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Lynching Ethics: Toward a Theory of Racialized Defenses

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LYNCHING ETHICS: TOWARD A THEORY OF RACIALIZED DEFENSES

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"I wonder what people would think if they found a nigger hanging on Herndon Avenue."[1]

INTRODUCTION

So much depends upon a rope in Mobile, Alabama. To hang Michael Donald, Henry Hays and James "Tiger" Knowles tied up "a piece of nylon rope about twenty feet long, yellow nylon."[2] They borrowed the rope from Frank Cox, Hays's brother-in-law.[3] Cox "went out in the back" of his mother's "boatshed, or something like that, maybe it was in the lodge."[4] He "got a rope," climbed into the front seat of Hays's Buick Wildcat, and handed it to Knowles sitting in the back seat.[5]

So much depends upon a noose. Knowles "made a hangman's noose out of the rope,"[6] thirteen loops in the knot, thirteen loops "around" Michael Donald's neck, a "classic hangman's noose."[7] A hangman's noose "needs to be cut and burned right . . . so it won't unravel."[8] Both ends of the rope must be "cut off and burned."[9]

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This article is dedicated to Adrian Barker.

1. Record at 1026, State v. Cox, No. CC-87-2143 (Ala. 1987) [hereinafter Record]. Record citations preserve the original text of the trial transcript except where it appears clearly erroneous or ungrammatical.

2. Record at 1059-60.

3. *See id.* at 1055, 1059.

4. *Id.* at 1060.

5. *See id.* at 1063-64.

6. *Id.* at 1064.

7. *Id.* at 742. Morris Dees describes the thirteen loop knot as "standard Klan operating procedure." *See* MORRIS DEES & STEVE FIFFER, A SEASON FOR JUSTICE: THE LIFE AND TIMES OF CIVIL RIGHTS LAWYER MORRIS DEES 212 (1991).

8. Record at 1064.

9. *Id.* at 1069.

Tightly "pulled up" and left "swinging," Michael Donald's rope "burned into the bark."[10]

So much depends upon a camphor tree. Hays and Knowles "went out . . . driving around looking for someone to kill."[11] In East Mobile, "over around David Avenue," they "came on Michael Donald . . . kidnapped him and took him to Baldwin County and killed him, and brought him back to Herndon Avenue and hung him up" in a tree across the street from Hays's home.[12]

* * *

Early on the morning of March 21, 1981, a man discovered Michael Donald's mutilated body hanging from a camphor tree on the 100 block of Herndon Avenue in Mobile, Alabama.[13] That night, members of the United Klans of America, Alabama Realm, burned a cross on the grounds of the Mobile County Courthouse.[14] An autopsy found that Donald had been beaten, stabbed, strangled, and then "hung up."[15]

In 1983, a Mobile County grand jury indicted Hays, the Exalted Cyclops of the United Klans of America, for capital murder.[16] At trial, the jury found Hays guilty and recommended life without parole.[17] The trial judge rejected the recommendation of the jury and sentenced Hays to death.[18]

In 1984, a Mobile County grand jury indicted Cox, also a member of the United Klans of America, for conspiracy to commit murder.[19] After impaneling a jury and convening the trial, the trial judge dismissed the indictment and discharged Cox, citing the Alabama three-year statute of limitations for criminal conspiracy.[20] In 1987, an Alabama grand jury reindicted Cox for murder.[21] Commenced in 1988, the initial trial of the murder indictment ended in a mistrial. Reconvened in 1989, a second trial resulted in a conviction.[22]

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10. *Id.* at 742-43.
11. *Id.* at 1072, 1075.
12. *Id.* at 1078-79.
13. *See id.* at 461-62.
14. *See* Hays v. State, 518 So. 2d 749, 752 (Ala. Crim. App. 1985).
15. Record at 740-50, 751.
16. *See Hays,* 518 So. 2d at 751-52.
17. *See* 518 So. 2d at 751.
18. *See* 518 So. 2d at 751.
19. *See* Cox v. State, 585 So. 2d 182, 185 (Ala. Crim. App. 1991).
20. *See* 585 So. 2d at 185.
21. *See* 585 So. 2d at 185.
22. *See* 585 So. 2d at 185.

Additionally, in 1985 a federal grand jury indicted Knowles, a third member of the United Klans of America, for violating the civil rights of Michael Donald.[23] Knowles pleaded guilty to civil rights violations in the United States District Court for the Southern District of Alabama.[24] The district court sentenced him to life imprisonment.[25] In return for Knowles's guilty plea and his service as a State witness against Hays, Cox, and other Klansmen, the federal prosecutor recommended that Alabama forego concurrent prosecution of Knowles for capital murder in state court.[26]

In 1984, the Southern Poverty Law Center,[27] acting on behalf of Beulah Mae Donald, the mother of Michael Donald, filed a civil rights action in the United States District Court for the Southern District of Alabama against the United Klans of America, Hays, Knowles, Cox, and two other Klansmen seeking $10 million in damages.[28] In 1987, a jury found the Klan and its members guilty of violating Michael Donald's civil rights and awarded Beulah Mae Donald $7 million in damages.[29]

In this article, I take up the cause of Henry Hays, James Knowles, and Frank Cox, the cause of the Ku Klux Klan and other agents of racial violence in American history. I come to their cause not out of sympathy but in pursuit of a larger project devoted to the historical study of race, lawyers, and ethics in the American criminal justice system. Provoked by the jurisprudence of critical race theory ("CRT"),[30] the project investigates the rhetoric of race or "race-talk" in criminal defense advocacy and ethics within the context of racially motivated private violence.[31] The purpose of this long-term project is to understand the status of race, racialized defense strategy, and race-neutral representation in the law and ethics

23. *See* United States v. Knowle, No. CR83-00028 (S.D. Ala. 1986).

24. *See Cox*, 585 So. 2d at 185.

25. *See* 585 So. 2d at 185.

26. *See* 585 So. 2d at 185.

27. For an augmented history of the Southern Poverty Law Center, see MORRIS DEES & STEVE FIFFER, HATE ON TRIAL: THE CASE AGAINST AMERICA'S MOST DANGEROUS NEO-NAZI (1993).

28. *See* DEES & FIFFER, *supra* note 7, at 222; *see also* BILL STANTON, KLANWATCH: BRINGING THE KU KLUX KLAN TO JUSTICE 191-249 (1991).

