the "law enforcement enthusiasts."[144] Proponents of this view claim that "intent is the most appropriate barometer of . . . racism."[145]

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140. Freeman, *supra* note 131, at 1102 (citation omitted).

141. *Id.* at 1103 (arguing that post-1973 Supreme Court cases construing anti-discrimination laws rationalize "[t]hat but for an occasional aberrational practice, future society is already here and functioning").

142. *Id.* at 1054.

143. THE WIZARD OF OZ (MGM 1939) (In an attempt to discourage Dorothy and her companions from uncovering the illusion of his omnipotence, the Wizard demands in a thunderous voice, "Pay no attention to that man behind the curtain!").

144. Butler, *supra* note 101, at 697.

145. *Id.* at 697-98 ("According to . . . law enforcement enthusiasts, the criminal law may have a disproportionate impact on the black community, but this is not a moral or racial issue because the disproportionate impact is the law's effect, not its

That is, racism requires proof of discriminatory intent, and absent such proof, there is no problem to remedy.[146] This is so even if the effect of doing nothing is to perpetuate more racism.

By casting himself as an innocent person, moreover, the lawyer employs an approach sanctioned by no less than the U.S. Supreme Court. According to Lawrence, the Court in *Washington v. Davis*[147] held, inter alia, that a racially disproportionate impact is not enough to challenge the constitutionality of a facially neutral law.[148] Racially discriminatory purpose or intent is required, because otherwise, "innocent people [will] bear the costs of remedying a harm in which they played no part."[149] Similarly, a lawyer utilizing the "not me" variant of the Denial Response may claim that the Black defendant's rejection of his appointed lawyer is tantamount to punishing an "innocent" person (the lawyer) for the sins of the system.

As such, this variant asks the defendant to ignore the detrimental effects the racism of "the system" will have on his case, assuming that the defendant even believes his lawyer is not a racist per se. The variant also fails to account for Lawrence's "unconscious racism." If the defendant believes, as Lawrence does, that we are all motivated by unconscious racist feelings—that, in effect, "we are all racists"[150]—then it will bring the defendant no solace to hear his lawyer say, "I am not bad even if the system is." Such a response is akin to the Court's approach in *Davis* that, using Freeman's terminology, unless there is a "perpetrator," there is no problem to remedy.[151]

Finally, underlying both variants of the Denial Response is the belief that a defendant who makes the Racism Argument may himself be engaged in racist thinking. That is, that he may be judging the lawyer, without knowing anything about him, based merely on the color of his skin. A lawyer using this response will thus encourage the defendant to assume nothing and not to

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intent. For law enforcement enthusiasts, intent is the most appropriate barometer of governmental racism.").

146. *See* Freeman, *supra* note 131, at 1054 ("Central to the perpetrator perspective are the twin notions of 'fault' and 'causation' . . . .").

147. 426 U.S. 229 (1976).

148. *See* Lawrence, *supra* note 102, at 318 (stating that *Davis* established the doctrine that "plaintiffs challenging the constitutionality of a facially neutral law [must] prove a racially discriminatory purpose on the part of those responsible for the law's enactment or administration").

149. *Id.* at 320.

150. *Id.* at 322 ("To the extent that this cultural belief system has influenced all of us, we are all racists . . . .").

151. *See supra* notes 133-134 and accompanying text.

employ what may be inaccurate racial stereotypes. Rather, the lawyer may suggest, the defendant should judge each person on the basis of that person's character alone so as not to impede the development of a positive attorney-client relationship.

B. The Irrelevance Response

The Irrelevance Response focuses on the practical, and parts of it speak to all three of the defendant's arguments (the Racism, Effectiveness, and Expediency Arguments). The essence of the response is that the race of the lawyer does not matter at all, or at least not as much as the defendant believes. The racism vel non of the system (or its actors) is not the focus, as this approach claims that the lawyer should be "color-blind."[152] As such, he should not take the race of any of the system's participants, including his own, into account.[153]

There are two variants of this response. The first addresses the defendant's claim in the Effectiveness Argument that, in the context of the defendant's case, a white lawyer cannot be as effective as a lawyer who is African-American. The second attempts to answer all three of the defendant's arguments by focusing attention on the real-world practicalities of indigent defense.

1. "Ability matters, not race" variant

This variant accepts the truth of the defendant's belief that the white attorney cannot fully understand or appreciate what it means to be Black, but it disagrees that because of this handicap, the white lawyer cannot be as effective as (or more effective than) his Black counterpart. Under this view, effectiveness depends not on race, but on ability. That is, effective advocacy transcends race. Thus, the judge, jury, and prosecutor will be swayed by the facts and arguments, not by the racial identity of the lawyer. Likewise, witnesses and the defendant's confidants, including his family and friends, will respond favorably to a lawyer, regardless of race, who is committed to the defendant and genuinely and diligently working on his behalf.

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152. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens . . . ."), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

153. *See* Russell, *supra* note 11, at 785-86 (defining "'colorblind' lawyering" as "advocacy strategies premised upon the position that racism is or should be characterized as irrelevant to a particular context, even if it has been otherwise raised in the proceedings").

This variant further believes that trust is not a matter of race. Rather, trust is earned over time and comes not from the race of the lawyer, but from the hard work and results that the lawyer achieves on his client's behalf. "Judge me by my results," the white lawyer might say, "not by my skin color."

The "ability matters, not race" variant's reliance on color-blindness contains elements of Freeman's Perpetrator Perspective, as it serves to "legitimize the status quo."[154] A different model of lawyering, however, more precisely describes this variant. This model is the Neutrality Model.[155] It posits that, given his commitment to the "rule of law," a lawyer can and should provide his best representation irrespective of his or the client's race. A lawyer's capabilities, in other words, are not affected by his race, but rather are race-neutral.[156] Hence,

> "aspects of the self [s]uch as one's race, gender, religion, or ethnic background [are] irrelevant to defining one's capabilities as a lawyer." . . . Therefore . . . race not only *should not* be a factor in the attorney client relationship, but it absolutely *is not* a factor if law school has done its job.[157]

The reason that race is irrelevant under this model (i.e., that a lawyer should "bleach out"[158] any effects race has on his professionalism) is that otherwise, people would come to believe that justice is not uniform. The principle that justice is blind is premised on the belief that the laws will be applied impartially and that a lawyer's level of advocacy will not vary depending on the client's skin color. If justice did vary, this model says, "there would no longer be any reason to adhere to the law."[159]

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154. Freeman, *supra* note 131, at 1105 (noting that a problem with some of the Supreme Court's antidiscrimination jurisprudence is that it "legitimize[s] the status quo by immunizing the preexisting condition of black underrepresentation from statutory or constitutional scrutiny").

155. *See* Acevedo et al., *supra* note 5, at 3-12 (describing the Neutrality Model).

156. *See id.* at 3 (stating that under the Neutrality Model, "lawyers, because of extensive socialization and training in law school, apply their skills equally to all clients, regardless of the race, ethnicity, gender, or sexual orientation of the attorney or client." (citation omitted)).

157. *Id.* at 11 (quoting Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1579 (1993)).

158. *Id.* at 10 (quoting Professor Levinson as saying that the purpose of law school is to instill a new professional identity in place of the existing one and that in the process, law school "'bleach[es] out' . . . merely contingent aspects of the self").

159. *Id.* at 7.

> Without this commitment to neutrality, law would cease to be legitimate. If people believed that the sort of justice that you were accorded depended on personal identity factors, such as race, rather than the impartial application of neutral laws, there would no longer be any reason to adhere

Clients also need standardization, the Neutrality Model claims. As Professor Wilkins explains:

> From the client's perspective, this understanding of the lawyer's role [that the quality of lawyering does not depend on race] appears to offer vulnerable consumers the benefits of standardization. Clients need not ask whether a given lawyer does or does not subscribe to a particular professional norm. Nor is it important for the client to investigate the lawyer's background or personal beliefs, because these contingent features are, by definition, irrelevant to how the lawyer will perform her professional role. Given that many Americans find racial issues especially difficult and divisive, bleached out professionalism's promise to render racial questions irrelevant is likely to appear particularly welcome to clients who believe that focusing attention on race interferes with the development of supportive and effective professional relationships.[160]

Standardization is not just important for the clients, but also for the legal institution as a whole. Neutrality, or "bleached-out professionalism," ensures that lawyers will adhere to a standard set of professional norms, norms that are essential to holding attorneys accountable to a code of conduct.[161] Neutrality also helps ensure that the legal profession will remain a viable vehicle for societal advancement. Without bleached-out professionalism, the argument goes, minority lawyers might be treated differently, thus depriving them of the social benefits and prestige that ordinarily accompany a law degree.[162]

Thus, under the "ability matters, not race" variant of the Irrelevance Response, the white lawyer's pitch to his Black client is as follows: "I can and will present the best defense regardless of my race, including playing the 'race card' if that is in your best interest. My ability and professionalism will not be affected by my skin color; nor will my effectiveness on your behalf. My race, in other words, is irrelevant."

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to the law.

Id. (citation omitted).

160. Wilkins, *supra* note 117, at 1512.

161. *See id.* at 1513 (stating that removing the promise of uniformity "would arguably make it even more difficult for society to hold lawyers accountable for protecting legal rules and structures, because divergent groups of lawyers might hold quite different understandings of how they should relate to clients and state officials").

162. *See id.* at 1513-14 (discussing the reasons that abandoning the bleached-out professionalism model would "undermine the legal profession's role as an important avenue for social advancement").

2. The "no choice" variant

The second variant of the Irrelevance Response is the more practical of the two, and, in its brutally honest way, attempts to address all three of the defendant's arguments. This variant says that irrespective of the defendant's arguments on racism, effectiveness, and expediency, and even assuming the validity of those arguments, the accused's options are limited. In an ideal world the defendant could hire whomever he wants. However, in this, the real world, an indigent Black defendant who cannot hire an attorney only has three options: (1) keep the white lawyer who has already been appointed; (2) ask the court to appoint a different lawyer who is of the same race as the defendant; or (3) represent himself.

The last option is not a viable choice for most defendants, given the complexity of the criminal law and trial practice.[163] Self-representation is even less attractive for those who are in custody. Moreover, there are legal disincentives. For example, a pro se litigant who is convicted may not thereafter be allowed to complain of ineffective assistance of counsel.[164] Similarly, the second option is not practical, both because the accused does not have the right to choose who his appointed counsel will be,[165] and because it would be improper for a judge to remove the current appointed lawyer merely because the latter happens to be Caucasian. Moreover, even if the judge grants the defendant's request, there is a risk that replacement counsel will be less qualified than the lawyer he is replacing.

The first option, therefore, practically speaking, is the only one left to the defendant. Realistically, according to the "no choice" variant, the defendant should keep the white lawyer, that being the least unattractive option available. "You might not be happy with the situation," the white lawyer may say to his client, "but you are stuck with me, so let's make the best of it." Or, a lawyer with less finesse might simply say, "I'm your lawyer. Take it or

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163. *See* Amy Bach, *Justice on the Cheap*, THE NATION, May 21, 2001, at 27 (reporting that "[n]ationally, only 1 percent of felony defendants represented themselves in the nation's seventy-five largest counties in 1992"); *cf.* 3 LAFAVE ET AL., *supra* note 70, at 567 (observing generally that when a trial court denies a defendant's request for substitute appointed counsel or for more time to hire retained counsel, "[v]ery often the defendant will choose [to represent himself], noting that he does so only because it is the lesser of two evils").

164. *See* COOK, *supra* note 67, at 8-114 (stating that courts have found that "[a]n accused who elects to defend pro se may not thereafter complain of ineffective assistance").

165. *See supra* notes 68-73 and accompanying text.

leave it."

As can be seen, both variants of the Irrelevance Response seek to preserve a status quo that the defendant finds unsatisfying, and in that sense they possess shades of Freeman's Perpetrator Perspective.[166] Moreover, as with the Denial or No Racism Response, underlying the Irrelevance Response is the message that the defendant should not impede the development of a positive attorney-client relationship by resorting to racist logic or inaccurate racial stereotypes. "My race is irrelevant to my legal persona," the lawyer may counsel his client. "Work with me and I will prove it."

C. The Relevance Response

The final response our hypothetical lawyer may proffer takes the opposite approach to the Irrelevance Response. The Relevance Response acknowledges both that racism is a serious problem in this country and that irrespective of racism, the race of the lawyer (and the client for that matter) does impact both the attorney-client relationship and the lawyer's effectiveness. This response, therefore, admits the relevance of racism and race. At the same time, however, this response does not concede that the client should jettison his white court-appointed lawyer. Rather, this response says that, for a number of reasons, including the practicalities of the real world, the lawyer and client should stay together.

The Relevance Response has three variants. All of these variants focus on the effectiveness of counsel for the reason that, even for the defendant making the Racism Argument, the lawyer's effectiveness is the single most important issue for a defendant who wants to win his case. The variants differ, however, in this respect: the first two agree with the view that racism infects the criminal justice system (including the lawyer) and/or that because of his white upbringing, a white lawyer cannot fully understand or appreciate what it means to be African-American; the third variant disagrees that a white lawyer, just because he is Caucasian, cannot understand or appreciate what it means to be Black. Each of these variants will be discussed in turn.[167]

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166. *See supra* notes 133-134 and accompanying text.

167. There is another variant of the Relevance Response that, for the following reasons, is not treated in depth in this Article. This variant, which can be called the "I quit" variant, says that all of the defendant's arguments are absolutely true and his request for a Black lawyer should be honored without any discussion of the underlying issues. The lawyer says, in effect, "If you don't want me, I will quit."

1. The "you need a white lawyer" variant

The first variant of the Relevance Response attempts to respond to the defendant's Racism and Effectiveness Arguments. This variant posits that the Black defendant will be better off with a white lawyer precisely because racism infects the criminal justice system. "If you believe the system is racist," the white lawyer might say, "then you need a white lawyer."[168] This is also true if, as the Effectiveness Argument claims, the white lawyer cannot fully understand or appreciate the environment from which the African-American client comes. "I agree that I cannot fully understand your environment," a lawyer making this response might say, "but it is also true that as a lawyer, I do understand the environment of the criminal justice system. And it is within that environment that you are now forced to operate, an environment, by the way, that is primarily run by (not to mention developed and constructed by) whites."

Despite its odiousness,[169] the power of the "you need a white

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This variant constitutes a response that a conscientious lawyer would not make. First, if the lawyer truly believes, as this Article assumes, that it is in the best interests of the defendant for the latter to remain a client of the former, then the lawyer should do everything ethically within his power to persuade the defendant to remain a client. Second, the "I quit" variant is neither realistic nor practical given the real-world options discussed in Part III.B above. Finally, this variant represents a complete abdication of the lawyer's responsibility, both as an officer of the court and as a member of society, to promote justice and better relations between people of different races and ethnicities. At a minimum, a conscientious lawyer should look upon the defendant's race-based concerns as an opportunity to engage in a meaningful dialogue with an eye toward improving understanding between lawyer and client.

168. A survey of attorneys of color in the Civil Division of the New York City Legal Aid Society revealed that "many . . . clients of color actually preferred attorneys who embodied the clients' stereotype of what lawyers should be." Acevedo et al., *supra* note 5, at 35. For instance, in the survey, "[o]ne African-American [female attorney] stated 'clients must take the race of their attorney into consideration since when it comes to lawyers society thinks Jewish is better.'" *Id.* Another African-American attorney in the survey "wrote that 'sometimes clients come to the office openly stating that they want a (white) Jewish attorney.'" *Id.*

169. One reason for this odiousness is that the "you need a white lawyer" variant relies at least in part on racist logic and/or racial stereotypes that may be inaccurate. In this context, a separate question arises regarding whether the lawyer's responses should include ones that rely on such logic or stereotypes. Is it proper or even ethical for a lawyer to meet a racist argument with a racist argument? *See* Sheri L. Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1750-60, 1799-1803 (1993) (discussing the use of racial stereotypes in criminal trials and arguing the use of racial imagery by lawyers should be strictly limited, to wit: "use of racial imagery should be subject to the same strict scrutiny standard as other racial classifications"); *see also* Wilkins *supra* note 117, at 1587 (advocating against lawyers raising arguments "designed solely to appeal to the racial prejudice of jurors, [as such arguments] do nothing to further the defendant's underlying right to put the State to its proof" and stating that "arguments of this

lawyer" variant is hard to deny. The sad fact is that the system itself, and particular actors within it, do treat African Americans differently than whites. For this reason, a white lawyer may be more effective than his Black counterpart. As Wilkins has observed, "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."[170] This inequality of treatment may be particularly pronounced when race or racism is a specific issue in the case. Professor Margaret Russell, for instance, argues that certain race-based defenses may be more effective coming from a white lawyer:

> Black attorneys who raise such [issues of race] in court often face a heavy burden of justifying either that race really exists as an issue at all, or that they are competent to address the topic of race in a fair and reasoned manner. When Black attorneys articulate racism as a primary factor in a particular case, they may encounter fractious demands that they "prove it," or harsh accusations that they are "playing the race card" or otherwise engaging in unprofessional behavior . . . . 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 in issue as well.[171]

Professor Clark Cunningham has similarly suggested that on racial matters, whites may impose a higher standard of proof on Blacks making a race-based argument; that "[w]hen a white person hears a black person use a word like 'racist,' the response is often a strong defensive reaction that implicitly says to the black person, 'prove it!'"[172] Thus, a race-based argument to a white jury may fare better coming from a lawyer who is Caucasian rather than from one who is African-American.

