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The criminal trial of O.J. Simpson has ended. The game is over. The players have left the field. The commentators in the press and on the local, national, and cable stations have all lined up to provide the post-game analysis. The only thing missing is the Goodyear blimp. The master metaphor for this trial was "the big game," which is no surprise for a couple of reasons. First, "trial as sport" is an old metaphor, arguably reduced to a cliché—a metaphor used to the point such that it has lost its vitality. Moreover, the "game" metaphor was inevitable for this trial, given the football career of O.J. Simpson.

But while the game metaphor is old, it has kept its power. And I am concerned about its power over my students. The power of games is that they generally have definite outcomes—one side wins and one side loses. The power of the promise of a clear result is often ignored, although one could see glimmers of it in the widespread fear that the *Simpson* case would end in a hung jury, a tie. The uncertainty and unpredictability of the outcome of the game creates tension and drama; who will win? In the clarity of the outcome—whether the light of the victory or the darkness of the loss—it becomes harder, however, to care about the perennial question: Does it matter how you play the game?

As a law professor, I worry that my students have stopped caring about this question. As illustrated by the *Simpson* case, and the articles in this symposium, this question cannot be resolved by the rules of evidence, the rules of professional responsibility or even the verdict itself. Maria L. Ontiveros's article, *Rosa Lopez, David Letterman, Christopher Darden, and Me: Issues of Gender, Ethnicity, and Class in Evaluating Witness Credibility*, for example, argues that the images created through Christopher Darden's cross-examination of Rosa Lopez mattered a great deal.[1]

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1. *See* Maria L. Ontiveros, *Rosa Lopez, David Letterman, Christopher Darden and Me: Issues of Gender, Ethnicity and Class in Evaluating Witness Credibility*, 6 HASTINGS

His efforts to discredit her testimony by showing her inconsistencies in providing her name, her addresses, and her estimates of the time frame of the night of the murder were, in Professor Ontiveros's estimation, both misleading in their disregard of cultural differences and hurtful, as Lopez was held up to ridicule by the media.[2] Also, look at Thomas Morawetz's article, *Fantasy, Celebrity, and Homicide*, concluding that the defense strategy, of attempting to create a master narrative of police conspiracy, was an attempt to engage the jury, and the larger public, in a fantasy rather than a sense of the truth.[3]

Christopher Darden and Johnnie Cochran's strategies were, however, well within the bounds of the rules of evidence and the rules of professional conduct. Some would argue that they were only doing their jobs in the most effective way possible. Professor Ontiveros would not argue that Latina witnesses always tell the truth or that inconsistencies cannot be significant in evaluating credibility. Professor Morawetz would not deny that the police do sometimes commit perjury and plant or manipulate evidence.

One way to answer the question of "does it matter how one plays the game," is to shift the focus to the other players. It can be argued that O.J. Simpson and the Los Angeles County District Attorney's Office pushed their lawyers to make the arguments criticized by Ontiveros and Morawetz. It can be argued that the defense lawyers failed to protect the integrity of Rosa Lopez, that it was the defense's job to rehabilitate her credibility by explaining the cultural differences more clearly and providing more context for her testimony. It can be argued that the prosecution failed to prove that the evidence in this particular case was solid, despite the racist attitudes of one of its key police witnesses. It can be argued that Judge Lance Ito, in his rulings on the relevancy of questions asked on cross-examination or on the evidence and arguments relating to racist conspiracies, failed to reign in the lawyers' excesses. It can be argued that the media failed to present a controlled and fair picture of the case, distorting witnesses like Rosa Lopez to the point of caricature. It can be argued that the jurors failed to see through the "smoke" spewed forth by the lawyers on both sides.

These arguments appear to absolve two players, Darden and Cochran, from any responsibility for their rhetorical strategies. But Christopher Darden is not naive; we cannot realistically expect that an experienced prosecutor in Los Angeles, with its heavy Latin-American population, is

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WOMEN'S L.J. 135 (1995).

2. *Id.* at 139-44.

3. *See* Thomas Morawetz, *Fantasy, Celebrity and Homicide*, 6 HASTINGS WOMEN'S L.J. 209 (1995).

ignorant of at least some of the problems Professor Ontiveros points out. At a minimum, Darden knew he had a choice in conveying his attitude toward Lopez. Similarly, Johnnie Cochran is certainly aware of the power of "the race card" and how it can be held or played, as a part of any hand in a criminal case against a black defendant in Los Angeles. There is evidence that the defense team itself was conflicted as to whether it was necessary to make the racist attitudes and actions of police officers in other cases a central issue in the *Simpson* case.[4] Moreover, even if these lawyers were not aware of these problems, it can be argued that they should have been.

Courtroom strategies must be decided without the luxury of certainty. An advocate must balance a multitude of variables in deciding how to frame a case in general, and in deciding what specific questions to ask during direct or cross-examination. The temptation to appeal to the prejudice or bias of the jury—to fear and ignorance—in the belief that it will help your outcome, can be overwhelming. What incentive is there to resist? Indeed, a lawyer has every incentive not to resist. The lawyer can always blame the client, blame the other side for not objecting, blame the judge for failing to rule correctly, blame the jury for its lack of critical thinking skills, or blame the media for mischaracterizing what you said. You can blame everyone but yourself.