29. *See* DEES & FIFFER, *supra* note 7, at 330-31.

30. *See, e.g.*, CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995); Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993); Symposium, *Critical Race Theory*, 82 CAL. L. REV. 741 (1994).

31. For discussion of the public-private distinction in the setting of racial violence, see *infra* notes 188-93 and accompanying text.

of criminal defense lawyering. Out of this understanding, I hope, will come a general theory of racialized defenses grounded in the normative ideals of moral community.

In a prior work, I searched the rhetoric of race in cases of racially motivated black-on-white private violence by focusing on the 1993 trial of Damian Williams and Henry Watson in Los Angeles County Superior Court on charges of attempted murder and aggravated mayhem, stemming from the beating of Reginald Denny and seven others during the South Central Los Angeles riots of 1992.[32] Close inspection of the Williams-Watson trial record suggests that the rhetorical structure of criminal defense stories of black-on-white racial violence incorporates competing narratives of deviance and defiance that engraft an essentialist dichotomy of good-bad moral character on the racial identity of young black men.[33] The distillation of male racial identity into objective, universal categories of black manhood distorts the meaning of racial identity and the image of racial community.[34] Moreover, the tendency of criminal defense lawyers to privilege deviance narratives and to subordinate defiance narratives in storytelling magnifies that distortion, inscribing the mark of bestial pathology into the texture of racial identity and community. The American Bar Association's Model Rules of Professional Conduct and Model Code of Professional Responsibility[35] countenance such deformity by allowing racialized or color-coded criminal defense strategies to survive unregulated under neutral accounts of liberal contractarian and communitarian legal theory.[36]

Calling for remedial regulation in racialized contexts such as the Williams-Watson trial, I proposed an alternative ethic of professional responsibility animated by principles of race consciousness, contingency, and collectivity.[37] A strong version of this alternative ethic directs criminal defense lawyers to reject the use of deviance-based racialized strategies unless such strategies are necessary to frustrate, by means of jury nullification, a racially discriminatory prosecution.[38] A weak version entreats defense lawyers to join

32. *See* Anthony V. Alfieri, *Defending Racial Violence,* 95 COLUM. L. REV. 1301 (1995).

33. *See id.* at 1304, 1309.

34. *See* Anthony V. Alfieri, *Race-ing Legal Ethics,* 96 COLUM. L. REV. 800, 801 (1996).

35. *See* MODEL RULES OF PROFESSIONAL CONDUCT (1995); MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980).

36. *See* Alfieri, *supra* note 34, at 801; *see also* Alfieri, *supra* note 32, at 1320.

37. *See* Alfieri, *supra* note 34, at 802; *see also* Alfieri, *supra* note 32, at 1340.

38. *See* Alfieri, *supra* note 34, at 802.

their clients in collaborative deliberation over the meaning of racial identity and injury within a counseling dialogue devoted to moral character and community integrity.[39]

Unsurprisingly, these remedial prescriptions sparked swift and acute criticism.[40] Robin Barnes, for example, denounced the remedial scheme as unprecedented, unworkable, and likely unconstitutional.[41] Furthermore, she condemned the underlying interpretive analysis of the Williams-Watson trial record for mistakenly entangling social and legal strands of race-talk, misjudging the harm inflicted upon black racial identity and community, and misconceiving the criminal defense lawyer's duty to advocate on behalf of individual client interests, even when preservation of those interests demands the use of racialized narratives.[42] For Barnes, the eradication of racial prejudice from the criminal justice system necessitates a regime of legal neutrality, not a regime of race-conscious ethics rules.[43]

Grand intentions notwithstanding, Barnes's dedication to neutrality consigns to folly her campaign aimed at purging the criminal justice system of racial prejudice. In the context of racial violence and racialized legal discourse, neutrality is not merely elusive, it is largely untenable. Broadly or narrowly construed, the color-coded rhetoric of legal discourse affords little chance of or room for neutral speech on matters of racial significance. Moreover, dedication to neutrality accepts the harms of racial injury as inevitable and, worse, unremarkable. That the harms are suffered by the victims and agents of racial violence, as well as by their cohort communities, seems of no moment to Barnes.

The threshold premise of this article, and its allied research, is the recognition and condemnation of racial injury within the distinct, though sometimes overlapping, borders of public and private violence. The instant turn to racial rhetoric in the circumstance of white-on-black private violence, specifically in the case of lynching, strains that border distinction. Gauged by any measure, the political violence of lynching seems to override the public-private distinction commonly posited by legal advocates and adjudicators. Yet

39. *See id.*

40. *See* Robin D. Barnes, *Interracial Violence and Racialized Narratives: Discovering the Road Less Traveled,* 96 COLUM. L. REV. 788 (1996); David B. Wilkins, *Race, Ethics, and the First Amendment,* 63 GEO. WASH. L. REV. 1030, 1069-70 n.183 (1995).

41. *See* Barnes, *supra* note 40, at 789-90, 792.

42. *See id.* at 789-93.

43. *See id.* at 791, 794.

here, tailored carefully to the facts presented in the case of Michael Donald, the distinction seems to hold and, equally important, to prove rhetorically and morally instructive.

The enormous breadth of the subject of lynching in America, spanning two centuries and crossing interdisciplinary boundaries, coupled with a scarcity of archival court collections, especially trial records, dictates a somewhat improvisional initial approach to the rhetoric of lynching cases.[44] The starting point, staked out in this introductory article, is an effort to map competing *theories* of racialized defenses arising out of lynching prosecutions. Building on this effort, the next article will survey the varied *forms* of racialized defenses fashioned against lynching prosecutions. A third article will chart the development of racialized defenses in lynching-related civil rights actions. Together, the articles will lay the groundwork for a fuller account of the history of racialized defenses in American criminal and civil rights law.

To the extent that it assumes a theory-driven posture toward sociolegal practice, the instant approach will doubtless stir protest. Detecting an "impatience to theorize,"[45] some may condemn the approach for privileging abstract theoretical design over contextualized reflection.[46] To be sure, epistemological hierarchy of any sort warrants careful scrutiny. The hazards of error and misreading are always great. But the same hazards attend anthropological,[47] interpretive,[48] and empirical[49] investigations. No methodology is with-

44. A comprehensive search for archival court records requires the wide-ranging review of state and county court documents. Two library collections provide useful aid in organizing such a search: the Papers of the National Association for the Advancement of Colored People, Library of Congress, Manuscript Division, Washington, D.C.; and the News Clippings File of the Tuskegee Institute, Hollis Burke Frissell Library, Tuskegee, Alabama.