2. The "we need to talk" variant

The second variant to the Relevance Response is more mellifluous. It is based on what has been called the Race

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kind are fundamentally contrary to the social purposes of lawyering").

170. David B. Wilkins, *Straightjacketing Professionalism: A Comment on Russell*, 95 MICH. L. REV. 795, 797 (1997). Wilkins goes on to say that "[w]hite 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." *Id.*

171. Russell, *supra* note 11, at 771-72 (1997); *see also* McIntosh, *supra* note 130, at 294 (listing as one of the privileges she enjoys because she is Caucasian, "[i]f I declare there is a racial issue at hand, or there isn't a racial issue at hand, my race will lend me more credibility for either position than a person of color will have").

172. Cunningham, *supra* note 8, at 1378. Cunningham was Associate Professor of Law at Washington University when his article appeared. *Id.* at 1298 n.†.

Consciousness Model of lawyering.[173] This model, in contrast to the Neutrality Model,[174] posits that personal identifying characteristics[175] such as race, gender, and ethnicity, are very relevant to defining an attorney's abilities and effectiveness.[176] Indeed, these characteristics can be the key reason that the lawyer is (or is not) effective. Rather than "bleaching out" these characteristics, the Race Consciousness Model says that the presence and effects of these characteristics need to be openly acknowledged and discussed. Doing so will lead to greater understanding and ultimately a better attorney-client relationship. In sum, this model of lawyering

> is based on the premise that individuals who share common personal identity factors such as race feel an affinity for one another that enhances communication and understanding between them. Since communication and understanding is vital to the attorney-client relationship, the race of both the attorney and the client has an impact on lawyering and is a factor that should be taken into consideration.[177]

Thus, this variant of the Relevance Response says that the white lawyer and the Black defendant should recognize the effects race and racism will have on their relationship and, more broadly, on the defendant's case. This means that both parties should specifically discuss race. That discussion may obviously be difficult and perhaps painful, but the result will be enhanced communication and better understanding between the two. This, in turn, will strengthen the attorney-client relationship and thereby make the lawyer a more effective advocate. "I want to understand and appreciate the differences between us," the lawyer may say, "so that I can see the positive and negative effects of those differences, and more meaningfully explain your story to the judge/jury/prosecutor."[178]

The "we need to talk" variant accordingly attempts not only to acknowledge the concerns underlying the defendant's three

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173. *See* Acevedo et al., *supra* note 5, at 3-4, 12-19.

174. *See supra* notes 155-162 and accompanying text.

175. Bill Hing refers to these kinds of characteristics as "personal identification differences." *See* Bill O. Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807, 1808 (1993); *see also* Acevedo et al., *supra* note 5, at 3 n.7 (referring to such characteristics as "personal identity factors").

176. *See* Acevedo et al., *supra* note 5, at 3.

177. *Id.*

178. It is also possible that the end result of the "race discussion" between lawyer and client is that the two agree that the defendant would be better served by an African-American lawyer. While this is not the preferred result, it is one that this variant must acknowledge and accept.

arguments, but also, at least on a micro-level, to address those concerns. In this sense, this variant is akin to Freeman's Victim Perspective, the goal of which is to address the underlying conditions that cause racial discrimination.[179] Like that perspective, the "we need to talk" variant seeks to address the underlying problem of a fractured, racially divisive attorney-client relationship by encouraging greater and better communications between the parties about that problem.

But why should the defendant undertake this task? If, as the Effectiveness and Expediency Arguments claim, a Black lawyer can be more effective without the need for "re-tooling," then why should a Black defendant bother with a white lawyer? There are at least three answers to this question. First, as already noted, the real-world practicalities are such that the appointed lawyer and indigent defendant are stuck with each other, for better or worse. The parties might as well opt for "better," especially given their shared objective to win the defendant's case. Second, any lawyer, Black or white, who successfully goes through the process of meaningfully talking about race with his client will be a more effective advocate on his client's behalf than a lawyer who does not go through this process. This means that a white lawyer who is "race conscious" because of such discussions will likely be more effective than a Black lawyer who has not engaged in such discussions with his client. Finally, race-conscious discussions contemplated by the "we need to talk" variant will improve the knowledge and understanding of white lawyers and Black defendants, which, in turn, may contribute to justice and an improvement in the racial discourse in society as a whole. In other words, there is a social ethic that demands that people of different races and ethnicities learn to get along with each other. Hence, in contrast to the "you need a white lawyer" variant of the Relevance Response, which perpetuates the divisiveness between the races, the "we need to talk" variant attacks the divisiveness problem directly, thereby furthering the Sixth Amendment's efforts at achieving justice.

Moreover, there is empirical support to buttress the "we need to talk" variant's claim that discussing race will benefit the attorney-client relationship. Wilkins recently observed, for example, that "a series of pioneering studies [have] determined that interracial teams that openly discuss issues of race are more likely to form long-term supportive and productive working

179. *See supra* notes 135-136 and accompanying text.

relationships."[180] One of these studies examined twenty-two pairs of cross-racial (Black-white) work relationships and found that the junior people in these relationships who wanted to directly engage the senior people on racial differences were more likely to obtain greater satisfaction and benefits from those relationships when the senior people shared the desire to directly discuss race.[181] This study suggests that our hypothetical Black client-white lawyer relationship will have the greatest chance of being mutually satisfying when both parties actively discuss racial differences. Similarly, Professor Cynthia Estlund has noted that:

> Numerous controlled studies have shown a positive relationship between even short-term cooperative interaction with equal-status partners and feelings of respect and liking for the other-race individual. One recent survey of the research concludes that "there is undoubtedly a positive correlation, generally speaking, between reported interaction of members of an ethnic out-group and positive or friendly attitudes toward that group."[182]

In sum, the "we need to talk" variant recommends that, to further quote Wilkins, "lawyers . . . cast off the bleaching pretensions of mainstream legal discourse and confront directly the extent to which race and racism are thoroughly enmeshed in legal discourse."[183]

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180. Wilkins, *supra* note 117, at 1592.

181. *See* Thomas, *supra* note 8, *passim* (1993). Ironically, junior and senior people who both did not want to directly discuss race were also found to develop more satisfying and beneficial relationships. *See id.* at 177, 190. This finding points out that for the relationship to be most satisfying, both parties to it must agree on whether racial differences will or will not be discussed. *See id.* Thus, given that our hypothetical defendant wants to openly address race and racism, it behooves our hypothetical lawyer to acknowledge the relevance of race in the relationship.

182. Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 24 (2000) (citations omitted). Estlund was Professor of Law at Columbia Law School when her article appeared. *Id.* at 1 n.*. She further observes that:

> A leading early theory of prejudice posited that negative stereotypes and hostility toward other racial groups flourished in ignorance and that close contact between members of different races improved racial understanding and racial attitudes. Segregation was thus as much the cause as the result of racial tension and division. Integration, and positive interracial contacts, were the answer . . . . [This theory] has been tested, and has usually been confirmed, in a large number of empirical studies using many different methodologies—field studies, survey research, and laboratory experiments—in a wide range of settings.

Id. at 22-24.

183. Wilkins, *supra* note 117, at 1520 (summarizing the view of critical race theorists who believe that "the experiences of minority lawyers and litigants can only be understood through the lens of the 'master narrative' of race").

3. The "on my own" variant

The final variant of the Relevance Response is similar to the "we need to talk" variant in that it also acknowledges the value of understanding and appreciating the racial differences between lawyer and client. The "on my own" variant, however, does not recognize the need for race-conscious communications between the two parties. Rather, this variant says that the lawyer can get there on his own. That is, this variant claims that the lawyer is already conscious of the racial differences and fully appreciates the effects of those differences. The lawyer may make this claim based on his own life experiences, including his knowledge of racism and its effects; his experiences with other defendants; or his conversations or other interactions with people of color. "I understand where you are coming from," this attorney might say, "because I have personally experienced/witnessed racism and its effects, and I can use the knowledge acquired from that experience on your behalf."[184]

A theme running through this and the "we need to talk" variants is that the client should refrain from relying on unsubstantiated assumptions that the lawyer cannot be effective merely because he is white. Such assumptions can hinder the development of a positive attorney-client relationship. The defendant can ill afford such a result, the "on my own" variant cautions, given what is at stake: the defendant's life and/or liberty.

IV. Seeking a Resolution

The problem of an attorney-client relationship that is rife with racial tension, as our hypothetical relationship is, cannot be solved solely by resort to one or more of the possible attorney responses outlined above. Below are some suggestions for improving that relationship, including granting the indigent defendant more say in choosing who his appointed lawyer will be. Striving for such improvement should be the goal of every lawyer, appointed or not. That said, some of the suggestions recognize that sometimes the defendant's best option is to terminate the relationship with his white lawyer and seek new appointed counsel.[185]

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184. The "on my own" variant attempts to answer the claim of the Effectiveness Argument that a white lawyer cannot be as effective as a Black one because the former cannot understand or appreciate what it means to be a person of color.

185. In the end, an appointed lawyer must respect his client's desire to

Addressing a Black defendant's concerns with being assigned a white court-appointed lawyer also is important to furthering the Sixth Amendment goal of ensuring that justice be done. As noted previously, the concept of justice is important on both the micro-level (for the defendant) and on the macro-level (for the judicial system). With respect to the former, addressing the defendant's concerns will result in better communication between lawyer and client, which, in turn, may lead to enhanced trust and attorney effectiveness. Improved effectiveness may not only positively affect the outcome of the defendant's case, but it also may contribute to the defendant's perception of fairness. This perception is a prerequisite to the defendant believing that the criminal justice system is legitimate and that its verdicts should be accepted and respected both during the pendency of his case and afterward, when he rejoins society.[186]

The actuality and perception of fairness is also key to achieving justice on the macro-level. Better communication between lawyers and clients, which leads to improved attorney effectiveness, means that more appropriate criminal charges will be filed, fewer innocents will be found (or plead) guilty, and fairer sentences will be imposed. These more just outcomes and the perception of fairness that they engender will bolster the integrity of the criminal justice system and the public's respect for it.

The system's integrity also will be enhanced because poor defendants will obtain the same meaningful and effective attorney-client relationships that defendants of means now take for granted. Some parity will thus be restored to the appointed, versus retained, attorney relationship. Finally, addressing an African-American defendant's concerns with being assigned a white lawyer will further justice beyond the criminal justice system by improving race relations between Caucasians and

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terminate the attorney-client relationship even if the former believes that decision to be in error or not in the best interest of the defendant. *See* 3 LAFAVE ET AL., *supra* note 70, at 595 (stating that the attorney must abide those decisions that are within the power of the client to make). In this context, moreover, the lawyer should not consider what is best for society at large given his duty of fidelity and loyalty to the client. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2000) ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

186. A defendant who does not respect the criminal justice system may also choose to "opt out" of it by refusing to work with or rejecting the court-appointed attorney. The system's typical response to such a defendant is to require him to work with the lawyer or force the accused to represent himself with the appointed lawyer as an advisor. These responses do not produce judgments, verdicts, or sentences that society can deem reliable or fair. Thus, if enough defendants choose to "opt out," the entire criminal justice system may break down.

people of color. Such justice should be a goal of every person, lawyer or not.

With this preamble, this Article now attempts to further the Sixth Amendment's goal of ensuring justice by offering some suggestions for improving our hypothetical attorney-client relationship.

A. Promote Greater and Better Communication

The cornerstone of trust in a white attorney-Black client relationship cannot be laid without meaningful communications about race and racism. As the Race Consciousness Model recommends, lawyers and clients of different races should talk about race and its effects, if any, on the defendant's case.[187] Ignoring those effects, per the Neutrality Model,[188] does not address the underlying causes of racial tension. Dissipating that tension will only come, as Freeman's Victim Perspective[189] says, by directly attacking the conditions underlying that tension.

At a minimum, greater and better communication will help sensitize the parties to the influence of race in the relationship. As has been observed, "an attorney who is out of touch [about personal identification differences] may be able to get by and even achieve good results for clients. However, learning about identification differences and understanding their potential significance can only enhance the attorney-client relationship and the attorney's effectiveness."[190]

Such communication, however, should not be limited to the attorney and client. The other actors in the criminal justice system, including prosecutors, judges, and legislators, must be sensitized to the racial concerns of indigent Black defendants. Those actors should promote better, more honest communication about race.[191] Indigent defendants too, should be better educated

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187. *See supra* Part III.C.2.

188. *See supra* Part III.B.1.

189. *See supra* notes 135-136 and accompanying text.

190. Hing, *supra* note 175, at 1810.

191. *See* Alfieri, *supra* note 117, at 1367 ("Renewed calls for empathy in race-infected contexts are now widely heard, even in contemporary politics . . . ."); Walker, *supra* note 101 (commenting that "[i]n general, whites and blacks are highly conscious of race in their interactions with one another yet are unwilling to discuss openly what this means"). Walker goes on to recommend:

> More than anything, blacks and whites need to know each other as whole, complex individuals. We need to talk about the tensions underlying our interactions. That would be the first step in a long process of reckoning with this nation's racist history, in order to stem its effect on the present.

Id.

about their rights and encouraged to speak up when they have concerns. Too often, racial issues, like the metaphorical elephant, crowd the room without ever being acknowledged.

This deafening silence can be traced in part to the failed Neutrality Model's ethic of bleaching out differences such as race, gender, and ethnicity.[192] Law schools should foster race consciousness so that students learn to be sensitive to the issue of race and not afraid to discuss it. As some have advocated:

> [L]aw schools should focus more on [racial] differences, and more on communication skills . . . . Because law is taught from a neutral perspective, we may be inhibiting white students, who most likely have not been forced to examine racial issues, from developing the sensitivity that may be necessary to effectively advocate for people of color . . . . Perhaps, then, the time has finally arrived for our law schools to acknowledge that the pursuit of colorblindness is an inadequate social policy by which to achieve justice within our legal system.[193]

Despite what the Neutrality Model believes, teaching race consciousness will not undermine our legal system. First, race consciousness will not result in laws being applied with any more bias than they already are. Second, just because race and racism are openly acknowledged and discussed does not mean that lawyers will be any less effective. Indeed, as previously noted, studies and common sense say just the opposite.[194] Third, race conscious lawyering will not change the requirement that all lawyers adhere to a specified code of ethical and professional conduct. Lawyers, Black and white, who run afoul of ethical rules or who are incompetent under the *Strickland* standard, will still be held accountable.[195] Lastly, taking race into account will not

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192. *See supra* Part III.B.1.

193. Acevèdo et al., *supra* note 5, at 66; *see also* Hing, *supra* note 175, at 1830-33 (recommending that law schools teach classes and require more clinical experience in how to be conscious of personal identification differences such as race, ethnicity, and gender); *cf.* Cunningham, *supra* note 8, at 1378 (noting that some have advocated for adopting a less accusatory tone in the racial discourse, and citing as an example that whites often respond with acts of "microaggression" when accused of being discriminatory and that in response, "scholars [have] introduce[d] a new word, 'racialist,' to describe judgments and actions controlled by racial stereotypes without adopting an accusatory tone").

194. *See supra* notes 180-182 and accompanying text.

195. While not addressing the issue of race, the Defense Function Standards of the American Bar Association do address the issue of different model standards for retained versus appointed counsel. *See* ABA STANDARDS FOR CRIMINAL JUSTICE Defense Function Standard 4-1.2 cmt. (3d ed. 1993) (stating that it was not "thought appropriate to set a different standard according to the nature of the employment").

diminish the legal profession's role as an instrument of minority advancement. If anything, that role will be strengthened as race-conscious lawyers see the need for greater diversity within the legal profession.[196]

Finally, in order to promote greater and better communication, standards of professional conduct should be adopted setting forth a commitment to an improved dialogue between attorney and client on the matter of race. Such standards as the American Bar Association's Standards for Criminal Justice (Prosecution Function and Defense Function) and the Model Rules of Professional Conduct are currently silent on this issue.[197]

B. Accord Greater Weight to the Importance of a Meaningful Attorney-Client Relationship

Morris v. Slappy, it will be recalled, unequivocally rejected the view of the Ninth Circuit Court of Appeals that a "meaningful" attorney-client relationship is part of the Sixth Amendment right to counsel.[198] The facts of *Slappy* are illustrative of the lack of control many indigent defendants have over the conduct of their own cases.