Some of my students try to answer the question concerning how one plays the game by invoking the duty of zealous representation that they believe lawyers owe to their clients. In doing so, they shift the blame to "the system." There is no duty of zealous representation, however, in the A.B.A. Model Rules. There is no such duty in the California Code of Professional Conduct. Despite this, those same students persist in believing that there is such a duty, and that the duty permits them to engage in any conduct that does not violate the other rules of professional responsibility. They believe this gives them a relatively clear path to the goal line.

I think, however, that there can be consequences for ignoring the question of how you ought to play the game—practical, personal and professional consequences. The chief practical problem is backfire; will the jury feel you are pandering to their lowest instincts and react against your client? A related practical problem regards impact on future clients; how long will a defense based primarily on fear of racism work? It may help a client today, but what about the client tomorrow? What happens to the future client who has been more clearly and directly set up by racist police officers than the client you defend today? Will that future jury

4. Eric Malnic, *The Simpson Verdicts: Shapiro Trades Criticism with Cochran and Bailey*, L.A. TIMES, Oct. 4, 1995, at A3.

really focus on your client's case or will they dismiss your arguments as "the same old song?"

There can also be personal consequences that flow from the arguments a lawyer makes. If a lawyer is willing to argue anything on behalf of her or his client, does that lawyer risk losing any sense of what she or he actually believes? Can a lawyer really be successful in believing that her or his personal beliefs are irrelevant to the client's case? Will a lawyer's ability to dissociate her or himself from her or his client and the case lead to a pervasive cynicism that makes it difficult to find the value in other causes?

Finally, lawyer's arguments can have consequences for the legal profession, with reverberations in society as a whole. Will the view of the lawyer as mouthpiece, willing to champion any cause, case or argument for a price, finally erase any view of the lawyer as a civic leader?

I tend to view the question of how the game is to be played rather personally because I teach evidence, civil procedure, and seminars in argumentation and persuasion. I teach the game; I teach how to play it effectively. I believe, however, that I must motivate students to play the game well. I worry about the consequences of students looking only to the outcome of the game, and ignoring how it is played. But how do I best teach my students?

Legal education is classically and notoriously based on the Socratic dialogue, the teacher asking questions and the student responding. In the Socratic dialogue—in both Plato's version and legal education—the questions are rhetorical and the answers are scripted. The teacher's job is to ask the questions and maneuver the students to the answer, without revealing, of course, that the student has "reached" the answer. I use this method, along with others, in teaching my courses. I can defend it most of the time because I think it forces the student to listen and analyze problems actively, rather than passively absorbing lecture material. But I cannot teach about the issues I am raising here—issues of how the game should be played—in the same Socratic way.

The hard questions raised here are ultimately lessons about character, the character of the player. As Professor James Boyd White has noted, this is a question of "ethics" (which in Greek means "habit" or "character") in a literal sense, a question of what "kind of character a person defines for himself and offers to others—the kind of life and community he makes—when he chooses to think and talk in one way rather than in another."[5] In his article, Professor White creates his own Socratic

5. James Boyd White, *The Ethics of Argument: Plato's Gorgias and the Modern Lawyer*, 50 U. CHI. L. REV. 849 (1983).

dialogue to confront these issues from the perspective of the modern lawyer.

I have my seminar students read Professor White's article, which, like Plato's dialogue, does lead its readers to certain conclusions. Moreover, I have some of my own answers regarding how the game ought to be played. The problem is that I do not believe it does my students much good to have me write articles about these ideas or to teach them, whether through the Socratic dialogue, lecture, or any other method, about these answers. You cannot "make" someone else's character for them.

I have had many students who really believed that the only thing that mattered about the game was whether you won or lost. I have had a few of these former students come to me after they lost "a game," wanting to engage me in conversation about how the game was played—not about why they lost, but rather about what it did to them. These conversations have been painful for each of us. I struggle not to say, "I knew that" or "I could have told you that." My former students struggle not to place the "blame" somewhere else. I would like to say that each person left each of these conversations unburdened and enlightened, but that would not be true. There was generally only a sense of sadness because it appears that another choice would have been a better one, a realization made through the rueful certainty of hindsight. There is no firm sense, however, that these students will make a better choice next time, for "next time" will present its own set of complexities.

So what do I do as a teacher of the game? I have chosen a very limited goal: to teach law students that they have choices to make—in deciding how to question a witness, what to argue in closing arguments, how to frame the case, and in every other context within which a lawyer operates. One of the values of the *Simpson* case is that it allowed my students to look at the attorneys involved, think about the choices they had to make, and ask themselves individually: "Is that the kind of lawyer I want to be?" I want my students to think about the consequences of their choices before they must make them in moments of pressure and uncertainty. I want each student to see that in choosing how to communicate as a lawyer, a person makes her character and contributes to the character of the profession. And that is the name of the game.