45. Lucie White, *Paradox, Piece-Work, and Patience,* 43 HASTINGS L.J. 853, 859 (1992).

46. *See id.; see also* Peter A. Joy, *Clinical Scholarship: Improving the Practice of Law,* 2 CLINICAL L. REV. 385, 402-04 (1996); Cathy Lesser Mansfield, *Deconstructing Reconstructive Poverty Law: A Practice-Based Critique of the Storytelling Aspects of the Theoretics of Practice Movement,* 61 BROOK. L. REV. 889 (1995).

47. *See* CLIFFORD GEERTZ, AFTER THE FACT: TWO COUNTRIES, FOUR DECADES, ONE ANTHROPOLOGIST 96-135 (1995); Peter Just, *History, Power, Ideology, and Culture: Current Directions in the Anthropology of Law,* 26 LAW & SOCY. REV. 373 (1992) (review essay); Annelise Riles, *Representing In-Between: Law, Anthropology, and the Rhetoric of Interdisciplinarity,* 1994 U. ILL. L. REV. 597.

48. *See* Patricia Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative,* 29 LAW & SOCY. REV. 197 (1995); Diane Reay, *Insider Perspectives or Stealing the Words out of Women's Mouths: Interpretation in the Research Process,* 53 FEMINIST REV. 57 (1996).

49. *See* Austin Sarat, *Off to Meet the Wizard: Beyond Validity and Reliability in the Search for a Post-empiricist Sociology of Law,* 15 LAW & SOC. INQUIRY 155 (1990); David M. Trubek & John Esser, *"Critical Empiricism" in American Legal Studies: Paradox, Program, or Pandora's Box?,* 14 LAW & SOC. INQUIRY 3 (1989).

out peril. Although broad, the project advanced here strives for a contextual account of the law of criminal lawyering and ethics in the hope of capturing some sense of the theory and practice of racial violence in American legal history.

The article is divided into four parts. Part I describes the narrative form and racialized substance of lynching defenses. Part II examines rival theories of lynching defenses, notably jury nullification, victim denigration, and diminished capacity. Part III analyzes alternative ethical justifications of lynching defenses under modern and postmodern visions of jurisprudence. Part IV proposes a reconstructed ethic of lynching defenses informed by the norms of virtue, citizenship, race consciousness, and spirituality.

I. LYNCHING HISTORIES

The lynching of Michael Donald at the hands of the Ku Klux Klan sounds themes echoed throughout the history of lynching in America: difference, hate, violence, and community.[50] Plainly, a full account of that history, and of the place of the Klan in its progress,[51] exceeds the scope of this article. The main thrust of this article addresses neither the progress nor the prosecution of lynching,[52] but rather the legal defense of racially motivated violence. Symbolic of the physical and interpretive violence of race, lynching and its legal defense raise issues common to the postmodern study of law and the politics of difference,[53] especially the contested poli-

50. On the history of American lynching, see JESSE D. AMES, THE CHANGING CHARACTER OF LYNCHING (1942); JAMES E. CUTLER, LYNCH-LAW: AN INVESTIGATION INTO THE HISTORY OF LYNCHING IN THE UNITED STATES (1905); WALTER WHITE, ROPE & FAGGOT: A BIOGRAPHY OF JUDGE LYNCH (1929); ROBERT L. ZANGRANDO, THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950 (1980).

51. Historians divide the evolution of the Ku Klux Klan into three periods corresponding to the late nineteenth century Reconstruction-era, the post–World War I era of the 1920s, and the post-World War II era of the civil rights movement. For Reconstruction-era histories, see DAVID M. CHALMERS, HOODED AMERICANISM: THE FIRST CENTURY OF THE KU KLUX KLAN 1865-1965 (1987); ALLEN W. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION (1971); WYN CRAIG WADE, THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA 31-116 (1987).

On the revival of the Klan in the 1920s, see KATHLEEN M. BLEE, WOMEN OF THE KLAN: RACISM AND GENDER IN THE 1920S (1991); NANCY MACLEAN, BEHIND THE MASK OF CHIVALRY: THE MAKING OF THE SECOND KU KLUX KLAN (1994).

On the rise of the modern Klan in the post-World War II and civil rights-era, see DAVID H. BENNETT, THE PARTY OF FEAR: THE AMERICAN FAR RIGHT FROM NATIVISM TO THE MILITIA MOVEMENT 273-331 (1995); PATSY SIMS, THE KLAN (1978).

52. For a review of lynching prosecutions, see JAMES H. CHADBOURN, LYNCHING AND THE LAW 13-24 (1933); EVERETTE SWINNEY, SUPPRESSING THE KU KLUX KLAN: THE ENFORCEMENT OF THE RECONSTRUCTION AMENDMENTS 1870-1877, at 180-204, 316-40 (1987).

53. On postmodernism and legal practice, see LAWYERS IN A POSTMODERN WORLD: TRANSLATION AND TRANSGRESSION (Maureen Cain & Christine B. Harrington eds., 1994); Anthony V. Alfieri, *Impoverished Practices*, 81 GEO. L.J. 2567 (1993).

tics of the racial trial.[54] The legal defense of lynching, for example, involves the identity-making function of legal narrative,[55] the social construction of race,[56] and the culture and cognitive psychology of bias.[57]

The product of an apartheid system of rhetorical and spatial dimensions, the American trial court provides the arena for the intersection of law, lawyering, ethics, and race. An important literature explores the role of judges and courts in the history of racial oppression both here[58] and abroad.[59] Curiously, this literature omits sustained treatment of the complicity of lawyers in legitimizing the juridical structures (such as law, legal discourse, and institutional procedure) of racial oppression.[60]

The emergence of an outsider jurisprudence in the legal academy during the last decade offers a chance to cure this omission. Guided by new voices of color[61] probing the connections of law, race, and identity,[62] the jurisprudence is evolving rapidly under the

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54. The literature on political trials is extensive. *See, e.g.*, POLITICAL TRIALS (Theodore L. Becker ed., 1971); AMERICAN POLITICAL TRIALS (Michael R. Belknap ed., 1981); Georgia W. Ulmschneider, *Rape and Battered Women's Self-Defense Trials as "Political Trials": New Perspectives on Feminists' Legal Reform Efforts and Traditional "Political Trials" Concepts*, 29 SUFFOLK U. L. REV. 85 (1995).