Joseph Slappy was charged in San Francisco with the rape and robbery of a woman walking home from the grocery store.[199] Harvey Goldfine from the San Francisco Public Defender's Office was appointed to represent Slappy, but was hospitalized shortly before trial and thus was unable to continue with the case.[200] Six days before the scheduled trial date, another trial attorney from

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196. *See* Wilkins, *supra* note 117, at 1592 (stating that "there is substantial evidence that, contrary to the assumptions underlying bleached out professionalism, race consciousness, not colorblindness, is the most effective strategy for negotiating diversity in the workplace").

197. *See* ABA STANDARDS FOR CRIMINAL JUSTICE *passim*, Defense Function Standard 4-3.1 & cmt. (3d ed. 1993) (discussing the necessity and importance of trust and confidence, but never mentioning race or racism as a factor in the attorney-client relationship); *see also* MODEL RULES OF PROF'L CONDUCT *passim*, R. 2.1 (not mentioning race as a factor that a lawyer may consider when rendering professional advice, but instead, stating that in rendering such advice, "a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation"); *id.* at R. 8.4 cmt., para. 2 (stating that a lawyer does not engage in misconduct if he engages in "legitimate advocacy" respecting "race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status"); *cf. id.* at Scope, para. 14 (noting that the Model Rules of Professional Conduct "do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules").

198. Morris v. Slappy, 461 U.S. 1, 13-14 (1983).

199. *Id.* at 4-5.

200. *Id.* at 5.

the Public Defender's Office, Bruce Hotchkiss, was assigned to take over.[201]

On the first day of trial, Slappy complained that Hotchkiss had not had enough time to prepare his defense.[202] That complaint was rejected by the trial judge, who in the face of Hotchkiss' representations that he was prepared, refused to postpone the trial.[203] Slappy renewed this complaint on the second and third days of trial, eventually arguing to the trial court that he was unrepresented by counsel given that his initial attorney, Harvey Goldfine, was in the hospital.[204] The trial judge rejected these arguments as well, and ultimately Slappy was convicted of all charges.[205]

After his conviction was affirmed on direct appeal, Slappy brought a habeas corpus action in federal court claiming, inter alia, that the trial court erred in refusing to postpone his trial.[206] The district court rejected Slappy's claims, but the Ninth Circuit Court of Appeals reversed, ruling that the Sixth Amendment right to counsel "include[s] the right to a meaningful attorney-client relationship."[207] Finding that Slappy had established such a relationship with Goldfine, and that the trial court erred in denying the accused's request for a continuance, the Ninth Circuit ordered that Slappy be retried.[208]

The Supreme Court reversed, characterizing the Ninth Circuit's ruling as "novel" and "without basis in the law."[209] In so doing, the Court too cavalierly dismissed the importance of a meaningful attorney-client relationship, especially to indigent defendants who have little or no choice in who their counsel will be. In essence, the *Slappy* Court ignored the Sixth Amendment's goal of achieving justice by sacrificing it on the altar of expediency.

To further that goal, greater weight should be accorded to the importance of a meaningful lawyer-client relationship. This does not mean that a defendant should have a constitutional right to such a relationship or that a judge, to use the words of the

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201. *Id.*
202. *Id.* at 6.
203. *Id.* at 6-7. Among other representations, Hotchkiss said to the trial court, "I feel that I am prepared. My own feeling is that a further continuance would not benefit me in presenting the case." *Id.* at 6.
204. *Id.* at 7-9.
205. *Id.*
206. *Id.* at 9-10.
207. *Id.* at 10-11.
208. *Id.*
209. *Id.* at 13.

Supreme Court, has to "guarantee that a defendant will develop [meaningful] rapport."[210] It means simply that courts should recognize the importance of such a relationship and give greater deference thereto when called upon to assess the relations between lawyer and client.[211] In *Slappy*, the Court was wrong, as Justices Brennan and Marshall in a separate opinion pointed out, to find absolutely no merit in the Ninth Circuit's view.[212]

The consequence of according greater deference to the importance of a meaningful attorney-client relationship is that an indigent will have an easier time arguing to a trial judge that different counsel ought to be appointed to his case. Because a meaningful relationship is not something the Supreme Court thinks is worth protecting, trial judges currently have no disincentive to summarily rejecting an indigent's motion for new appointed counsel.[213] When, however, the issue of race impedes the development of such a relationship, courts should be more willing to appoint substitute counsel.

This means as well that new counsel should be appointed if the defendant can make a credible showing that his appointed lawyer will be ineffective because of the latter's race, or that a lawyer of a different race will be markedly more effective than the current appointed lawyer. This is not to say that a court should relieve an appointed lawyer merely because he is white or Black. That is a result that the legal system and society as a whole

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210. *Id.* at 13-14 (saying that "[n]o court could possibly guarantee that a defendant will develop the kind of rapport with his attorney . . . that the [Ninth Circuit] Court of Appeals thought part of the Sixth Amendment guarantee of counsel").

211. *See, e.g.*, Slappy v. Morris, 649 F.2d 718, 721 (9th Cir. 1981) (recognizing that the Sixth Amendment right to counsel "encompasses the right to have the trial judge accord weight to that relationship in determining whether to grant a continuance" when the defendant's attorney is temporarily unavailable), *rev'd* 461 U.S. 1 (1983).

212. *See Morris v. Slappy*, 461 U.S. at 19-20, 25 (Brennan, J., joined by Marshall, J., concurring in the result) (stating that an interest in a meaningful attorney-client relationship "does find support in other cases" and that "[i]n light of the importance of a defendant's relationship with his attorney to his Sixth Amendment right to counsel, recognizing a qualified right to continue that relationship is eminently sensible").

213. Currently, obtaining substitute counsel is unreasonably difficult. *See supra* notes 69-76 and accompanying text; *see also* COOK, *supra* note 67, at 8-58 (noting that a motion for new appointed counsel generally will not be successful unless "the accused can point to particular reasons for [the] dissatisfaction"); 3 LAFAVE ET AL., *supra* note 70, at 595 n.6 (citing cases that hold that a defendant is not entitled to substitute appointed counsel "where the disagreement with counsel relates to a matter within the exclusive province of the lawyer"); *cf.* COOK, *supra* note 67, at 76 (Supp. 2000) (noting that "[t]he failure of a trial court to consider an accused's complaints about appointed counsel is error").

cannot countenance.[214] However, courts should be more sensitive to the effects of personal identifying characteristics, such as race, and grant relief to an indigent defendant who can establish a credible link between those characteristics and the effectiveness of his current counsel.

Paying more attention to the meaningfulness of the attorney-client relationship will also, like Freeman's Victim Perspective recommends,[215] address the causes underlying the racial concerns of a Black indigent defendant. Courts would have to listen to those concerns if the quality of the relationship were given greater prominence than it is now. This approach also complements the Race Consciousness Model's call for greater and better communication.[216] Once the actors in the criminal justice system begin talking about race, they will be more receptive to the indigent defendant's call for a more racially meaningful attorney-client relationship. Finally, for an indigent defendant who truly wants to replace his lawyer, the above approach restores some of the defendant's dignity by giving him more control over the kind of relationship he may want to have with his lawyer.

C. Revise Procedures for Appointing Counsel

In addition to giving an indigent defendant more say in replacing his appointed lawyer, an indigent defendant should also be given greater say in the initial selection of his appointed lawyer. The procedures for appointing counsel should be revised to give the accused the option to select his own counsel. Assuming that the chosen lawyer agrees to the appointment, that he is conflict-free and qualified to handle the case, and that he or she is otherwise acceptable to the court, there is no overriding reason not

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214. An interesting question that is beyond the scope of this Article is whether a defendant who rejects his appointed counsel merely because of the latter's race violates some ethical obligation. A lawyer, of course, is prohibited from discriminating on the basis of race. Professor Wilkins, in considering this question in terms of gender, concluded that:

> Although [the] client and every other citizen is morally (and in many cases legally) required not to discriminate on the basis of status in their employment decisions, there is nothing in the nature of the attorney-client relationship that prohibits clients from seeking to obtain the services of those lawyers whom they believe will best serve their cause. Thus, the client's decision to take gender into account when hiring his lawyer stands on different ethical footing than the lawyer's decision to refuse the representation on the basis of the client's gender.

David B. Wilkins, *Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*, 11 GEO. J. LEGAL ETHICS 855, 898-99 (1998).

215. *See supra* notes 135-136 and accompanying text.

216. *See supra* Part III.C.2.

to honor the defendant's choice. Granting the accused this privilege will help bring some parity to the retained versus appointed counsel selection process, give the client greater control over the conduct of his defense, and replace some of the defendant's dignity that the current "take it or leave it" regime strips away.

Alternatively, the defendant could be assigned two alternate counsel in addition to his appointed lawyer. The latter would be responsible for meeting with the accused and representing him as usual. However, within some reasonable period of time after the appointment, the defendant could elect to substitute in any one of the alternates. The initially appointed counsel would be obligated to assist the defendant in making that decision, and the alternates would be permitted during that time period to speak with the accused about the case.[217] Once the final section has been made, or the time period had expired, the de-selected lawyers would be relieved of any further responsibility for the case.

Several scholars who have studied indigent appointments have recognized the value in allowing the client more say in the selection process. Professor Peter Tague, for instance, has argued that "an indigent will receive better representation if allowed to choose the attorney who will defend him."[218] In observing that an accused has significant reasons for wanting to choose his appointed counsel, one of which is allowing for "greater participation in structuring his defense,"[219] Professor Tague examined the justifications for the existing practice and found those justifications wanting.[220] He even believes that there is merit in the view that an accused has a constitutional right to

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217. To ensure confidentiality, the attorney-client privilege would have to be extended to cover these communications.

218. Peter W. Tague, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73, 85 (1974) [hereinafter Tague, *An Indigent's Right*] ("Despite the evidence that an indigent will receive better representation if allowed to choose the attorney who will defend him, the courts have refused to accede to this request."); *see also* Peter W. Tague, *Ensuring Able Representation For Publicly-Funded Criminal Defendants: Lessons From England*, 69 U. CINN. L. REV. 273 (2000) (suggesting that vouchers could be used to allow an indigent defendant to choose a private lawyer). Tague is currently Professor of Law at the Georgetown University Law Center. *See* GEORGETOWN UNIVERSITY LAW CENTER, http://www.law.georgetown.edu/index.html (last visited Dec. 1, 2001).

219. Tague, *An Indigent's Right*, *supra* note 218, at 99.

220. *See id.* ("[D]enying an indigent the right to choose his counsel fails to further in any substantial way legitimate government interests, interests that can be protected by less intrusive measures. The classification distinguishing indigent from nonindigent should therefore fall and an indigent should have equal opportunity to select his own counsel.").

choose his own attorney.[221]

Professors Stephen Schulhofer and David Friedman have similarly found the current methods of appointing counsel wanting.[222] They argue that indigents should be allowed control over the selection of appointed counsel through "deregulated systems," including vouchers to retain private counsel.[223] "[T]he defendant could be provided several recommendations," they suggest, "or the name of a single attorney likely to accept appointment. An even more cautious model would continue the practice of having the court appoint counsel, but would advise defendants that they can choose a substitute if they prefer."[224] The end result of such systems would be an enhanced attorney-client relationship. In their words, "[t]he mere existence of a right to choose would dissipate some of the distrust that now infects many involuntary attorney-client relationships and would *for the first time* give the appointed attorney a self-interested reason to value the satisfaction of his client as well as that of the court."[225]

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221. *See id.* at 87, 99; *see also* Holly, *supra* note 2, at 201-19 (critiquing the rationales for denying indigents the right to choose their own counsel and suggesting that because indigent defendants are obligated to repay all or a portion of the costs of their legal defense, they have a limited right to select the attorney who is assigned to them).

222. *See* Schulhofer & Friedman, *supra* note 70, at 106 (commenting that "[t]he reasons given for refusing to honor defendants' choices [of appointed counsel] are in our view insufficient"). When their article was published, Schulhofer was Bernice J. Greenberg Professor of Law and Director of the Center for Studies in Criminal Justice at the University of Chicago Law School, and Friedman was a Visiting Professor at Cornell Law School. *Id.* at 73 n.*.

223. *Id.* at 77, 101.

224. *Id.* at 103; *see also* 3 LAFAVE ET AL., *supra* note 70, at 551 (observing that "[a]t least two states [Georgia in capital cases and California] have departed from [the] traditional position that allows a trial court to completely disregard the defendant's preference for appointment of a particular counsel").

225. Schulhofer & Friedman, *supra* note 70, at 104 (emphasis in original). Schulhofer and Friedman also believe that the officials who choose appointed counsel may not have the best interests of the defendant at heart. They observe:

> A public official who chooses for the defendant is likely to have . . . a weaker incentive to make the best choice. Indeed . . . the official . . . has incentives to value cooperativeness, disinclination to work long hours, and other qualities that might not win favor with defendants themselves. Providers may end up being selected according to how well they serve the court, not how well they serve defendants.

Id. at 80. The American Bar Association also encourages the practice of allowing indigent defendants to choose their own appointed counsel. The ABA Standards for Criminal Justice, for instance, contain this recommendation:

> Neither statutes nor court decisions recognize the right of an eligible defendant to select the private lawyer of his or her choice . . . . In contrast, the defendant with sufficient funds can retain the lawyer of his or her choice and discharge an attorney when confidence in the lawyer diminishes. There is much to be said for allowing the eligible defendant, when administratively feasible, the same freedom of action available to the

In sum, fair procedures and reliable results, both components of justice, are more likely to result if the indigent has a real voice in deciding the composition and character of the relationship with his appointed lawyer. The Sixth Amendment decisions and court rules disallowing the indigent defendant any meaningful say in selecting or replacing his appointed counsel undermine that mandate for justice.

Conclusion

This Article has related the potential concerns an indigent Black defendant may have when appointed a white lawyer and some possible responses to those concerns, both by the lawyer and the system of which the lawyer is a part. Three arguments were identified that encapsulate those concerns: the Racism Argument, the Effectiveness Argument, and the Expediency Argument. Three possible responses by the lawyer, with some variants, were also identified: the Denial or No Racism Response, the Irrelevance Response, and the Relevance Response. Finally, strategies were suggested for alleviating the racial friction that may arise in the white lawyer-Black defendant relationship, including adoption of the Race Consciousness Model's goal of discussing racial differences.

The overarching goal of the constitutional right to counsel is to promote the cause of justice, both for the individual defendant, who has the right to a fair trial, and for the system of criminal justice, which needs to produce reliable results. That goal is undermined when a white appointed lawyer refuses to acknowledge or adequately address the effects his and his client's race have on their relationship. Accordingly, the appointed lawyer and the other actors in the criminal justice system should become more race-conscious and not only communicate better about race, but also acknowledge and address the concerns, whether real or perceived, that underlie an African-American defendant's objections to being appointed a lawyer who happens to be Caucasian.

> defendant of means. Where the defendant has personally selected counsel, there is likely to be greater confidence in the attorney and in the justness of the legal system generally. Obviously, if all defendants insisted on the right to choose their own attorneys, the administrative burden would surely undermine the effectiveness of the assigned-counsel system. But where the requests are few and do not pose serious administrative inconvenience, selection of counsel by defendants should be encouraged.

ABA STANDARDS FOR CRIMINAL JUSTICE Standard 5-2.3 cmt. (2d ed. 1980) (citations omitted).

Adherents of the Neutrality Model believe that racial differences do not matter and that they should be "bleached out" of the attorney-client relationship. This view is not only wrong for those defendants who believe that race matters, but it is also dangerous, for it undermines *Gideon*'s call for justice for all. Yet, it is naïve to believe that the viewpoint of those schooled to ignore race and racism can be changed overnight. But, we should begin the process. The Sixth Amendment right to counsel demands no less.