55. *See generally* Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991).

56. *See generally* Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

57. *See generally* Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989).

58. *See, e.g.*, ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975); William E. Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974).

59. *See, e.g.*, STEPHEN ELLMANN, IN A TIME OF TROUBLE: LAW AND LIBERTY IN SOUTH AFRICA'S STATE OF EMERGENCY (1992); Martin Chanock, *Criminological Science and the Criminal Law on the Colonial Periphery: Perception, Fantasy, and Realities in South Africa, 1900-1930*, 20 LAW & SOC. INQUIRY 911 (1995).

60. Noteworthy exceptions concern lawyer complicity in the Nazi and South African state regimes. *See* Guyora Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 YALE L.J. 1321 (1989); Stephen Ellmann, *Law and Legitimacy in South Africa*, 20 LAW & SOC. INQUIRY 407 (1995).

61. *See* Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991).

62. For studies of racial identity, see JUDY SCALES-TRENT, NOTES OF A WHITE BLACK WOMAN: RACE, COLOR, COMMUNITY (1995); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263 (1995); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law and A Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991); Francisco Valdez, *Sex and Race in Queer Legal Culture: A Meditation on Identity and Inter-Connectivity*, 5 S. CAL. REV. L. & WOMEN'S STUD. (forthcoming 1996); Mary Coombs, *Interrogating Identity*, 2 AFR.-AM. L. & POLY. REP. 222 (1995) (book review). *See*

prodding of CRT,[63] Asian,[64] and LatCrit scholars.[65] The advent of the CRT and fledgling LatCrit movements dislodges the traditionally subordinate position of race and ethnicity in American law and ethics. Thus dislodged, the meaning of color in black,[66] Asian,[67] Latino/a,[68] and Native American[69] advocacy takes on new and unsettled import. This instability enables critical scholars to reassess the written and social texts of the law exhibited in the courtroom.[70] Textual reassessment implicates narrative[71] and discourse theory,[72] and thereby highlights the rhetoric of the criminal trial.[73] Reimagining the rhetoric of racialized advocacy and ethics at trial or in the law office creates transformative opportunities to move

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generally AFTER IDENTITY: A READER IN LAW AND CULTURE (Dan Danielsen & Karen Engle eds., 1995).

63. *See, e.g.*, Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference?*, 82 CAL. L. REV. 787 (1994); Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741 (1994); Eleanor Marie Brown, Note, *The Tower of Babel: Bridging the Divide Between Critical Race Theory and "Mainstream" Civil Rights Scholarship*, 105 YALE L.J. 513 (1995).

64. *See, e.g.*, Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1243 (1993); Jim Chen, *Unloving*, 80 IOWA L. REV. 145 (1994).

65. *See, e.g.*, Symposium, *LatCrit Theory: Naming and Launching a New Perspective in Legal Discourse*, 1 HARV. LATINO L. REV. (forthcoming 1996); Symposium, *Latinas/os, LatCrit Theory and the 21st Century*, 85 CAL. L. REV. (forthcoming 1997).

66. *Compare* Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) *with Colloquy: Responses to Randall Kennedy's Racial Critiques of Legal Academia*, 103 HARV. L. REV. 1844 (1990).

67. *See* 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 (1993).

68. *See* Margaret E. Montoya, *Mascaras, Trenzas, Y Grenas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185 (1994).

69. *See* Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989); Robert A. Williams, Jr., *Vampires Anonymous and Critical Race Practice*, 95 MICH. L. REV. 741 (1997).

70. *See, e.g.*, Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process — A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 AM. CRIM. L. REV. 743 (1995); Cara W. Robertson, *Representing "Miss Lizzie": Cultural Convictions in the Trial of Lizzie Borden*, 8 YALE J.L. & HUMAN. 351 (1996).

71. *See* Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994); Valorie K. Vojdik, *At War: Narrative Tactics in the Citadel and VMI Litigation*, 19 HARV. WOMEN'S L.J. 1 (1996).

72. *See* Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992); Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763 (1995).

73. For studies of criminal trial rhetoric, see generally Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992); Philip N. Meyer, *"Desperate for Love": Cinematic Influences upon a Defendant's Closing Argument to a Jury* 18 VT. L. REV. 721 (1994).

legal practice toward an appreciation of the importance of racial identity and community.

Consider the idea of the racialized defense. By racialized, I mean a defense coded, overtly or covertly, in the rhetoric of color. Garnered from interdisciplinary research on race and the criminal law process,[74] judicial reports of racial and ethnic bias in the courtroom,[75] and the writings of CRT[76] and ethics[77] scholars, color-coded claims and defenses pervade the sociolegal discourse of American law, culture, and society. The resurgence of the black rage defense[78] and the emergence of the variegated cultural defense[79] reflects the protean nature of that discourse. Taken together, these defenses illustrate the intertwined character of legal and social discourse about race.

Alluding to this entwined quality, Alan Hunt observes "that legal life and everyday social life are mutually conditioning and constraining and that elements of legal consciousness play an active part in popular consciousness and practices."[80] To Hunt, law "enters into the way that life is imagined, discussed, argued about, and fought over."[81] The act of "imagining, talking, arguing, and fight-

74. *See generally* CORAMAE R. MANN, UNEQUAL JUSTICE — A QUESTION OF COLOR (1993); MICHAEL TONRY, MALIGN NEGLECT — RACE, CRIME, AND PUNISHMENT IN AMERICA (1995).

75. *See, e.g.*, Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System, *Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System*, 73 OR. L. REV. 823 (1995); Special Committee on Gender to the D.C. Circuit Task Force on Gender, *Report of the Special Committee on Gender to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, 84 GEO. L.J. 1657, 1893 (1996). *See generally* Todd D. Peterson, *Studying the Impact of Race and Ethnicity in the Federal Courts*, 64 GEO. WASH. L. REV. 173 (1996).

76. *See* Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994).

77. *See* Eva S. Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 GEO. J. LEGAL ETHICS 1 (1994); Andrew E. Taslitz & Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment Is No Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781 (1996).

78. *See* Patricia J. Falk, *Novel Theories of Criminal Defense Based upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 N.C. L. REV. 731 (1996). *See generally* WILLIAM H. GRIER & PRICE M. COBBS, BLACK RAGE (1968).

79. *See, e.g.*, Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36 (1995); Alison D. Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. CAL. REV. L. & WOMEN'S STUD. 437 (1993); Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57 (1994).

80. Alan Hunt, *Law, Community, and Everyday Life: Yngvesson's Virtuous Citizens and Disruptive Subjects*, 21 LAW & SOC. INQUIRY 173, 178-79 (1996) (reviewing BARBARA YNGVESSON, VIRTUOUS CITIZENS, DISRUPTIVE SUBJECTS: ORDER AND COMPLAINT IN A NEW ENGLAND COURT (1993)).

81. *Id.* at 179.

ing" in turn "shapes the law."[82] In this way, the racialized organization of law, lawyering, and ethics infects and, conversely, is infected by the racialized composition of popular culture and everyday social life in America.[83] The fusion of racialized legal and social discourse is not simply confined to high-profile cases.[84]

The prominence of the racialized defense in contemporary sociolegal discourse underscores the crucial function of narrative and storytelling in criminal law and lawyering. Dismantling racialized storytelling in a criminal context reveals two core presuppositions that shape the traditional criminal defense paradigm: partisanship and nonaccountability.[85] The precepts of client partisanship and moral nonaccountability spawn discrete rhetorical forms of color-coded narrative. The play of narrative, Rebecca French notes, "breaks open a discipline by creating new linguistic and representational forms."[86] Here, the focus is on the racialized criminal courtroom, its race-neutral ethical precepts, and its color-coded narrative forms.

The examination of racialized courtroom narratives requires an analysis of hierarchy and status in legal rhetoric. Consider the rhetoric of colorblind constitutionalism. The colorblindness trope[87] is basic to the discourse of American law and jurisprudence. Yet, insofar as it denies the social significance of racial categories, it pre-

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82. *Id.*

83. *See generally* RACE-ING JUSTICE, ENGENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS AND THE CONSTRUCTION OF SOCIAL REALITY (Toni Morrison ed., 1992).

84. *See* Adeno Addis, *"Hell Man, They Did Invent Us": The Mass Media, Law and African Americans,* 41 BUFF. L. REV. 523 (1993); Juan F. Perea, Los Olvidados: *On the Making of Invisible People,* 70 N.Y.U. L. REV. 965, 967-70 (1995).

85. *See* Alfieri, *supra* note 32, at 1321.

86. Rebecca R. French, *Of Narrative in Law and Anthropology,* 30 LAW & SOCY. REV. 417, 421 (1996) (review essay). Explicating these narrative forms, French remarks:

> In this period of late or postmodernism, single-person narrative is viewed as a safe and effective technique both for avoiding false generalizations that might be attacked (the false coherence of essentialist stereotypes) and for creating a new form of social science that includes, instead of dismisses, multiplicity and diversity.

Id. at 419; *see also* Benjamin L. Apt, *Aggadah, Legal Narrative, and the Law,* 73 OR. L. REV. 943, 968 (1995) ("Legal narrative often attempts to expose the shortcomings of current laws and reveal the effect of laws on society.").

87. *See* T. Alexander Aleinikoff, *A Case for Race Consciousness,* 91 COLUM. L. REV. 1060 (1991); Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom,* 28 CONN. L. REV. 1 (1995).

serves racial hierarchy and status inequality.[88] In this respect, colorblind rhetoric operates as a "status-preserving"[89] discourse.

The law of lawyering which governs the criminal defense of racial violence in lynching cases also constitutes a status-preserving discourse. In practical effect, it protects the racial hierarchy of white dominance and black subordination embedded in the racialized narratives of American law, culture, and society. Within federal and state courtrooms, this status hierarchy appears legitimate and nondiscriminatory.

This legitimacy rests in part on the rhetoric of colorblindness. Cloaked in this rhetoric, the Model Code and the Model Rules condone the use of racialized narrative in criminal defense advocacy. Construing the law of lawyering as a racial status law and its language as a status-preserving discourse challenges the race-neutral standing of the Model Code and the Model Rules. Central to this challenge is an explanation of precisely how legal rules *covertly* enforce status privileges "once justified in overtly hierarchy-based discourses, with reference to other, less contested, social values,"[90] such as citizenship and community.

II. LYNCHING DEFENSES

Lynching defenses embody a distinct narrative form of the racialized defense. This Part considers three varieties of lynching defenses: jury nullification, victim denigration, and diminished capacity. The defenses of jury nullification and victim denigration make overt use of hierarchy-based racial discourse. Nullification rhetoric invokes the power and prerogative of white racial supremacy. Denigration rhetoric conjures up a vision of black racial inferiority where victims are worthy of killing but unworthy of protection or redress. The defense of diminished capacity, by contrast, makes covert use of hierarchical racial discourse through reference to the social values of community and civic virtue. For white lawbreakers, civic commitment lies only to segregated community.

The racial hierarchies encoded in the rhetoric of nullification, denigration, and diminished capacity denote *difference* in legal and social status. The elaboration of difference follows the logic of ad-

88. *See* Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733 (1995).

89. The term belongs to Reva Siegel. *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2185 (1996).

90. *Id.* at 2177.

versarial justice,[91] sharply distinguishing and dividing claims of community racial entitlement into oppositional stands. Despite complaints of excess, the model of adversarial justice expressly tolerates deceptive and sometimes false or frivolous claims.[92] Bound up in false hierarchies of natural superiority and inferiority, the narrative signification of racial difference is likewise tolerated.