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Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straitjacket of Legal Practice

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BEYOND "SELLOUTS" AND "RACE CARDS": BLACK ATTORNEYS AND THE STRAITJACKET OF LEGAL PRACTICE

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I. INTRODUCTION: REPRESENTING RACE

For attorneys of color, the concept of "representing race" within the context of everyday legal practice is neither new nor voluntarily learned; at a basic level, it is what we do whenever we enter a courtroom or conference room in the predominantly white legal system of this country. The ineluctable visibility of racial minorities in the legal profession, as well as the often unspoken but nevertheless deeply felt sense of racially hierarchical positioning to which this visibility subjects us, are aptly expressed in the following droll recollection of a 1960s-era Black civil rights lawyer:

> A favorite story among Southern black attorneys was of the black lawyer who was to argue a case before the Mississippi Supreme Court. He had prepared his briefs with great precision and scholarship, and was quite confident that the law was in favor of his client — that is, as confident as a black lawyer can be in a Southern court. However, in his concentration on the law, he had neglected to look up the proper way to address the Supreme Court before beginning his argument. A stylized, formal address is always used in speaking to an appellate court, differing from court to court, but it's usually some variation of "May it please the distinguished Chief Justice and the distinguished Associate Justices of this Honorable Court." Being forced to call upon his instinct for an improvised form of address, he arose, looked up and down the bench, and said, "Good morning, white folks." His brief could not have stated the issue of the case more realistically and precisely than this spontaneous greeting.[1]

Although it is often assumed that people of color initiate or even "instigate" extemporaneous comments about race in legal pro-

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1. Edward A. Dawley, *Black People Don't Have Legal Problems,* Address at the Tom Paine Summer Law School (summer 1970), *in* THE RELEVANT LAWYERS: CONVERSATIONS OUT OF COURT ON THEIR CLIENTS, THEIR PRACTICE, THEIR POLITICS, THEIR LIFE STYLE 219, 220-21 (Ann Fagan Ginger ed., 1972) [hereinafter THE RELEVANT LAWYERS].

ceedings, the reality is that many people of color — like the Black lawyer in the tale above — simply articulate a subtext that is unmentioned but obvious: that their minority racial presence is forced into stark and distorted relief against an otherwise seemingly "transparent" background of white omnipresence.[2] Attorneys of color often find that they are identified, categorized, and evaluated first as members of their racial group, and only secondarily — if at all — as lawyers. In this sense, "representing race" is a fundamental and inescapable part of minority attorneys' professional identity and political function as marginalized actors in the mainstream legal system, quite apart from and transcendent of the particulars of individual client representation. As suggested above, this phenomenon derives its salience from two factors: the paucity of people of color in the legal profession;[3] and the debasing and racially prejudicial slights to which they are subjected on a recurrent basis.[4]

Regarding the first factor, minority attorneys still suffer from severe underrepresentation in the legal profession. At the beginning of this decade, Blacks, Asian Americans, Latinos and Latinas, and Native Americans comprised only twelve percent of the

2. Barbara Flagg defines "transparency" as the proclivity of whites to think of themselves as "raceless" unless they are in situations in which juxtaposition with people of color renders racial differences obvious: "The most striking characteristic of whites' consciousness of whiteness is that most of the time we don't have any. I call this the *transparency* phenomenon: the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific." Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993) [hereinafter Flagg, *Was Blind*]; *see also* Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2013 (1995) [hereinafter Flagg, *Fashioning a Title VII Remedy*]. For an extended application of the concept of transparency to the historical and legal construction of white racial identity, see IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996).

3. *See generally* TASK FORCE ON MINORITIES IN THE LEGAL PROFESSION, A.B.A., REPORT WITH RECOMMENDATIONS (1986) (recommending adoption by the ABA of policies to integrate the legal profession and create more opportunities for minority lawyers); Ramsey Campbell, *State's Legal System Lacks Minorities, Commission Says; Racial and Ethnic Bias Study Concludes Underrepresentation Has Created an Unfair System*, ORLANDO SENTINEL TRIB., Nov. 14, 1991, at D1; Rita Henley Jensen, *Minorities Didn't Share in Firm Growth*, NATL. L.J., Feb. 19, 1990, at 1; Steven Keeva, *Unequal Partners: It's Tough at the Top for Minority Lawyers*, A.B.A. J., Feb. 1993, at 50; Alexander Stille, *Little Room at the Top for Blacks, Hispanics; Outlook Better for Women, Asians*, NATL. L.J., Dec. 23, 1985, at 1; Doreen Weisenhaus, *Still a Long Way to Go for Women, Minorities: White Males Dominate Firms*, NATL. L.J., Feb. 8, 1988, at 1. Racial exclusion is revealed by not only the number of practicing lawyers, but of law faculty and law students as well. *See, e.g., Minority Women Lagging in Law Faculties*, N.Y. TIMES, Apr. 3, 1992, at A19; Saundra Torry, *At Yale Law, a Gender Gap in Who Gets Clerkships Sparks Debate*, WASH. POST, May 13, 1991, at F5 (reporting on gender and race disparities in the selection of law students for clerkships).

4. *See generally* Claudia MacLachlan, *Legal Bias: Attorneys See Discrimination*, ST. LOUIS POST-DISPATCH, Dec. 3, 1989, at E1; David Margolick, *Bar Group Is Told of Racial Barriers*, N.Y. TIMES, Feb. 16, 1985, at 15; Lena Williams, *For the Black Professional, the Obstacles Remain*, N.Y. TIMES, July 14, 1987, at A16; Jeannie Wong, *Panel Hears How Minorities See Court System*, SACRAMENTO BEE, Apr. 11, 1992, at B1.

nation's law students, less than eight percent of lawyers, eight percent of law professors, and two percent of the partners at the nation's largest law firms.[5] When compared with the overall percentage of people of color in the national population — approximately twenty-five percent[6] — these paltry figures illustrate the extent to which attorneys of color are still very much a token presence in the legal system.[7] Worse still, this phenomenon doubly exacerbates the conditions of isolation experienced by minority lawyers, because their numbers are just high enough to undermine claims of white racial exclusivity in the profession, yet far too low to facilitate the comforting sense of belonging or even anonymity that attaches quite naturally to white lawyers.[8]

The double bind that tokenization imposes on minority attorneys is the pressure to comport themselves generally as though the legal profession is integrated, colorblind, and even raceless, yet to take on the burdens — gratefully! — of role-modeling and otherwise representing their race on the occasional race commission or diversity committee instituted by their colleagues to manifest concern for the plight of minorities. Thus, minority attorneys, even while expressing their desire to volunteer to assist communities of color within and outside the legal profession, sometimes complain that they are somehow expected "naturally" to take on the emotional and temporal demands of extra "race work" as though

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5. *See* DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 53-54 (1994) (citing Jensen, *supra* note 3, at 1).

6. *See* RHODE, *supra* note 5, at 53.

7. *See* Jensen, *supra* note 3, at 28-29.

8. Invoking her everyday personal experiences as a white woman, Peggy McIntosh attributes this sense of ease to white privilege, which she describes as

> an invisible package of unearned assets that I can count on cashing in each day, but about which I was "meant" to remain oblivious. White privilege is like an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools, and blank checks.

Peggy McIntosh, *Unpacking the Invisible Knapsack: White Privilege*, CREATION SPIRITUALITY, Jan./Feb. 1992, at 33. For additional recent works advancing a theoretical critique of white privilege and its effects on legal and social relations, see CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefancic eds., forthcoming 1997); LÓPEZ, *supra* note 2; STEPHANIE M. WILDMAN ET AL., PRIVILEGE REVEALED: HOW INVISIBLE PRIVILEGE UNDERMINES AMERICA (1996); Adrienne D. Davis, *Identity Notes Part One: Playing in the Light*, 45 AM. U. L. REV. 695 (1996); Flagg, *Fashioning a Title VII Remedy*, *supra* note 2; Flagg, *Was Blind*, *supra* note 2; Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993); Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 PENN. L. REV. 1659 (1995); Martha R. Mahoney, *Whiteness and Women, In Practice and Theory: A Reply to Catharine MacKinnon*, 5 YALE J.L. & FEMINISM 217 (1993); David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 946-95 (1996).

it were the responsibility solely of nonwhites to eradicate discrimination.[9]

If tokenization represents the first set of problems confronting minority attorneys, a second set of obstacles may be attributed to the daily, unrelenting mistreatment to which many minority attorneys are subjected. Attorneys of color often find their everyday professional and personal encounters peppered with reminders of their minority status in the legal system.[10] For example, the New York Judicial Commission on Minorities found that fourteen percent of its surveyed litigators asserted that judges, lawyers, or courtroom personnel publicly repeat ethnic jokes, use racial epithets, or make demeaning remarks about a minority group "often" or "very often"; another twenty-three percent stated that such comments occur "sometimes."[11] Moreover, minorities in the legal profession report anecdotally that outside the legal setting — for example, in pursuing such mundane tasks as hailing taxis,[12] boarding elevators,[13] shopping for clothes,[14] or driving down the street[15] — they

9. On the burdens of "race work," see Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want To Be a Role Model?*, 89 MICH. L. REV. 1222, 1226-27 (1991). Delgado writes:

> Suppose you saw a large sign saying, "ROLE MODEL WANTED. GOOD PAY. INQUIRE WITHIN." Would you apply? Let me give you five reasons you should not.
>
> *Reason Number One.* Being a role model is a tough job, with long hours and much heavy lifting. You are expected to uplift your entire people. Talk about hard, sweaty work!

Id. (footnotes omitted).

10. A common complaint among minority attorneys is that in legal proceedings they are often presumed to be nonattorneys, e.g., criminal defendants, bailiffs, spectators, or — if female — court reporters or parties' wives. *See, e.g.*, Editorial, N.J. HERALD & NEWS, Sept. 16, 1991, at A4, *quoted in* RHODE, *supra* note 5, at 125 n.36 (" 'I'll come into the courtroom wearing a $500 suit with a legal folder full of briefs under my arm and the courtroom official or guard will order me into the defendant's chair,' said Newark attorney Robert L. Brown, a black man. 'They just assume automatically that if you're black, you're the one on trial.' ").

11. *See* Arthur S. Hays & Amy Stevens, *Racism Is Said to Pervade New York Courts*, WALL ST. J., June 5, 1991, at B6.

12. "Taxi stories" — describing the inability to hail a cab because of the cab driver's trepidation of the would-be passenger's skin color — are prevalent in the experiences of urban professionals of color, particularly Black males. The taxi story even entered the ranks of Hollywood movie mythology in the legal thriller *The Pelican Brief*, in which the swashbuckling hero played by Denzel Washington is stymied in his efforts to chase down an investigative lead because he cannot hail a taxi on the street in Washington, D.C. *See also* HENRY LOUIS GATES, JR., LOOSE CANONS: NOTES ON THE CULTURE WARS 147 (1992); CORNEL WEST, RACE MATTERS, at ix-xvi (1993).

13. *See* Taunya Lovell Banks, *Two Life Stories: Reflections of One Black Woman Law Professor*, 6 BERKELEY WOMEN'S L.J. 46, 49-51 (1991) (describing two white women's refusal to board an elevator in a "luxury condominium" with "five well-dressed Black women in their thirties and forties"); Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1560-61 (1989) (recounting a white female passenger's ridicule of a Black woman waiting to board the elevator).

14. *See* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 44-51 (1991) (chronicling the author's exclusion from Benetton, a chic clothing store).

are visually "sized up" according to their color rather than the accoutrements of upper-middle-class professional status that they thought might insulate them from suspicion.[16] The debilitating, lingering effects of such routine and recurrent degrading treatment should not be underestimated as significant influences in the formation of professional identity. Most attorneys of color are forced to invoke the prevailing lawyerly ethos of becoming thick-skinned and detached — that is, if they hope to remain in the profession with their sanity and composure reasonably intact. This response, combined with other age-old survival mechanisms used by people of color trapped in racist environments, usually helps render everyday interactions tolerable. But it would be naïve to assume that the above factors — tokenization and everyday, microaggressive harassment — do not exert a profound and destabilizing impact upon minority lawyers' conceptions of professionalism, attorney-client interaction, case selection, lawyering strategy, courtroom behavior, and a host of other concerns. For women of color in the legal profession, gender bias further exacerbates the burdens of "high visibility, few mentors and role models, and additional counseling and committee responsibilities."[17] Although research literature infrequently addresses the particular obstacles faced by those also discriminated against on the basis of sexual orientation or disability, one might well imagine the inhibitory effects of those factors as well.

Therefore, when a symposium such as this focuses much-needed scholarly attention on the possible intersections of critical theory and progressive practice with respect to the representation of race in the legal process, it is crucial to keep in mind that attorneys of color bring vastly different experiences from those of white attor-

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15. *See* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 691 n.76 (1995) (quoting Henry L. Gates, Jr., *Thirteen Ways of Looking At A Black Man*, NEW YORKER, Oct. 23, 1995, at 56, 58 (relating common experiences of prominent Black men who have been subjected to vehicle stops by the police and noting that "Blacks — in particular, black men — swap their [negative] experiences of police encounters like war stories, and there are few who don't have more than one story to tell. . . . There's a moving violation that many African-Americans know as D.W.B.: Driving While Black")).

16. Sadly, the tacit acknowledgement of class hierarchy in the telling of these tales is as lamentable as are the lessons of racial bias. What, one wonders, do these anecdotes reveal about assumptions made regarding the humanity of people of color who could never afford to take cabs, shop at upscale stores, dine in swanky restaurants, or drive BMWs?

17. Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1191 (1988). Few sources document the unique biases faced by women of color in the legal profession. For compelling accounts of the personal experiences of Black women in legal education, see generally *Black Women Law Professors: Building a Community at the Intersection of Race and Gender, a Symposium*, 6 BERKELEY WOMEN'S L.J. 1 (1990-91).

neys to the underlying issues at hand. Regardless of which specialty or career path within the legal profession minority attorneys choose, they face a distinctly different set of obstacles than do whites, particularly in cases potentially involving racial issues. Although recent scholarship in lawyering theory has been quite illuminating in exploring a broad array of themes concerning the socially constructed nature of client identity and lawyer identity in progressive practice, the role of race in these constructions deserves greater attention.[18]

In this essay, I focus on some of the pressures and constraints faced by Black attorneys in particular when addressing issues of race in legal proceedings.[19] I argue that when issues of race are at least arguably relevant factors in a case, Black attorneys face an unduly restrictive set of choices, each of which carries impossible burdens. Saddled with the tacit professional expectation of being responsible for identifying, fixing, or rationalizing away race problems *outside* the courtroom, Black attorneys who raise such concerns *in* court often face a heavy burden of justifying either that race really exists as an issue at all, or that they are competent to address the topic of race in a fair and reasoned manner. When Black attorneys articulate racism as a primary factor in a particular case, they may encounter fractious demands that they "prove it," or harsh accusations that they are "playing the race card" or otherwise engaging in unprofessional behavior. Conversely, when Black attorneys take on advocacy obligations that require the subordination and decontextualization of issues of race in the service of other

18. Recent articles exploring these concerns include Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995); Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807 (1993); Michelle S. Jacobs, *Legitimacy and the Power Game*, 1 CLINICAL L. REV. 187 (1994); Symposium, *Political Lawyering: Conversations on Progressive Social Change*, 31 HARV. C.R.-C.L. L. REV. 285 (1996); David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030 (1995); 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 (1993).

19. Some of the observations expressed in this article about the quandaries faced by Black lawyers might be applied to lawyers of minority-group status generally. However, the Darden-Cochran conflict — and the set of race and legal practice issues that it embodies — strikes me as particularly emblematic of burdens specifically faced by Black lawyers because of the culturally distinct set of stereotypes endured by Blacks. In using expansive terms such as "Black lawyers" and "Black communities," I am of course mindful of the diversity of backgrounds and viewpoints that these labels necessarily include.

I also acknowledge that within the community of Black attorneys, other factors (e.g., gender and sexual orientation) signify other salient differences in experiences and perspectives. This article posits that the problems discussed herein apply to Black attorneys generally, without delving into those additional dimensions.

objectives, they may be labeled as "sellouts" who have abandoned their communities. Whatever the choice, the focus of such cases inevitably becomes not just race, but *their* race and *their* lawyerly merits as well. 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 in issue as well. This additional layer of scrutiny and suspicion may in turn raise for the Black attorney difficult professional and personal questions of identity, autonomy, authenticity, and loyalty. Unless, as suggested above, Black attorneys steel themselves mentally and emotionally for the extra demands of race work in a legal system that still operates on the unspoken assumption that fixing race problems is naturally the work of minorities, they are destined to lead professional lives of fatigue, frustration, and perhaps exploitation.[20] This in turn significantly undermines the social-justice imperatives that lead public-spirited Blacks — whether in the private or public sectors — to select law as a career path in the first place.

Thus, I argue, Black attorneys encounter not only a glass ceiling barring their vertical and hierarchical career advancement, but a type of glass bubble as well that severely circumscribes the flexibility and creativity so critical to the Black lawyer's — or indeed any lawyer's — professional identity. Stereotypical, externally imposed assumptions about the role and function of Black attorneys have the powerful effect of straitjacketing and asphyxiating Blacks in an already highly restrictive environment. While it is important for Black lawyers — like other lawyers — to subject themselves to rigorous critique regarding the political and societal implications of their career choices and professional behavior, I am wary of the strong tendency of mainstream popular and legal discourses to find ways to castigate Black attorneys for problems essentially not of their creation. Thus, in evaluating the microcosm of Black legal practice, it is essential to locate it within its macrocosm of constructed racial meaning. The Black attorney generally is not accorded the respect, autonomy, or even anonymity enjoyed by her white colleagues, and she is therefore doubly disadvantaged by the imposition of careerist pigeonholes and expectations.

20. For a report on the enervating effects of tokenism on minority law professors, see generally Roy L. Brooks, *Life After Tenure: Can Minority Law Professors Avoid the Clyde Ferguson Syndrome?*, 20 U.S.F. L. Rev. 419 (1986); Richard Delgado, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 Harv. C.R.-C.L. L. Rev. 349 (1989).

To illustrate the straitjacketing that I suggest is quite typical in the life of the Black attorney, I draw upon a seemingly atypical example: public commentary on the work of two prominent and now infamous Black attorneys — prosecutor Christopher Darden and defense attorney Johnnie Cochran in the murder prosecution of O.J. Simpson. Because of the ubiquity of media coverage of the trial — including the melodramatic effect of cameras in the courtroom — Cochran and Darden rapidly became two of the most recognizable Black lawyers in this nation's history. Only the televised confrontation of Clarence Thomas and Anita Hill has exposed Black attorneys so intensely to the voyeuristic scrutiny of the American television-viewing public.[21] Yet, a closer examination of public attitudes toward Darden and Cochran reveals patterns quite common in the treatment of Black lawyers generally.

Public (including media) reaction to the lawyering styles of these two men in the so-called "Trial of the Century"[22] exemplifies what I describe below as the " 'Sellout' vs. 'Race Card' " trope: when issues of race are even potentially relevant in a particular case, Black attorneys are cabined within a false dichotomy of options that implicate not just questions of lawyering strategy, but public generalizations about their racial identities and professional skills as well. The dichotomy is false because its components have been erroneously constructed as opposites: (1) claiming the irrelevance of race, or perhaps even denying so vehemently that racism is at issue that one is branded an "assimilationist" or "sellout;" *versus* (2) raising racism as an issue, thereby risking accusations that one is recklessly "playing the race card" and pandering to racial tensions.

In my view, this putative oppositeness is a construct that obscures the complexity of the value and strategy choices faced by Black attorneys in several ways. First, in the metanarrative or "master narrative"[23] of a predominantly white legal system, this

21. On the popular cultural mythology engendered by the Hill-Thomas hearings, see Anna Deavere Smith, *The Most Riveting Television: The Hill-Thomas Hearings and Popular Culture, in* RACE, GENDER AND POWER IN AMERICA: THE LEGACY OF THE HILL-THOMAS HEARINGS 248 (Anita Faye Hill & Emma Coleman Jordan eds., 1995).

22. Gerald F. Uelmen wryly notes that his research "has uncovered at least thirty-two trials since 1900 that have been called a 'trial of the century.' " GERALD F. UELMEN, LESSONS FROM THE TRIAL: *THE PEOPLE V. O.J. SIMPSON* 204 (1996).

23. *See* Lisa Lowe, *Heterogeneity, Hybridity, Multiplicity: Marking Asian American Differences,* 1 DIASPORA 24, 26 (1991) (discussing the role of metanarratives or "master narratives" in imposing "minority" cultural identity upon Asian Americans). In discussing the role of media discourses in sharpening tensions between African Americans and Korean Americans in the wake of the acquittal of the police officers in the first "Rodney King" trial, Lisa Ikemoto observes: "I use 'master narrative' to describe white supremacy's prescriptive, conflict-constructing power, which deploys exclusionary concepts of race and privilege in ways

false construction of opposites serves the backlash function of focusing attention on microcosms of intraracial conflict and public criticisms of individual Black attorneys, rather than on the more noxious legal and social contexts in which they operate. Second, it straitjackets Black attorneys by stereotyping and unnecessarily restricting their choices of potential advocacy strategies. Finally, the hyperbole surrounding the false dichotomy mischaracterizes the meaning of community affiliation and racial identification to many Black attorneys who are engaged in an ongoing struggle to be viewed not as racial icons, but as real-life, three-dimensional human beings.

Accordingly, this essay addresses the "Sellout"-"Race Card" quandary in the following manner: Part II briefly sets forth as illustrative the experiences of an earlier generation of Black attorneys who faced overt challenges to their professional competence based solely on their identities and experiences as Blacks. Part III describes the "sellout" and "race card" tropes as used against Darden and Cochran, respectively, in the Simpson case; I use these terms to epitomize the constraints faced by Black attorneys as they struggle through complex questions of race within the context of individual cases. I conclude by urging Black attorneys to resist such straitjacketing, particularly in the service of progressive antisubordination lawyering strategies.

Given the almost overwhelming degree of fascination with the O.J. Simpson case, its cultural and intellectual implications, and its variable symbolic values,[24] one major caveat bears mention and reiteration: this is not an essay about the merits of the Simpson case,[25] nor about the personal characters or legal talents of Christo-

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that maintain intergroup conflict." Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American / Korean American Conflict: How We Constructed "Los Angeles,"* 66 S. CAL. L. REV. 1581, 1582 (1993) (footnote omitted). I suggest that Ikemoto's point might be applied usefully to the role of the master narrative in maintaining *intragroup* conflict — such as "Darden versus Cochran" or "sellouts versus race cards" — as well. *See also* Charles R. Lawrence III, *The Message of the Verdict: A Three-Act Morality Play Starring Clarence Thomas, Willie Smith, and Mike Tyson, in* RACE, GENDER, AND POWER IN AMERICA: THE LEGACY OF THE HILL-THOMAS HEARINGS, *supra* note 21, at 118 n.3 ("In using the term 'Master Narrative' . . . I refer . . . to the narrative of American society in which the subordination of certain groups has been structured along race and gender lines.").

24. *See* Janny Scott, *The Joy of Deconstructing O.J.: At Symposium, Deep Thoughts and Cheap Thrills,* N.Y. TIMES, Sept. 25, 1996, at B1 (analyzing scholarly obsession with deriving social significance and historical lessons from the Simpson case). For a compelling analysis of race and gender in both the O.J. Simpson and Susan Smith murder trials, see Cheryl I. Harris, *The Foulston & Siefkin Lecture: Myths of Race and Gender in the Trials of O.J. Simpson and Susan Smith — Spectacles of Our Times,* 35 WASHBURN L.J. 225 (1996).

25. There are, of course, voluminous sources of information about this matter. Major media have covered the case since its inception in June 1994 with the murders of Nicole Brown Simpson and Ronald Goldman, and their preoccupation continued in connection with

pher Darden and Johnnie Cochran. For what it is worth, I believe that both men are talented lawyers committed in many respects to racial justice and Black community betterment. Rather, my point is to demonstrate that the public accentuation of the Cochran-Darden conflict — as well as the valorization and vilification to which each man has been subjected — reveals far more about the burdens shared by all Black attorneys than about Cochran's and Darden's individual differences.

II. Lessons from Elders: The Nexus Between Race and the Undermining of Professional Credibility

The achievements and visibility of a substantial number of Blacks in the legal profession constitute a relatively new phenomenon, but the scrutiny and suspicion with which they are treated in mainstream legal practice do not. Often, such distrust expresses an underlying belief that being reasoned and objective as a legal professional — particularly with regard to issues of race — is somehow at odds with the sustenance of Black racial identity. For example, a generation ago, in *Pennsylvania v. Local Union 542, International Union of Operating Engineers,*[26] Judge Leon Higginbotham was called upon by defendants to recuse himself from a class action brought under the Civil Rights Act of 1964 and other civil rights statutes. The state-initiated suit sought legal and equitable relief against defendant union officials for alleged race discrimination against the twelve Black complainants and the class they represented. In their motion for recusal,[27] the defendants argued that Judge Higginbotham's status as a prominent Black civil rights scholar and advocate rendered him unqualified to adjudicate claims of race discrimination in a fair and impartial manner. In a lengthy

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the civil trial of the Brown and Goldman families against Simpson. In addition, many of the attorneys on both sides of the criminal prosecution have published books about the trial. *See, e.g.*, Johnnie L. Cochran, Jr. with Tim Rutten, Journey to Justice (1996); Christopher A. Darden with Jess Walter, In Contempt (1996); Alan M. Dershowitz, Reasonable Doubts: The O.J. Simpson Case and the Criminal Justice System (1996); Robert L. Shapiro with Larkin Warren, The Search for Justice: A Defense Attorney's Brief on the O.J. Simpson Case (1996); Uelmen, *supra* note 22. Other recent books about the case include Vincent Bugliosi, Outrage: The Five Reasons Why O.J. Simpson Got Away With Murder (1996) and Jeffrey Toobin, The Run of His Life (1996). Recently, a law journal devoted an entire issue to the topic of race and gender in the Simpson case. *See* 6 Hastings Women's L.J. 121 (1995).

26. 388 F. Supp. 155 (E.D. Pa. 1974).

27. *See generally* 28 U.S.C. § 144 (1988) ("Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.").

and detailed consideration of the motion, Judge Higginbotham summarized the defendants' reasons for requesting disqualification as follows:

> That "I [have] identified, and [do] identify, [myself] with causes of blacks, including the cause of correction of social injustices which [I believe] have been caused to blacks"; that I have made myself "a participant in those causes, including the cause of correction of social injustices which [I believe] have been caused to blacks"; . . . [t]hat "in view of the applicable federal law," and by reason of my "personal and emotional commitments to civil rights causes of the black community, the black community expectation as to [my] leadership and spokesmanship therein, and the basic tenet of our legal system requiring both actual and apparent impartiality in the federal courts," my "continuation . . . as trier of fact, molder of remedy and arbiter of all issues constitutes judicial impropriety."[28]

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28. 388 F. Supp. at 158 (quoting defendants' affidavits in support of the motion). In his opinion denying the motion, Judge Higginbotham summarized the fifteen allegations relied upon by the defendants in their affidavits. The accompanying text represents the court's summary of the last two of these fifteen points, which I have chosen to excerpt because they seem most emblematic of the charge of "bias" brought by the defendants. However, because I do not wish to risk mischaracterizing or unfairly truncating the broad-ranging nature of defendants' plethora of claims of bias, I include Judge Higginbotham's summary of their first thirteen points as well:

1. That the instant case is a class action, brought under the Civil Rights Act of 1964 and other civil rights statutes, charging that defendants have discriminated against the twelve black plaintiffs and the class they represent on the basis of race, and seeking extensive equitable and legal remedies for the alleged discrimination;
2. That I will try the instant case without a jury, and that I am black;
3. That on Friday, October 25, 1974, I addressed a luncheon meeting of the Association for the Study of Afro-American Life and History, during the 59th Annual Meeting of that organization, "a group composed of black historians";
4. That in the course of that speech I criticized two recent Supreme Court decisions which involved alleged racial discrimination, and said, *inter alia,* that:
   (a) "I do not see the [Supreme] Court of the 1970's or envision the Court of the 1980's as the major instrument for significant change and improvement in the quality of race relations in America";
   (b) "The message of these recent decisions is that if we are to deal with the concept of integration, we must probably make our major efforts in another forum";
   (c) "As I see it, we must make major efforts in other forums without exclusive reliance on the federal legal process."
5. That I used the pronoun "we" several times in the course of the speech, and that my use of this pronoun evidences my "intimate tie with and emotional attachment to the advancement of black civil rights";
6. That by my agreement to deliver the speech I presented myself as "a leader in the future course of the black civil rights movement";
7. That my speech took place in "an extra-judicial and community context," and not in the course of this litigation;
8. That the following day, Saturday, October 26, 1974, *The Philadelphia Inquirer* published "an article appearing under a predominant headline on the first page of the metropolitan news section, . . . describing the October 25th meeting and publishing the aforementioned quotes";
9. That approximately 450,000 copies of *The Philadelphia Inquirer* containing this account were distributed publicly on or about October 26, 1974;
10. That this account made "the community at large" aware of my "significant role as a spokesman, scholar and active supporter of the advancement of the causes of integration";

The extraordinary nature of the defendants' disqualification motion did not go unnoticed by Judge Higginbotham, nor did its underlying assumptions about the nexus between being Black and the ability to fulfill professional obligations of fairness and impartiality with respect to issues of race. In an opinion even more extraordinary than the motion itself, Judge Higginbotham engaged in a brilliant disquisition on racial injustice, the burdens suffered by Blacks in the legal profession,[29] and the "raced" nature of all jurisprudence. Acknowledging the difficulty inherent in acting as "judge in [one's] own case"[30] — that is, in assessing his own impartiality, as required by the recusal statute — Judge Higginbotham carefully addressed the factual underpinnings of each of the defendants' assertions and responded to their claims of bias in great detail. He explained why his pride in his heritage and commitment to racial equality should not be viewed as a "partisan" matter that would somehow compromise or undermine his professional integrity.[31] In rejecting the defendants' tacit presumption that a Black judge posed a unique threat to norms of judicial neutrality with respect to race, he commented:

> [A] threshold question which might be inferred from defendants' petition is: Since blacks (like most other thoughtful Americans) are aware of the "sordid chapter in American history" of racial injustice, shouldn't black judges be disqualified *per se* from adjudicating cases involving claims of racial discrimination? . . . [T]he absolute consequence and thrust of their rationale would amount to, in practice, a *double standard* within the federal judiciary. By that standard, white judges will be permitted to keep the latitude they have enjoyed for centuries in discussing matters of intellectual substance, even issues of

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11. That I believe "that there has been social injustice to blacks in the United States"; "that these injustices must be corrected and remedied"; and "that they must be remedied by extra-judicial efforts by blacks, including [myself]";
12. That "the very invitation to speak," "the content of [my] remarks" and my "posing for photographs" after the address identify me as "a leader for and among blacks," and "one of the country's leading civil rights proponents";
13. That I am a "celebrity" within the black community . . . .

388 F. Supp. at 157-58 (footnotes omitted).

29. In explaining the considerable lengths undertaken to provide historical context, scholarly documentation, and precise analytical constructs for his reasoning in denying a seemingly "simple" motion to recuse, Judge Higginbotham commented:

> Blacks must meet not only the normal obligations which confront their colleagues, but often they must spend extraordinary amounts of time in answering irrational positions and assertions before they can fulfill their primary public responsibilities.

388 F. Supp. at 181-82.

30. 388 F. Supp. at 161.

31. *See* 388 F. Supp. at 166; *see also* 388 F. Supp. at 163 ("I concede that I am black. I do not apologize for that obvious fact. I take rational pride in my heritage, just as most other ethnics take pride in theirs. However, that one is black does not mean, *ipso facto,* that he is anti-white; no more than being Jewish implies being anti-Catholic, or being Catholic implies being anti-Protestant. . . .").

> human rights and, because they are white, still be permitted to later decide specific factual situations involving the principles of human rights which they have discussed previously in a generalized fashion. But for black judges, defendants insist on a far more rigid standard, which would preclude black judges from ever discussing race relations even in the generalized fashion that other justices and judges have discussed issues of human rights. Under defendants' standards, if a black judge discusses race relations, he should thereafter be precluded from adjudicating matters, involving specific claims of racial discrimination.[32]

Although Judge Higginbotham's opinion in *Pennsylvania v. Local Union 542* represents the most detailed response to a motion for disqualification made in this vein, other Black judges have been subjected to similar challenges. Judge Constance Baker Motley, for example, defended her professional competence to preside over a sex discrimination case, explaining with withering succinctness that *everyone* — and not just she as a Black woman — is possessed of racial identity and gender identity.[33] Judge Higginbotham's and Judge Motley's observations, although articulated over two decades ago in the context of recusal challenges to the professional competence of Black members of the judiciary, have enormous significance for Black lawyers today who demand mainstream respect for and acceptance of their many-faceted roles as legal professionals and as advocates for racial and gender justice. One of the hard truths learned from Judges Higginbotham, Motley, and other "elders"[34] is that *"minority"* race, gender, or both subject one to ongo-

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32. 388 F. Supp. at 165 (footnotes omitted).

33. *See* Blank v. Sullivan & Cromwell, 418 F. Supp. 1, 4-5 (S.D.N.Y. 1975); *see also* United States v. Alabama, 582 F. Supp. 1197, 1200-02 (N.D. Ala. 1984) (Dyer, J.) (denying motion for disqualification filed against Judge U.W. Clemon in a race segregation case after the U.S. Court of Appeals ordered that another judge be assigned to hear the recusal proceedings); Paschall v. Mayone, 454 F. Supp. 1289, 1301 (S.D.N.Y. 1978) (Carter, J.) (denying motion for disqualification in race discrimination case). Interestingly, all three of the above cases — as well as *Pennsylvania v. Local Union 542* — involved challenges to the impartiality of Black judges who had been civil rights lawyers before their appointments to the bench. For a recent example of the controversy surrounding a recusal motion filed against a Black federal judge in a civil rights case, see Doug Bandow, *No Justice for Proposition 209*, WASHINGTON TIMES, Jan. 14, 1997, at A15 (discussing efforts to remove Judge Thelton E. Henderson from presiding over *Coalition for Economic Equity v. Wilson*, 946 F. Supp. 1488 (1996)); Howard Mintz, *Prop. 209 Defenders Struggle in Court*, THE RECORDER, Dec. 17, 1996, at 1; Carol Ness, *Temporary Ban on Prop. 209 Extended to All Agencies; Preference Law's Supporters Seek Judge's Ouster, Citing ACLU Connections*, SAN FRANCISCO EXAMINER, Dec. 17, 1996, at A3. For examples of recusal motions based on allegations of other "group"-related loyalties, see *United States v. Ibraham El-Gabrowny*, 844 F. Supp. 955, 961-62 (S.D.N.Y. 1994) (Mukasey, J.) (denying motion for disqualification in the World Trade Center bombing prosecution which was based in part on defense attorney William Kunstler's assertions that Judge Mukasey's adherence to precepts of Orthodox Judaism and Zionism would cause him to be biased against the defense and providing examples of other recusal motions).