The reconfiguration of difference-based racial hierarchy requires alteration of the signifying function of lynching defenses. Alteration may be accomplished through either nonreflexive or reflexive approaches to the law of criminal lawyering.[93] A nonreflexive, or discretionary, approach draws upon traditions of lawyer independence to disavow racialized strategies. This unilateral approach conceives of the criminal defense lawyer as an unbridled moral activist. A reflexive or collaborative approach appeals to civic republican traditions to encourage lawyer-client deliberations of racial identity, moral character, and dialogic community. This bilateral approach restores the Brandeisian vision of "socially responsible advocacy."[94]

Both discretionary and collaborative approaches to criminal lawyering reaffirm the bonds that link the criminal law to moral character[95] and community. To prevail, however, reaffirmation must confront the ascending rhetoric of excuse in criminal defense

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91. For deft exposition of this logic, see David Luban, *The Adversary System Excuse, in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83 (David Luban ed., 1983); *see also* Stephen McG. Bundy & Einer R. Elhauge, *Do Lawyers Improve the Adversary System?*, 79 CAL. L. REV. 313 (1991).

92. *See* R.J. Gerber, *Victory v. Truth: The Adversary System & Its Ethics*, 19 ARIZ. ST. L.J. 3 (1987); Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403 (1992). *Compare* Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" To Present a False Case*, 1 GEO. J. LEGAL ETHICS 125 (1987) *with* John B. Mitchell, *Reasonable Doubts Are Where You Find Them: A Response to Professor Subin's Position on the Crimina Lawyer's "Different Mission,"* 1 GEO. J. LEGAL ETHICS 339 (1987).

93. Jack Balkin suggests two approaches to ideological demystification: nonreflexive and reflexive. *See* J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935 (1995) (reviewing CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993)). According to Balkin, a nonreflexive approach "sees ordinary citizens as suffering from a pathology, a defect that needs to be cured through the analyst's expertise." *Id.* at 1984. A reflexive approach, by comparison, "understands the relationship between the analyst and analysand as a *disagreement* about what is good, a disagreement that may be due to misunderstandings and ideological blinders on both sides." *Id.* at 1984-85.

94. Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445, 1471 (1996).

95. *See* Peter Arenella, *Character, Choice, and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments*, SOC. PHIL. & POLY., Spring 1990, at 59; Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719 (1992).

advocacy.[96] Interweaving gender,[97] race,[98] and the social environment,[99] the concept of excuse limits individual blame and collective accountability.[100] At the same time, it implicates the meaning of shame and shaming.[101]

Dan Kahan defines shame in terms of disgrace. Shame, according to Kahan, is "the emotion that a person experiences when she believes that she has been disgraced in the eyes of persons whom she respects."[102] As such, it illuminates the conjunction of culture, community, and the criminal justice system.[103]

Lynching defenses encourage cultural and community resistance to shame[104] by inviting collective defiance of legal and nonlegal sanctions.[105] The defenses urge the renunciation of shame in favor of sympathy for white lawbreakers.[106] Instead of commonality with

96. *See* R. JAY WALLACE, RESPONSIBILITY AND THE MORAL SENTIMENTS 118-53 (1994); Richard J. Bonnie, *Excusing and Punishing in Criminal Adjudication: A Reality Check*, 5 CORNELL J.L. & PUB. POLY. 1 (1995); Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671 (1988); Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091 (1985).

97. *See* Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 3 (1994); Deborah W. Denno, *Gender, Crime, and the Criminal Law Defenses*, 85 J. CRIM. L. & CRIMINOLOGY 80 (1994).

98. *See* GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL (1988).

99. *See* K.D. HARRIES, CRIME AND THE ENVIRONMENT (1980); Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. J. 9 (1985).

100. *See* Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511 (1992).

101. *See* JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989); GABRIELE TAYLOR, PRIDE, SHAME, AND GUILT: EMOTIONS OF SELF-ASSESSMENT 53-84 (1985); John Braithwaite, *Shame and Modernity*, 33 BRIT. J. CRIMINOLOGY 1 (1993); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 630-52 (1996).

102. Kahan, *supra* note 101, at 636 (footnote omitted).

103. *See* Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880 (1991).

104. *See* Martha Craven Nussbaum, *Shame, Separateness, and Political Unity: Aristotle's Criticism of Plato*, *in* ESSAYS ON ARISTOTLE'S ETHICS 395, 427 (Amelie Oksenberg Rorty ed., 1980) (finding merit in the centrality of "character-friendship" within the Aristotelian polis, especially in its "capacity for refining self-criticism through emulation and the sense of shame" (footnote omitted)).

105. *See* Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133 (1996).

106. Segregated pronouncements of racial sympathy mark the loss of Gordon Wood's notion of a "modern humanitarian sensibility." For Wood, that loss implies the abandonment of the Jeffersonian belief in the equality of the moral worth and authority of every individual. Abandonment of this ideal, he cautions, poses a threat to civil society. *See* Gordon S. Wood, *Thomas Jefferson, Equality, and the Creation of a Civil Society*, 64 FORDHAM L. REV. 2133, 2141-42 (1996); *see also* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1991).

people or communities of color, the defenses incite separation and detachment.

A. *Jury Nullification*

The racialized defense of jury nullification binds communities to racial difference and subordination. Construed as an expression of community moral sentiment, nullification seeks to rectify perceived inequalities of racial status.[107] Out of deference to the subordinate racial status of black jurors and defendants, Paul Butler explains that nullification occurs when a jury harbors objections to a law either on its face or as applied to a particular defendant and, accordingly, "disregards evidence presented at trial and acquits an otherwise guilty defendant."[108] Borrowing Butler's formulation for the purpose of upending it, the theory of jury nullification propounded here licenses *white* jurors to "approach their work cognizant of its political nature and their prerogative to exercise their power in the best interests" of the *white* community.[109]

Nullification defense strategies recognize race as a rhetorical presence in criminal jury selection and deliberation.[110] Recent literature on the criminal jury[111] confirms the magnitude of this presence. Race taints jury selection[112] notwithstanding the diverse demographic factors impinging on the process of voir dire.[113] Similarly, race contaminates jury deliberation in spite of the constitu-

107. On racial bias in criminal trials, including the determination of guilt, see Shari Lynn Johnson, *Black Innocence and the White Jury,* 83 MICH. L. REV. 1611 (1985).

108. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System,* 105 YALE L.J. 677, 700 (1995). Butler adds:

> Jury nullification occurs when a jury acquits a defendant who it believes is guilty of the crime with which he is charged. In finding the defendant not guilty, the jury refuses to be bound by the facts of the case or the judge's instructions regarding the law. Instead, the jury votes its conscience.

Id.

109. *Id.* at 715.