34. For other chronicles of these "elders," see DERRICK BELL, CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTER (1994); J.L. CHESTNUT, JR. & JULIA CASS,

ing and pervasive assumptions of nonobjectivity and incompetence, particularly with regard to explicitly raced or gendered cases; the presumption is that "minority" group loyalties will taint professional ethics in a way that "majority" affiliations will not. As I shall discuss below, the present-day manifestations of these beliefs are different only in form but not in substance from the more explicit racial stereotypes applied to Black lawyers of earlier generations.

III. "SELLOUTS" AND "RACE CARDS": THE DARDEN DILEMMA AND THE COCHRAN CONUNDRUM

A. *The Darden Dilemma Redefined*

In his bestselling memoir of the Simpson case, prosecutor Christopher Darden comments:

> I understand that some black prosecutors have a name for the pressure they feel from those in the community who criticize them for standing up and convicting black criminals. They call it the "Darden Dilemma."[35]

Darden elaborates upon this theme in considerable detail throughout his book, explaining that his affection, pride, and concern for the Black community — *his* community — significantly motivated his decision to seek a law degree and to become a prosecutor.[36] He informs the reader of his life-long personal and professional commitment to the betterment of African Americans.[37] He further points out that in his pre-Simpson prosecutorial career, he devoted

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BLACK IN SELMA: THE UNCOMMON LIFE OF J.L. CHESTNUT, JR. (1990); MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH (1992); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975); GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983); PAULI MURRAY, SONG IN A WEARY THROAT: AN AMERICAN PILGRIMAGE (1987); JESSIE CARNEY SMITH, EPIC LIVES: ONE HUNDRED BLACK WOMEN WHO MADE A DIFFERENCE (1993); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 (1994); GILBERT WARE, WILLIAM HASTIE: GRACE UNDER PRESSURE (1984); John George, *Solo in Soul Country*, *in* THE RELEVANT LAWYERS, *supra* note 1, at 367-82.

35. DARDEN, *supra* note 25, at 472-73. The so-called Darden Dilemma has persisted as a subject of much commentary in the mainstream press — nationally and internationally — even many months after the Simpson verdict. *See, e.g.*, William Claiborne, *One Angry Man: He Couldn't Convince the Jury, but Christopher Darden Isn't Resting His Case*, WASH. POST, Mar. 20, 1996, at B1; Ellis Cose, *The Darden Dilemma*, NEWSWEEK, Mar. 25, 1996, at 58; Ros Davidson, *Lawyer at Heart of Race Dilemma*, SCOTLAND ON SUNDAY, May 26, 1996, at 15, *available in* LEXIS, News Library, Curnws File; Ken Hamblin, *No Excuse for Color-Coded Justice*, ATLANTA J. & CONST., Apr. 10, 1996, at A15, *available in* 1996 WL 8200403; Stebbins Jefferson, *Guilty of Having Moral Standards*, PALM BEACH POST, Apr. 6, 1996, at A1, *available in* LEXIS, News Library, Curnws File.

36. *See* DARDEN WITH WALTER, *supra* note 25, at 65-67, 106-07.

37. *See id.* at 14, 201, 471.

considerable energies to investigating and prosecuting racist and other lawless behavior in the Los Angeles Police Department.[38] Why then, he anguishes, was he branded by some in the Black community a "sellout" and a "token" for his decision to join in the prosecution of a wealthy Black celebrity who had evinced little concern for Blacks and had immersed himself in white privilege throughout his adult life? Darden laments:

> I had naively believed my presence would, in some way, embolden my black brothers and sisters, show them that this was their system as well, that we were making *progress* . . . [I]nstead I was branded an Uncle Tom, a traitor used by The Man.[39]

Notwithstanding what I consider to be his genuine and justifiable torment over his apparent ostracism from some in the Black community,[40] I think that Darden's articulation of the so-called Darden Dilemma ignores the root cause of his quandary. In his insistence on interpreting the charges of "sellout" and "token" almost entirely as a personal individual slight against him by the Black community rather than as a justifiably skeptical reaction to the broader racial implications of the supposedly colorblind prosecutorial strategies employed in the Simpson case,[41] he seems

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38. *See id.* at 117-39.

39. *Id.* at 13-14.

40. Despite the pervasive impression that Darden was uniformly reviled and rebuffed by a "monolithic" Black community, some Black leaders praised his work on the case and acknowledged the difficult nature of his role on the prosecution team. *See, e.g.*, Andrea Ford, *Black Leaders to Honor Darden as Role Model*, L.A. TIMES, Dec. 13, 1995, at B1; *see also* Henry Weinstein, *Delicate Case Ends on Up Note for Darden*, L.A. TIMES, Sept. 28, 1995, at A1. Weinstein reported the views of two Black leaders thus:

> "As an African American lawyer, I would say that the buttons on my shirt were popping with pride — he did a magnificent job," said Reginald Holmes, former president of the Langston Bar Assn., the largest black lawyers organization in Southern California.
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> . . . .
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> . . . "From the beginning he's been in the hot seat — an almost impossible position," said Earl Ofari Hutchinson, veteran black activist and . . . author of the forthcoming book "Beyond O.J.: Race, Sex, and Class Lessons for America."
>
> "He's feeling the pressure. He's got to be mindful of the negative comments. I think it has caused him a lot of personal discomfort and cognitive dissonance. He's in a no-win situation."

Id. at A18.

41. Others have articulated and emphasized quite different concerns in defining the Darden Dilemma. *See, e.g.*, Paul Butler, *Christopher Darden: Sour Grapes From a Sore Loser*, L.A. TIMES, March 25, 1996, at B5 (criticizing Darden for invoking a so-called dilemma as an excuse to blame Black jurors for his own professional mistakes, and asserting that Blacks generally are proud of Black prosecutors who use their power responsibly); Joan Ullman, *In Contempt*, N.Y. L.J., Apr. 26, 1996, at 2 (reviewing DARDEN WITH WALTER, *supra* note 25 (summarizing the underlying question posed by the Darden Dilemma as: "How can any black prosecutor justify his role of sending more black men into prisons already overcrowded with this minority population, or worse yet, of wresting convictions that carry the death penalty?")); James Varney, *Few Black Lawyers Work for DA's Office*, NEW ORLEANS TIMES-PICAYUNE, Apr. 15, 1996, at A1, *available in* LEXIS, News Library, Curnws File

to view his dilemma as a dichotomous conflict of a Black prosecutor's loyalty to justice *versus* obeisance to antiwhite racism in Black communities. This interpretation is reinforced by much of the hyperbolic and at times contemptuous public commentary that helped construct the Darden Dilemma: the brave, law-abiding Black prosecutor *versus* the Simpson-loving, lawless Black community and jurors;[42] the truth-seeking "colorblindness" of the State *versus* the inflammatory race-baiting of the defense; the Black attorney's choice of seeking justice (even at the risk of being called a sellout) *versus* playing the race card.[43] By failing to reflect upon the distortion of meaning inherent in such constructions, Darden was as much a victim of these false dichotomies as he was their embodiment and defender.

A more nuanced understanding of the Darden Dilemma would acknowledge the integrity of Black communities, Black jurors, *and* Black attorneys in Darden's position who inevitably confront similar predicaments. This reinterpretation would focus intently on the broader legal, political, and societal framework within which all of these actors operate.[44] As discussed earlier, it is my view that racism severely limits the public credibility and lawyering choices of Black attorneys not only in a vertical, ladder-climbing, "glass ceiling" career sense, but also in terms of the latitude and autonomy

(" 'I've been battling this ever since law school in 1984,' said Orleans Parish assistant district attorney Glen Woods, who is black. 'How can you walk in and prosecute another African-American when you know how we've been persecuted? There aren't many of us, but I'd rather be on the inside watching white people to make sure they don't screw us over.' ").

42. For a examination of various meanings of lawbreaking to Blacks, see Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769 (1992).

43. Ken Hamblin provides a particularly noxious example of this false dichotomization:

> We all might assume that obeying the law and applying it equally under the Constitution would be a tough job for your average white racist member of the Ku Klux Klan, the Aryan Nation or the skinheads — hypothesizing that one of them could rise to power as a district attorney. We would demand nonetheless that they leave their bias behind to serve as the people's counsel.
>
> But what are the obligations of minorities? Should we allow them to maintain a special allegiance to people of color?
>
> . . . .
>
> . . . [M]inority prosecutors face people who see them as "turncoats for having the temerity to prosecute people of color."
>
> I call that liberal hogwash, pure and simple. If you can't stand the heat, get out of the kitchen. Become a social worker or go to work in the public defender's office before pursuing the fast-track political career of a big-city prosecutor.
>
> Stop polluting the legal profession.

Hamblin, *supra* note 35, at 15.

44. *See, e.g.*, Varney, *supra* note 41 (discussing the complex effects of economic, political, philosophical, and personal factors on Blacks' decisions to become prosecutors). According to figures cited by an official of the National Black Prosecutors Association, approximately 800 (or three percent) of the 30,000 prosecutors nationwide are Black, as compared with four percent of the defense attorneys. *See id.*

that they are accorded in juggling and reconciling competing obligations to Black communities and to the legal profession at large. Moreover, as Black attorneys seek an integrated and authentic fusion of personal and professional identities in a legal system that relegates them to a mere token presence, they often face confinement along an extremely narrow continuum of stereotypical identities. If they choose a career path not typically associated with the pursuit of racial justice — for example, corporate law or criminal prosecution — dominant popular discourse (even more than the "Black community") pigeonholes them with an array of labels ("assimilationist," "colorblind," "mainstream," "conservative," "sell-out"), all of which reinforce the ideology that such individuals are divorced from their "Blackness"; Black attorneys in such a situation face the dubious "privilege" of being rewarded and valorized by white institutional culture for the very qualities that garner doubt and suspicion from minority communities.[45] This contributes to the systemic schizophrenia that lies at the heart of the Darden Dilemma and that legitimately fuels Black community critiques in particular circumstances.[46]

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45. The role of whites — and not just or even primarily Blacks — in constructing and perpetuating these assumptions should not be underestimated. Consider also the vastly different ideological concerns that may undergird majority attitudes in their relations with so-called assimilationist Blacks in the context of the following retrospective on the life of Ronald H. Brown, the Black commercial lawyer and former Democratic National Committee chairperson who served as Commerce Secretary in the Clinton administration:

> Some viewed Mr. Brown (the son of a middle-class family) as proof that race is no longer a barrier to success; that policies such as affirmative action — which they consider unfair anyway — should be jettisoned. "By any definition, he was an amazing success in the American political arena," said Clint Bolick, vice president of the Institute for Justice, a public interest law firm that opposes affirmative action. "It kind of proves that the American system works; that if you've got brains and talent you can rise to the top regardless of your race."
>
> . . . .
>
> . . . [M]any people, particularly business executives he dealt with as Commerce Secretary, say they did not see his race at all when they looked at him, just skill at deal-making and promoting American business interests abroad.

Steven A. Holmes, *Remembering Ron Brown: So Visible, but From Which Angle?*, N.Y. TIMES, Apr. 7, 1996, § 4, at 1. Assertions such as the one made by Bolick reveal an ignorance of — or perhaps refusal to respect — Mr. Brown's relations with the community as well as his concerns for Black community empowerment.

46. There is some indication that the much-publicized Darden Dilemma has engendered broader public awareness of the persistence of these concerns among Blacks at least to a limited extent. Steven Holmes writes:

> [I]f Mr. Brown evokes a confusion, it is focused mainly among whites. For in his adeptness at playing many roles, he was the very model for the increased number of blacks striding into the professional class — with varying degrees of success — who must straddle two different and often mutually suspicious worlds. As they deal with enhanced opportunities, glass ceilings, grumblings from whites that they are too willing to play the race card, and self-doubts about whether they are becoming Uncle Toms, they can look at Mr. Brown and see something startlingly familiar. Themselves.

On the other hand, Black attorneys who select a career typically thought of as more "community-oriented" in nature — for example, civil rights or criminal defense — are often accorded a different set of labels equally superficial and inadequate, which express dominant cultural assumptions that their race-based advocacy as well as their race compromise their ethics and their professionalism. Both models are founded upon an atomistic conception of the Black attorney as a solo agent who must somehow both represent and transcend categorical assumptions about her race.

Unfortunately, at present the burgeoning genre of legal literature on lawyering theory includes little to address these concerns, but a few notable exceptions exist. For example, in a recent essay Paul Butler effectively describes the genesis of his own "prosecutor's dilemma" as deriving not from any unfair, externally imposed community pressure, but from his own introspection and evolving self-critique regarding the paradoxical nature of his work:

> I was a Special Assistant United States Attorney in the District of Columbia in 1990. I prosecuted people accused of misdemeanor crimes, mainly the drug and gun cases that overwhelm the local courts of most American cities. As a federal prosecutor, I represented the United States of America and used that power to put people, mainly African-American men, in prison. I am also an African-American man. While at the U.S. Attorney's office, I made two discoveries that profoundly changed the way I viewed my work as a prosecutor and my responsibilities as a black person.
>
> The first discovery occurred during a training session for new Assistants conducted by experienced prosecutors. We rookies were informed that we would lose many of our cases, despite having persuaded a jury beyond a reasonable doubt that the defendant was guilty. We would lose because some black jurors would refuse to convict black defendants who they knew were guilty.
>
> The second discovery was related to the first, but was even more unsettling. It occurred during the trial of Marion Barry, then the second-term mayor of the District of Columbia. Barry was being prosecuted by my office for drug possession and perjury. I learned, to my surprise, that some of my fellow African-American prosecutors hoped that the mayor would be acquitted, despite the fact that he was obviously guilty of at least one of the charges — he had smoked cocaine on FBI videotape. These black prosecutors wanted their office to lose its case because they believed that the prosecution of Barry was racist.[47]

Id. at 4. For a more extended consideration of the burdens of Black professional life, see ELLIS COSE, THE RAGE OF A PRIVILEGED CLASS (1993); JOE R. FEAGIN & MELVIN P. SIKES, LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE (1994).

47. Butler, *supra* note 15, at 678 (footnotes omitted).

Butler proceeds from these perceptions to question the broader racial implications of his own prosecutorial role, and to advance the thesis that the race of a Black defendant is "sometimes a legally and morally appropriate factor for jurors to consider in reaching a verdict of not guilty or for an individual juror to consider in refusing to vote for conviction."[48]

In a related vein, David Wilkins examines the dilemmas of Black law students and attorneys who seek to integrate a career in corporate law with goals of racial justice and Black community responsibility, and advances an "obligation thesis" that urges "black corporate lawyers to recognize that they have moral obligations running to the black community that must be balanced against other legitimate professional duties and personal commitments when deciding on particular actions and, more generally, when constructing a morally acceptable life plan."[49] To this end, Wilkins recommends that law schools take an active role in assisting Black law students in acquiring the critical skills and empirical knowledge needed to avoid the pressures of assimilation and seeming "race neutrality" that attends corporate legal practice.[50]

The Darden Dilemma, then, might be more usefully and broadly explored as an ongoing interplay of competing values within Black attorneys who are attempting to puzzle through the implications of their professional choices for the well-being of Black communities. This inner tension may be influenced, heightened, and at times perhaps exacerbated by Black community critiques, but it is inherently and inevitably a result of a legal system that devalues all Black lives, including the token Black attorneys it ostensibly valorizes as the honored few. According to this proposed redefinition, the Black community did not create the Darden Dilemma, nor did Christopher Darden or Black prosecutors generally. Rather, it is an unavoidable structural component of a legal system originated and maintained under racial hierarchy. Armed with this revelation, Black attorneys can be empowered to *expand* their choices, rather than be relegated to them.

Indeed, given the seeming inevitability of the Darden Dilemma and other paradoxes in the Black lawyer's experience, it would appear to be a sign of mental health that Black lawyers and Black communities continue to experience and express cognitive disso-

48. *Id.* at 679.

49. Wilkins, *supra* note 18, at 1984.

50. *See id.* at 1984, 2013-26.

nance and chronic dissatisfaction with their assigned lot in the legal system.[51] In this regard, the Darden Dilemma might be reclaimed and revitalized by Black attorneys and Black communities as a basis for reconnection and debate.[52] I would hope that this reconnection would differ greatly from the wearying pressures of majority-imposed race work discussed above, in that the underlying notions of obligation would be developed through community-based reflection, rather than through the norms of mainstream legal practice.

B. *The Fallacy of Colorblind Lawyering*

The above-proposed redefinition of the Darden Dilemma also can serve to question an overly rigid adherence to notions of colorblindness in lawyering strategy. In using the term "colorblind" lawyering, I draw upon the work of critical race theory, which explores broadly the premise that ineradicable currents of racism pervade the law, and advances race consciousness as a method of analyzing and ameliorating racism's effects.[53] Critical race theorists challenge prevailing assumptions that race and color are social and legal categories that can be made *not* to matter simply by pronouncing them — even from a hopeful, liberal standpoint — to be inconsequential. According to these critiques, the most perilous fallacy of colorblind ideology is that it is wishful or wilful determination, or both, to ignore historical and systemic racism perpetuates the false belief that "racelessness" is equivalent to neutrality, objectivity, fairness, and equality.[54] As applied to the lawyering process, I intend the term "colorblind" lawyering to connote advocacy strate-

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51. In her memoirs of her life of "volunteer slavery" as a Black journalist in predominantly white environments, Jill Nelson vividly describes the mental and emotional strains involved in the juggling of contradictory professional and personal identities:

> I've also been doing the standard Negro balancing act when it comes to dealing with white folks, which involves sufficiently blurring the edges of my being so that they don't feel intimidated, while simultaneously holding on to my integrity. There is a thin line between Uncle Tomming and Mau-Mauing. To fall off that line can mean disaster. On one side lies employment and self-hatred: on the other, the equally dubious honor of unemployment with integrity. Walking that line as if it were a tightrope results in something like employment with honor, although I'm not sure exactly how that works.

JILL NELSON, VOLUNTEER SLAVERY 10 (1993).

52. Consider how Delgado urges the rejection of externally imposed "role model" burdens in favor of a more liberating relationship between minority legal professionals and their communities. *See* Delgado, *supra* note 9, at 1230-31.

53. For recent critiques of colorblind mythology, see generally Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991); HANEY LÓPEZ, *supra* note 2; Harris, *supra* note 8.

54. Kimberlé W. Crenshaw, a principal critical race theorist, elucidates this point in writing that the ostensible "objectivity of legal analysis is grounded in the apparent perspectivelessness of the dominant discourse." Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy In Legal Education,* 11 NATL. BLACK L.J. 1, 12 (1989).

gies premised upon the position that racism is or should be characterized as irrelevant to a particular context, even if it has been otherwise raised in the proceedings.[55]

In the Simpson case, this norm turned out to be of paramount and ultimately dispositive significance, particularly given Darden's vociferous public insistence from early in the proceedings that race was not an issue in the case. From a critical race-conscious as well as a pragmatic perspective, the flawed and indeed misleading nature of the publicly advanced prosecutorial stance of colorblindness is obvious. Even within the framework of the prosecution's proffered theory of the case, there would have been a significant difference between arguing the indeterminate or minimal role of racism in the case in chief and claiming that allegations of racism were simply irrelevant. Regardless of one's view of the strength of the case against Simpson — and indeed regardless of one's view of *who* was responsible for first articulating race as a factor — issues of race permeated the case from its inception: from prosecutorial strategies regarding where to try the case; to the acquiescence on both sides to try the case in part in the voyeuristic "court of public opinion"; to both sides' selection of jurors and counsel; and so forth.[56] Against this backdrop, the prosecution's repeated assertions that race was not an issue in the case appeared not only wishful and deluded, but deliberately misleading. Although the prosecution's stance is more accurately and comprehensibly explained as the argument that race was irrelevant to the factual predicates of the defendant's guilt or innocence, this point was obscured by the prosecution's broader rhetorical incantation of the "race doesn't matter" theme. This strategic stance of avowed "racelessness" in the face of the realities of the unfolding Simpson defense and its broader social context illustrate the fallacy of colorblind lawyering: pretending and asserting that race doesn't matter is not equivalent to neutrality and "perspectivelessness."[57] In fact, it *is* a perspective: one of studied indifference to the significance of race.

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55. For a race-conscious critique of the "liberal regime" of colorblindness in criminal defense advocacy, see Alfieri, *supra* note 18, at 1331-32 (arguing for the "race-ing" of legal ethics with regard to criminal defense lawyers' deployment of disempowering racial narratives).

56. As Brent Staples observes:

> The statement that race had no place in the trial is dishonest on its face. The so-called race card was played when District Attorney Gil Garcetti decided to try the case before a mainly black jury downtown instead of before a white jury in Santa Monica. Conviction by a mainly black jury would insulate Mr. Garcetti from riots like those that accompanied the acquittal of the white policemen who beat Rodney King.

Brent Staples, *Millions for Defense*, N.Y. TIMES, Apr. 28, 1996, § 7 (Book Review), at 15.

57. On "perspectivelessness," see Crenshaw, *supra* note 54, at 10-12.

The misguided and unrealistic adoption of a model of colorblind lawyering can pose especially onerous pressures on the Black attorney. In seeking to reconcile a stated professional — and perhaps even personal — norm of colorblind ideology with the personal experiential knowledge that of course race *does* matter significantly in the legal system, whether or not one wants it to matter, the Black attorney in such a situation encounters the daunting task of synthesizing conflicting ethical, personal, and advocacy priorities.

Thus, for example, Darden undermined his own colorblind lawyering strategy in one of the most highly publicized Darden-Cochran conflicts of the proceedings: his courtroom battle with Cochran over the admissibility of testimony regarding prosecution witness Mark Fuhrman's use of the epithet "nigger." Darden's ultimately unsuccessful argument for exclusion reflected simultaneously the colorblind position that race was not and should not be allowed to develop as a factor in the case, and the tacitly race-conscious realization that the racist utterances of a key witness would be of dispositive significance to the Black jurors:

> If you allow Mr. Cochran to use this word and play the race card . . . the direction and focus of the case changes: it is a race case now.
>
> It becomes an issue of color . . . . It becomes a question of who is the blackest man up here . . . .
>
> . . . .
>
> It's the filthiest, dirtiest, nastiest word in the English language . . . . It will do one thing. It will upset the black jurors. It will say, Whose side are you on, "the man" or "the brothers"?
>
> . . . There's a mountain of evidence pointing to this man's guilt, but when you mention that word to this jury, or any African-American, it blinds people. It'll blind the jury. It'll blind the truth. They won't be able to discern what's true and what's not.[58]

Given that — as argued above — every case argued by a Black attorney is at some level a "race case" in which the Black attorney is forced to represent race beyond the boundaries of the particular dispute in question, an ideology of colorblind lawyering puts the

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58. Kenneth B. Noble, *Issue of Racism Erupts in Simpson Trial*, N.Y. TIMES, Jan. 14, 1995, at 7. To this argument, Cochran responded:

> It'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. African-Americans live with offensive words, offensive looks, offensive treatment every day of their lives. And yet they still believe in this country.

Id.; see also William Carlsen, *Race Issue Finally Boils Over in Simpson Hearing*, S.F. CHRON., Jan. 14, 1995, at A1, *available in* 1995 WL 5261467; Tony Freemantle, *Pair Argue Disclosure of Epithets*, HOUSTON CHRON., Jan. 14, 1995, at 1, *available in* 1995 WL 5882802; Lisa Resper et al., *Blacks Debate Issue of Race in Simpson Case*, L.A. TIMES, Jan. 15, 1995, at A1; Ed Vulliamy, *N-Word Stirs O.J. Trial's Racial Cauldron*, THE GUARDIAN (London), Jan. 22, 1995, at 16, *available in* 1995 WL 7575906.

Black attorney at a serious disadvantage: she must deny the realities of racism in order to appear balanced and fair in advancing the case of the client. The pervasive and systemic role of racism in the legal system belies the assumption that the world can be neatly divided into "race cases" and "nonrace cases." Repudiating colorblind lawyering does not mean making race the primary focus of every case, but it does require a thorough and honest response when race is articulated as even arguably an influence.

In sum, then, an ideology of colorblind lawyering has the potential to exacerbate further the professional and personal predicament of the Black attorney, whose everyday experiences as a lawyer underscore the reminder that issues of race matter enormously. This phenomenon may consign the attorney to the adoption of legal categories and strategies not reflective of the paradoxical nature of her role, which in turn may engender criticisms that the lawyer has simply abandoned or sold out Black community concerns. To conclude that a particular Black attorney in such a situation is a sellout or mere assimilationist — without addressing the insidiousness of the underlying welter of constraints — is to ignore the asphyxiating conditions in which many Black attorneys must pursue their careers.

C. *The Cochran Conundrum: Accusations of Playing the Race Card and the Perils of Race-Conscious Lawyering*

If the Darden Dilemma may be reinterpreted to describe one set of constraints imposed upon Black attorneys, I use the term Cochran Conundrum to characterize another set of obstacles, encountered most frequently by Black lawyers who openly articulate issues of racism as relevant to a particular case. The name — derived, of course, from mainstream public and media reaction to Johnnie Cochran's explicitly race-based arguments in the Simpson case[59] — is meant to suggest that certain elements of the vehement

59. *See, e.g.*, Joseph Demma & Shirley E. Perlman, *Wrangling over "Race Card,"* NEWSDAY, Jan. 14, 1995, at A7, *available in* LEXIS, News Library, NEWSDY file; Bill Maxwell, *Intraracism Snares Chris Darden,* ARIZ. REPUBLIC, Oct. 25, 1995, at B5, *available in* 1995 WL 2840305 ("The truth is that, along with using race as a blunt instrument against whites, blacks use it to craft relations with one another . . . . [T]he defense, led by the brilliant Johnnie Cochran, played the intrarace card . . . ."); Joseph Wambaugh, *Perspective on the Simpson Case; The Race Card, from Bottom of Deck,* L.A. TIMES, Aug. 24, 1995, at B9 (calling Cochran's allegations of racism in public perceptions of the case "black racism" and concluding that "Johnnie Cochran has not only played the race card, he's dealt it from the bottom of the deck"). For an example of the ironic use of race-card terminology to criticize anti-Black attitudes, see Anthony Lewis, *Trust Gone Bust in a Divided America,* HOUSTON CHRON., Oct. 9, 1995, at 22, *available in* 1995 WL 9408020 ("Even before the verdict some politicians and intellectuals were playing the race card to whites, arguing that blacks were too demand-

criticism directed against Cochran are representative of the disapproval faced by lawyers who implement race-conscious strategies in client representation. The current manifestation of this deep-seated disdain is the accusation that one is "playing the race card" and therefore unfairly skewing reasonable debate on the "merits" of a case by insisting that racism is a relevant issue in an otherwise raceless context.[60]

Although the genesis of the phrase "playing the race card" precedes the Simpson case, the term has achieved widespread usage through its frequent invocation in public discourse during and now after the trial to describe and deride various aspects of the Simpson defense-team strategy. Christopher Darden himself introduced the phrase into the trial proceedings at an early stage in rebutting Cochran's claim that Darden had been added to the prosecution team "just to show that if a black prosecutor sees O.J. guilty, he is being judged by the evidence at hand and not for some deep-seated bias."[61] At another odd juncture, Darden advanced the race-card accusation when he and Cochran bickered over Darden's attempt to ask a witness whether he had described a certain person's voice as "sound[ing] like the voice of a Black man."[62] And, as noted above, Darden argued that Cochran was playing the race card in

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ing. The greater danger of the Simpson verdict and the reactions to it is that the white majority will turn even further against measures to ameliorate inequalities of opportunity.").

60. Interestingly, there is rarely discussion of what exactly the phrase "playing the race card" means in any individual context, although the accusation is often lodged with a casualness suggestive of an insider's "shorthand" — as though the reader will of course understand the author's meaning. In response, one might usefully invoke Angela Davis's blunt reminder: "Race is not a card." *See* Henry Louis Gates, Jr., *Thirteen Ways of Looking at a Black Man*, NEW YORKER, Oct. 23, 1995, at 56, 59. In an editorial assessing the closing arguments in the case, the *New York Times* offered some detail to its invocation of the criticism:

> Mr. Cochran, showing the knack for the theatrics that successful trial lawyers need, argued forcibly and fairly that the racism and perjury on the part of former Los Angeles detective Mark Fuhrman cast doubt on Mr. Fuhrman's credibility and justified skepticism about some evidence. But he crossed a line when he urged the jury to look beyond the specifics of the O.J. case and send a broader message that would help "police the police" everywhere and stop further misbehavior by racist cops.
>
> This was playing the race card with irresponsible sweep and remarkable viciousness.

Race Cards and Rebuttals, N.Y. TIMES, Sept. 30, 1995, at 18 (editorial).

61. Maxwell, *supra* note 59.

62. For a transcript of this exchange as covered by the Cable News Network, see Testimony of Robert Heidstra, *Cable News Network*, Transcript #110-4, July 12, 1995, *available in* LEXIS, News Library, Script File. In a particularly unfortunate colloquy, Cochran insisted that Darden's question itself was "racist": "You can't tell by listening to someone whether they're black [or] white.... I think it's totally improper in America at this time in 1995 just to hear this and endure this." Annette Kornblum, *Is Race-Tagging a Voice Talkin' Trash or Truth? What Science Says About Speech and Stereotypes*, WASH. POST, July 23, 1995, at C7 (quoting Cochran and discussing ebonics, the linguistic study of "Black English," including the sound, inflection, rhythm, and pitch of its various colloquial dialects).

seeking to introduce into evidence Mark Fuhrman's use of the word "nigger."[63]

Although Darden's early and uninhibited use of the race-card trope in court did much to encourage its usage in public and media commentary, the saying attracted the most attention and acquired an almost talismanic significance when uttered by Robert Shapiro, Cochran's co-counsel, in a television interview shortly after the verdict. Shapiro, who is white, publicly and emphatically disavowed what he suggested was a manipulative and inappropriate use of race in his own co-counsel's defense strategy. Shapiro singled out Cochran with particular ire for including in his closing arguments rhetorical references to Hitler and the Holocaust in castigating the Los Angeles Police Department's failure to address the racist behavior of Mark Fuhrman. Shapiro asserted: "My position was always the same, that race would not and should not be a part of this case. I was wrong. Not only did we play the race card, we dealt it from the bottom of the deck."[64]

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. One may legitimately view Cochran or Darden as a hero, foe, or pawn; one may legitimately view the now undisputed racism of Fuhrman as a controlling, major, or minor factor in the ultimate merits of the prosecution's case. But, I contend, the vituperation with which Cochran was labeled as, for example, an "oleaginous"[65] shyster who "shamelessly and shamefully stoked fires of racial animosity in the attempt to get his client off"[66] reveals far more than an individualized assessment of Cochran's capabilities as a lawyer. Outside the context of race — that is, both Cochran's and his client Simpson's race — Cochran's strategy might have been evaluated by his critics in more conventional terms as a zealous defense attorney's claim that the bias of a key prosecution witness was a highly relevant factor in assessing the prosecution's case; but because race — especially *Cochran's* race — powerfully affected public perceptions of his lawyering role, he became responsible for representing race it-

63. *See* Noble, *supra* note 58.

64. Staples, *supra* note 56.

65. *See* Joan Beck, *It's Boiling Down to Race — Again; the Nation Has Had Enough of Trying to Stomach O.J. "the Victim,"* CHICAGO TRIB., Oct. 15, 1995, at 21.

66. Taki Theadoracopoulos, *OJ's Lawyers Play the Race-Hate Card,* THE TIMES (London), Mar. 19, 1995, at 11.

self.[67] Thus, one commentator in essence blamed Cochran for the nation's continuing racial tensions:

> Were it not for the call by Simpson's black lawyer to the predominantly black jury to remember "you're the ones at war" against the racist white police — blatantly urging jurors to ignore the evidence of murder and to get even for society's past injustices — then the country quickly could have healed its wound.[68]

In my view, such venomous criticism is rooted in part in the suspicion and mistrust to which Black attorneys are subjected more broadly. Cochran had not only engaged in what his critics considered to be inappropriate advocacy; he had also violated a social taboo by rendering painfully explicit the racial overtones that had suffused the case from its inception. The angry, contemptuous nature of the playing-the-race-card accusation — lodged against the Simpson defense team generally but with particular scorn and ferocity against Cochran — epitomizes the resistance and even censure encountered by attorneys who use individual cases to pose broad critiques against systemic and institutional racism. When the "card-playing" attorneys happen to be Black, the hostility is compounded by underlying assumptions that *of course* Blacks cannot be trusted to "play fair" or to act responsibly with respect to issues of race. Thus, an explicit strategic decision to employ race-based advocacy is evaluated not only on professional terms but on deeply visceral ones. Such a decision runs the risk of being lambasted as whining, pandering, trickery, demagoguery, or manipulation; the advocate, in turn, must be prepared to be viewed in the lowest possible regard — even for a lawyer, or for a defense lawyer at that.