110. *Cf.* Kurt M. Saunders, *Law as Rhetoric, Rhetoric as Argument,* 44 J. LEGAL EDUC. 566, 577 (1994).

111. *See* JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 99-141, 207-39 (1994); NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW 172-95 (1995).

112. *See* Hiroshi Fukurai et al., *Where Did Black Jurors Go? A Theoretical Synthesis of Racial Disenfranchisement in the Jury System and Jury Selection, in* READING RACISM AND THE CRIMINAL JUSTICE SYSTEM 87-100 (David Baker ed., 1994); Hiroshi Fukurai & Edgar W. Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System,* 13 NATL. BLACK L.J. 238 (1994).

113. *See* Chris F. Denove & Edward J. Imwinkelried, *Jury Selection: An Empirical Investigation of Demographic Bias,* 19 AM. J. TRIAL ADVOC. 285 (1995).

tional aspiration of political insulation and cross-sectional community representation.[114]

For the white defender of black lynching, the criminal jury trial provides a forum for citizen political participation aimed at curing the problem of white political, social, and economic disenfranchisement.[115] Deployed as an "audience-based theory of argument,"[116] nullification rhetoric imbues the racialized speech found in opening and closing statements, direct and cross examinations, and even objections. The rhetoric vocalizes the political *astonishment*[117] of the white community toward lynching prosecutions. For defenders of that community, the ethical task is to "distinguish between what can be said and what cannot be said"[118] in the service of racial supremacy.

The evidence of community astonishment apparent in jury nullification points to an entrenched sociolegal consciousness of racial hierarchy. Demonstrated in public through the media[119] and in private through talk of conspiracy or hoax,[120] hierarchy-instilled racial consciousness molds the sociolegal reality of the criminal law. The rhetorical stratagems of prosecution and defense teams reflect that reality.[121] The constitution of the racialized self and racial commu-

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114. *See* Lewis H. LaRue, *A Jury of One's Peers,* 33 WASH. & LEE L. REV. 841 (1976); Daniel W. Van Ness, *Preserving a Community Voice: The Case for Half-and-Half Juries in Racially-Charged Criminal Cases,* 28 J. MARSHALL L. REV. 1 (1994); *see also* Marina Angel, *Criminal Law and Women: Giving the Abused Woman Who Kills A Jury of Her Peers Who Appreciate Trifles,* 33 AM. CRIM. L. REV. 229 (1996).

115. *See* Vikram David Amar, *Jury Service as Political Participation Akin to Voting,* 80 CORNELL L. REV. 203 (1995).

116. Saunders, *supra* note 110, at 577.

117. *Cf.* Louis E. Wolcher, *The Man in a Room: Remarks on Derrida's* Force of Law, 7 LAW & CRITIQUE 35, 40 (1996).

118. *Id.* at 63.

119. *See* Susan F. Hirsch, *Interpreting Media Representation of a "Night of Madness": Law and Culture in the Construction of Rape Identities,* 19 LAW & SOC. INQUIRY 1023 (1994).

120. *See* Katheryn K. Russell, *The Racial Hoax as Crime: The Law as Affirmation,* 71 IND. L.J. 593 (1996); *see also* Regina Austin, *Beyond Black Demons & White Devils: Antiblack Conspiracy Theorizing & The Black Public Sphere,* 22 FLA. ST. U. L. REV. 1021 (1995).

121. *See* Susan L. Pilcher, *Ignorance, Discretion and the Fairness of Notice: Confronting "Apparent Innocence" in the Criminal Law,* 33 AM. CRIM. L. REV. 1, 36 (1995).

Pilcher remarks that:

> [C]riminal prosecution serves a broadly educational function as well as an individually punitive one: public views of blameworthiness are significantly influenced by what is prosecuted, just as what is criminalized is influenced by public disapproval. Provided the enforced norm is perceived as morally legitimate, and the violator thus blameworthy, the norm is internalized and accrues power as a socializing force. Criminal enforcement in the absence of socialization of the norm, however, can have the opposite effect; if the public would not collectively react to violation of the norm with condemnation then the

nity mirrors the same reality.[122] Forged from the hierarchical tension of racial status domination and subordination, both the self and community suffer from the deformities of negation.

B. *Victim Denigration*

The racialized defense of victim denigration rests on the negation of racial identity in law and culture.[123] Negation fragments racial identity[124] and scatters deformed images throughout the criminal process.[125] Criminal defense lawyers employ this imagery in the "elaboration of difference."[126] Racial difference establishes the predicate for the segregation of the white self and the black other. Lynching defenders seek to enforce racial segregation by affirming the status of the white lawbreaker and demeaning the body of the black victim.[127]

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particular prohibition has no distinctive social power. This, in turn, fosters the diminished respect for the law. . . .

Id.

122. *See* Margaret Jane Radin, *The Colin Ruagh Thomas O'Fallon Memorial Lecture on Reconsidering Personhood,* 74 OR. L. REV. 423, 430 (1995). ("For appropriate self-constitution, both strong attachment to context and strong possibilities for detachment from context are needed. Because these requirements seem to oppose each other, they exist in tension. This tension causes problems for theory and contradictory tendencies in practice.").

123. *See* JAN NEDERVEEN PIETERSE, WHITE ON BLACK: IMAGES OF AFRICA AND BLACKS IN WESTERN POPULAR CULTURE 51-63, 132-41, 152-56, 174-78 (1992); *see also* Adele Logan Alexander, *"She's No Lady, She's a Nigger": Abuses, Stereotypes, and Realities from the Middle Passage to Capitol (and Anita) Hill, in* RACE, GENDER AND POWER IN AMERICA: THE LEGACY OF THE HILL-THOMAS HEARINGS 3 (Anita Faye Hill & Emma Coleman Jordan eds., 1995); A. Leon Higginbotham, Jr., *The Hill-Thomas Hearings — What Took Place and What Happened: White Male Domination, Black Male Domination, and the Denigration of Black Women, in* RACE, GENDER AND POWER IN AMERICA: THE LEGACY OF THE HILL-THOMAS HEARINGS, *supra,* at 26.

124. *See* Regina Austin, *"A Nation of Thieves": Securing Black People's Right to Shop and to Sell in White America,* 1994 UTAH L. REV. 147; Erika L. Johnson, *"A Menace To Society:" The Use of Criminal Profiles and Its Effects on Black Males,* 38 HOWARD L.J. 629 (1995).