It is difficult to ignore the connections between context-specific invocations of the race-card accusation and the far-reaching animus with which explicitly antiracist, race-conscious critiques are met in a

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67. For the viewpoint that Cochran's courtroom strategy was "applied critical race theory," see Jeffrey Rosen, *The Bloods and the Crits,* THE NEW REPUBLIC, Dec. 9, 1996, at 27 ("[S]urely the most striking example of the influence of the critical race theorists on the American legal system is the O.J. Simpson case, in which Johnnie L. Cochran dramatically enacted each of the most controversial postulates of the movement before a transfixed and racially divided nation."). In my view, Rosen's assertion is highly questionable in at least two of its implicit assumptions: (1) that Cochran, a veteran defense attorney whose courtroom style and strategic sense are the products of decades of litigation, was influenced in *any* significant sense during the Simpson trial by the writings of critical race theorists; and (2) that Cochran's courtroom strategy exemplifies tenets of critical race theory any more than, say, pragmatic criminal defense representation. Rather, I contend, the "striking," "dramatic," and "controversial" characteristics to which Rosen refers stem at least as much from spectators' reaction to Cochran as a forceful and persuasive Black male advocate as from the putative novelty of his arguments.

68. William Safire, *After the Aftermath: Damage Done,* ATLANTA J. & CONST., Oct. 13, 1995, at A19, *available in* 1995 WL 6556856.

variety of contexts.[69] Like the proliferation of charges of "political correctness" in academic and popular discourse in the early 1990s,[70] the increasingly widespread and cynical iteration of playing the race card today substitutes mockery and trivialization for thoughtful reaction and response. Ironically but perhaps not so unintentionally, such pejorative denunciations themselves function as trumps by impugning not just the comments but the very integrity of the "race-talking" advocate; the not-so-subtle implication is that talking about race has turned into a matter of sophistry, gamesmanship, and hyperbole. The intolerance conveyed by such an accusation serves a policing function by warning the would-be race-card transgressor that his or her complaints of racism will be interpreted as irrelevant, self-serving, and maliciously advanced.

What, then, are the implications of the Cochran Conundrum for the Black lawyer who attempts to raise issues of race in a legal proceeding? As noted above, one primary concern is the likelihood that one's very integrity and credibility will be called into question to a degree that white colleagues do not experience; like Black judges who have suffered the insults of motions for disqualification filed simply because they are Black judges in "race" cases, the Black lawyer will be presumed incompetent to meet the ethical demands of her professional — albeit advocacy, rather than judicial — role. This presumption renders race-conscious lawyering a Sisyphean task: the Black lawyer must — again and again — monitor and evaluate the effects of her own racial identity on decision-makers' perceptions of the race-conscious strategies employed.

A second and more daunting effect of the Cochran Conundrum, however, is the deleterious impact that it may exert on the development of creative, progressive, and radical lawyering strategies and critiques. Like all innovations, race-conscious lawyering will have a chance to develop only if lawyers are given the latitude to theorize about the connections between individual cases and a broader soci-

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69. See, for example, Peter Collier and David Horowitz's castigation of *Today* show host Bryant Gumbel and actor Laurence Fishburne for complaining about Hollywood racism:

> It was quite a spectacle. Here were two men making millions of dollars as African-American megastars, complaining about the white conspiracy to deny them success. . . . Deploring the unreformable reality of American racism has become a ritual for African-American celebrities, almost like presenting an apartheid pass in order to retain their status in the community, even when their life experiences argue the exact opposite.

Peter Collier & David Horowitz, *Hollywood's "Racism" Not So Black and White*, S.F. EXAMINER, Sept. 19, 1993, at D3, *available in* 1993 WL 8588751.

70. For an overview of the "political correctness" debate and its implications, see generally DEBATING P.C.: THE CONTROVERSY OVER POLITICAL CORRECTNESS ON COLLEGE CAMPUSES (Paul Berman ed., 1992); TODD GITLIN, THE TWILIGHT OF COMMON DREAMS: WHY AMERICA IS WRACKED BY CULTURE WARS (1995).

etal framework of racial hierarchy.[71] Given the current climate of resistance to such approaches, fewer and fewer advocates will choose to suffer the repercussions of being accused of playing the race card.

IV. Conclusion: Escaping the Straitjacket

Perhaps the most unfortunate aspect of the heavily emphasized intrarace conflict between Cochran and Darden — and the metanarrative of "Black versus Black" animus upon which it seemed to capitalize — was the extent to which it neglected to address the preconstructed nature of their differences. Although Cochran and Darden, to be sure, embody different generational perspectives on and strategic approaches to their conceptions of what it means to be a Black attorney, their conflict was constructed in the sense that it was structured and influenced by racial attitudes and assumptions beyond their understanding and control. Moreover, it was worsened by the dominant gaze of media frenzy,[72] especially the omnipresent voyeurism induced by cameras in the courtroom. At times, lamentably, both attorneys seemed to fuel this metanarrative of intraracial hostility by reserving their most antagonistic courtroom battles for racially charged conflicts with each other.[73] Within the limited parameters of adversarial combat over the fate of O.J. Simpson and the tragically lost lives of Nicole Brown Simpson and Ronald Goldman, each attorney invoked — arguably necessarily — choices of lawyering strategy destined to pit one against the other on issues of race. These issues transcended — perhaps equally necessarily — the particulars of the case and contributed to the transformation of Cochran and Darden into competing symbols of Black legal professionalism.

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71. Integral to the race-conscious critical project is the exploration of gender and sexual-orientation hierarchies, as well as racial and color hierarchies. Certainly, important gender issues (especially domestic violence) were deliberately and strategically subordinated in the race-conscious lawyering of the Simpson defense team.

72. *See* Margaret M. Russell, *Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film*, 15 Legal Stud. F. 243, 244 (1991) (using feminist theorist Laura Mulvey's critique of the "male gaze" to describe the "dominant gaze" of media, which tends "to objectify and trivialize the racial identity and experiences of people of color, even when it purports to represent them").

73. Sadly, at times these showdowns assumed a stagy, almost circus-like quality. For example, in their heated courtroom exchange over the admissibility of Fuhrman's use of racial epithets, Cochran turned to address Darden directly and chided: "I'm ashamed for Mr. Darden to allow himself to become an apologist for this man." Noble, *supra* note 58. Darden was equally churlish toward Cochran throughout the trial, at one point turning to him to assert: "That's what has created a lot of problems for my family and myself, statements that you make about me and race." *Simmering Ito Boils After Bickering*, St. Petersburg Times, July 13, 1995, at A1.

Recognition of and resistance to the construction and accentuation of intraracial conflict is critically important in seeking to preserve relationships not only among Black lawyers, but also between those lawyers and Black communities. Racial hierarchy is well served by microcosmic patterns of seemingly idiosyncratic spats and divisions among Black attorneys. As long as Black attorneys and their communities fritter away precious energy and resources engaging in personal sniping, we will have few opportunities to challenge the broader framework of legal dysfunction that encompasses us all.

As argued above, erroneous constructions and false dichotomies deprive Black attorneys who seek to serve their communities of critically needed latitude; because of the straitjacketing effects of contemporary legal practice, Black attorneys have not even begun to have the opportunity to explore difficult questions of legal professionalism, ethics, community identification, race-conscious lawyering strategies, or political agenda formation.[74] Moving beyond the false dichotomies requires the realization that they serve the regressive purpose of miring Black lawyers and their communities in self-hatred and disrespect; such dichotomies must be supplanted by broader visions of lawyering than the narrow constructions that exist today. This is indeed a daunting task, but, as Judge Higginbotham suggested a generation ago, Black attorneys have always had to shoulder the burdens of representing race in more ways than one.

74. For a persuasive argument that mainstream legal education should shoulder at least some responsibility for fostering these debates for the benefit of Black law students planning to enter the corporate sector, see generally Wilkins, *supra* note 18.

ABA National Lawyer Population Survey

10-Year Trend in Lawyer Demographics

Year 2017

REVISED†

Resident Active Attorney Demographics: Gender

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	Change from 2007
Gender												
Male	70%	68%	69%	69%	67%	67%	66%	64%	65%	64%	65%	-4.9 pp
Female	30%	32%	31%	31%	33%	33%	34%	36%	35%	36%	35%	4.9 pp
Other (1)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	0%	0%	0.0 pp
Count of States Reporting Statistic	42	39	40	41	42	44	43	43	43	45	46	4
% of Lawyers with Reported Statistic	57%	54%	55%	57%	57%	59%	59%	61%	63%	66%	61%	4.3 pp

Resident Active Attorney Demographics: Race/Ethnicity

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	Change from 2007
Race/Ethnicity (2)												
African-American	4%	4%	5%	5%	5%	5%	5%	5%	5%	5%	5%	1.6 pp
Asian	2%	2%	2%	2%	2%	2%	2%	2%	2%	3%	2%	0.8 pp
Caucasian/White	90%	89%	88%	89%	88%	88%	89%	88%	86%	85%	85%	-5.4 pp
Hawaiian/Pacific Islander	0%	1%	0%	1%	0%	1%	0%	0%	1%	0%	0%	0.0 pp
Hispanic	4%	3%	5%	4%	4%	3%	4%	4%	5%	5%	5%	1.4 pp
Multiracial (1)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	0%	0%	1%	2%	1.6 pp
Native American	0%	1%	1%	1%	1%	1%	1%	1%	1%	0%	1%	0.1 pp
Count of States Reporting Statistic	17	15	16	19	17	16	16	17	18	19	22	5
% of Lawyers with Reported Statistic	19%	15%	19%	22%	21%	21%	21%	21%	25%	31%	29%	9.7 pp

* Data Source: American Bar Association's National Lawyer Population Survey

** Individual state bar associations or licensing agencies are asked to provide demographics data for resident and active attorneys as of December 31st of the prior year, e.g. 2017 data is as of 12/31/2016. The numbers reflected here are the best available data provided to us from the respective associations or agencies.

† This report was revised October 2017 to correct an error in the 2016 data and eliminate the 'unknown' category on the race/ethnicity demographics. Those percentages now represent only those who have a reported race/ethnicity.

(1) Beginning with the 2016 survey, choices included "Multiracial" as an option for race/ethnicity and "Other" as an option for gender.

(2) Race/ethnicity percentages may total to more than 100% as many states allow responders to choose more than one option for race/ethnicity.

ABA National Lawyer Population Survey

Lawyer Population by State

Year 2018

Resident Active Attorney Count			
State	This Year	Last Year	% Change from Prior Year
Alabama	14,822	14,717	0.7%
Alaska	2,311	2,402	-3.8%
American Samoa	59	59	0.0%
Arizona	15,601	14,960	4.3%
Arkansas	7,080	6,851	3.3%
California	170,044	168,746	0.8%
Colorado	21,099	22,164	-4.8%
Connecticut	21,341	21,341	0.0%
Delaware	2,978	2,978	0.0%
Dist. of Columbia	53,778	54,692	-1.7%
Florida	78,244	77,008	1.6%
Georgia	32,802	31,672	3.6%
Guam	270	266	1.5%
Hawaii	4,261	4,236	0.6%
Idaho	3,882	3,836	1.2%
Illinois	63,422	62,782	1.0%
Indiana	15,826	15,826	0.0%
Iowa	7,454	7,523	-0.9%
Kansas	8,131	8,218	-1.1%
Kentucky	13,540	13,509	0.2%
Louisiana	18,918	19,307	-2.0%
Maine	3,988	3,940	1.2%
Maryland	38,800	38,800	0.0%
Massachusetts	42,926	43,442	-1.2%
Michigan	35,362	35,236	0.4%
Minnesota	25,252	25,483	-0.9%
Mississippi	7,007	7,067	-0.8%
Missouri	24,754	24,787	-0.1%
Montana	3,179	3,159	0.6%
Nebraska	5,565	5,545	0.4%
Nevada	7,520	7,281	3.3%
New Hampshire	3,523	3,507	0.5%
New Jersey	41,021	41,168	-0.4%
New Mexico	5,428	5,524	-1.7%
New York	177,035	177,035	0.0%
North Carolina	24,087	23,694	1.7%
North Dakota	1,694	1,698	-0.2%
North Mariana Islands	128	123	4.1%
Ohio	37,873	38,623	-1.9%
Oklahoma	11,695	13,470	-13.2%
Oregon	12,427	12,227	1.6%
Pennsylvania	50,112	49,406	1.4%
Puerto Rico	14,008	14,293	-2.0%
Rhode Island	4,154	4,167	-0.3%
South Carolina	10,445	10,316	1.3%
South Dakota	1,995	1,933	3.2%
Tennessee	18,695	18,461	1.3%
Texas	90,485	89,361	1.3%
Utah	8,285	8,204	1.0%
Vermont	2,227	2,326	-4.3%
Virgin Islands	776	372	108.6%
Virginia	24,208	24,249	-0.2%
Washington	26,057	25,786	1.1%
West Virginia	4,849	4,862	-0.3%
Wisconsin	15,539	15,549	-0.1%
Wyoming	1,716	1,776	-3.4%
TOTAL	1,338,678	1,335,963	0.2%

Compiled by: American Bar Association, 321 N Clark St, Chicago, IL 60654

* Individual state bar associations or licensing agencies are asked to provide the number of resident and active attorneys as of December 31st of the prior year, e.g. 2018 data is as of 12/31/2017. The numbers reflected here are the best available data provided to us from the respective associations or agencies.

Note: Vermont was not able to provide current data for 2017 so the data from the most recent submission were used. Also, four states had changes to the way they reported data from the prior year. The source of the Maryland data changed from the voluntary Maryland State Bar to the Maryland Supreme Court,which does not track residency status. Indiana was not able to provide a breakout of Active/Inactive status for Resident attorneys in 2016, but was able to for 2017. American Samoa had not provided Residency or Active status details in recent years, but was able to provide it for the 2017 survey. Virgin Islands changed their classifications for the Active/Inactive status for the 2017 survey. Virgin Islands was not able to provide residency in 2018 due to Hurricanes Irma and Maria. In 2018, Oklahoma separated senior members from the Resident Active count; they can still practice but are over the age of 70. In 2018, Indiana corrected the resident active figures for 2016; this report reflects the new total attorney count for 2016 than was previously reported.

Also found at: http://www.americanbar.org/resources_for_lawyers/profession_statistics.html

July 20, 2018

New ABA data reveals rise in number of U.S. lawyers, 15 percent increase since 2008

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CHICAGO, May 11, 2018 - Newly released survey data from the American Bar Association on the nationwide population of lawyers indicates a total of 1,338,678 licensed, active attorneys in the United States. The total represents a 0.2 percent increase since last year and a 15.2 percent rise over the past decade in number of U.S. lawyers.

The American Bar Association National Lawyer Population Survey is an annual snapshot of the number of licensed practicing lawyers in the 50 states, Washington, D.C., and five U.S. territories. The association compiles this information each year from data voluntarily submitted by state bar associations or licensing agencies that are asked to provide the number of resident and active attorneys as of December 31 of the prior year. Under those parameters, the 2018 survey represents data as of December 31, 2017.

Overall, the 2018 survey indicates a slight gain in the national lawyer population, rising 0.2 percent from 1,335,963 active resident attorneys on December 31, 2016 to 1,338,678 lawyers on the same day in 2017. A look at the 10-year trend in lawyer population also shows modest year to year increases since 2008, culminating in 2018 with an overall 15.2 percent gain in practicing U.S. lawyers over the decade.

Among other findings from the report, the top five areas with the

largest number of active attorneys in residence are **New York** (177,035), **California** (170,044), **Texas** (90,485), **Florida** (78,244) and **Illinois** (63,422). The top five areas with the fewest resident attorneys are **North Dakota** (1,694), **Virgin Islands** (776), **Guam** (270), **North Mariana Islands** (128) and **American Samoa** (59).

The 2018 data is presented in three tables. The first is a state-by-state listing of the number of resident lawyers with comparable data from the previous year. The next table shows the trend in population over the past 10 years, again organized by geographic area. And the last table offers the total number of lawyers by year from 1878 to present.

The numbers presented in the 2018 population report reflect the best available data provided to the ABA from the state associations and agencies. The organizations responding to the survey sometimes change their reporting standards. Among the changes affecting the 2018 report, **Vermont** was not able to provide current data for 2017 so the data from the most recent submission were used (2016). **Virgin Islands** was not able to provide residency data in 2018 due to Hurricanes Irma and Maria, causing the significant increase in lawyer count. In 2018, **Oklahoma** removed senior members from the count of active residents (they can still practice but are over the age of 70), causing the significant drop in lawyer count. Each table is footnoted to provide relevant detail on the data submitted by each responding entity.

A full copy of the 2018 survey is located here.

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