125. *See* Kevin Brown, *The Social Construction of a Rape Victim: Stories of African-American Males About the Rape of Desiree Washington,* 1992 U. ILL. L. REV. 997; Ariela Gross, *Pandora's Box: Slave Character on Trial in the Antebellum Deep South,* 7 YALE J.L. & HUMAN. 267 (1995); Bernard E. Harcourt, *Imagery and Adjudication in the Criminal Law: The Relationship Between Images of Criminal Defendants and Ideologies of Criminal Law in Southern Antebellum and Modern Appellate Decisions,* 61 BROOK. L. REV. 1165 (1995); Sheri Lynn Johnson, *Racial Imagery in Criminal Cases,* 67 TUL. L. REV. 1739 (1993); Lawrence Vogelman, *The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom,* 20 FORDHAM URB. L.J. 571 (1993).

126. *See* Chanock, *supra* note 59, at 935 (discussing the "elaboration of difference" through law).

127. Modern criminal law jurisprudence discloses a growing interest in the position of the victim. *See, e.g.,* GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS (1995); Lynne Henderson, *Whose Justice? Which Victims?,* 94 MICH. L. REV. 1596 (1996) (reviewing FLETCHER, *supra*).

The denigration defense centers on the racially subordinate status of black victims.[128] Affirming this unequal status renews long standing claims of moral, physical, mental, and genetic inferiority. The claims provide the historical rationale not only for lynching, but also for eugenic segregation and sexual sterilization.[129] They also supply the basis for assigning qualities of bad or immoral character to black victims.

To lynching defenders, black victims possess immoral character. Infirmities of character render such victims undeserving of privacy or dignity. The deterioration of victim-specific privacy interests attends the steady collapse of the boundary line separating public from private realms in law and liberal theory. Calling upon the state for juridical vindication hastens that collapse.[130] State action, in a significant sense, propels the victim of private violence into a public role.

Acting in concert with the state, criminal defense lawyers frame the identity of victims in the public sphere of the courtroom.[131] Framing in advocacy causes revictimization in death. Like victim impact statements, victim denigration statements "permit, and indeed encourage, invidious distinctions about the personal worth of victims."[132] Such distinctions, Susan Bandes comments, contradict the principle of moral equality in the criminal law.[133]

Increasingly embroiled in Supreme Court jurisprudence,[134] victim-related statements demonstrate the force of moral passion and emotion embedded in racialized defenses.[135] The racially impassioned rhetoric of victim denigration demands judgments of nar-

128. *See* Stephen L. Carter, *When Victims Happen to be Black*, 97 YALE L.J. 420 (1988); Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127 (1987).

129. *See* EDWARD J. LARSON, SEX, RACE, AND SCIENCE: EUGENICS IN THE DEEP SOUTH (1995); Edward J. Larson, *"In the Finest, Most Womanly Way:" Women in the Southern Eugenics Movement*, 39 AM. J. LEGAL HIST. 119 (1995).

130. *See* Dorothy E. Roberts, *The Only Good Poor Woman: Unconstitutional Conditions and Welfare*, 72 DENV. U. L. REV. 931, 941 (1995) ("The sphere of privacy protected by liberal rights largely evaporates once the individual invites in state assistance.").

131. *See generally* Mary I. Coombs, *Telling the Victim's Story*, 2 TEX. J. WOMEN & L. 277 (1993); Patricia Y. Martin & R. Marlene Powell, *Accounting for the "Second Assault": Legal Organizations' Framing of Rape Victims*, 19 LAW & SOC. INQUIRY 853 (1994).

132. Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 406 (1996).

133. *See id.*

134. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808 (1991), *overruling* Booth v. Maryland, 482 U.S. 496 (1987), *and* South Carolina v. Gathers, 490 U.S. 805 (1989).

135. *See* Markus D. Dubber, *Regulating the Tender Heart When the Axe Is Ready to Strike*, 41 BUFF. L. REV. 85 (1993); Angela P. Harris, *The Jurisprudence of Victimhood*, 1991 SUP. CT. REV. 77.

rative inclusion and exclusion. Bandes describes narrative judgment as "unavoidably normative" and "value-laden."[136] In her view, the issue "is *always* which narratives we should privilege and which we should marginalize or even silence."[137]

Victim denigration statements privilege narratives of white innocence and resistance antagonistic to black identity and the corollary value of black self-esteem.[138] The narratives reproduce racial hierarchies of moral worth, emphasizing the role of black depravity even at death. Denigration rhetoric of this kind ventures to establish an "empathetic link"[139] between white lawbreakers and white jurors, thereby *coloring* the judgment of culpability.[140] In the same way, the diminished capacity rhetoric of racial delusion seeks out the empathetic ratification of segregated community.

C. *Diminished Capacity*

The racialized defense of diminished capacity combines commitment, community, and delusion to free white lawbreakers of moral and criminal culpability. Freedom follows from the commitment to segregated community. Heralded in the case of lynching, that com-

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136. Bandes adds:

> Once we acknowledge the instrumental, political nature of legal narrative, we can enter the difficult discussions of why marginalization of some narratives occurs, how to separate the wrongly excluded narratives from those that ought to be excluded, how to include the wrongly marginalized narratives in legal discourse, and how to ensure that they are actually heard.

Bandes, *supra* note 132, at 387-88 (footnotes omitted).

137. *Id.* at 409. Death penalty abolitionists, for example, urge the silencing of victim impact narratives on the ground that they "incline the sentencer in favor of death, thus impugning the reliability of the jury's decision as an objective benchmark of the evolving standards [of decency]." Susan Raeker-Jordan, *A Pro-Death, Self-Fulfilling Constitutional Construct: The Supreme Court's Evolving Standard of Decency for the Death Penalty,* 23 HASTINGS CONST. L.Q. 455, 520 (1996). The resultant death sentences, accordingly, "are invalid gauges of societal standards of decency and should be given little probative force in the constitutionality determination." *Id.* at 521.

138. For a discussion of self-esteem and related values, see Roy L. Brooks, *Analyzing Black Self-Esteem in the Post-*Brown *Era,* 4 TEMPLE POL. & CIV. RTS. L. REV. 215, 217 (1995). Brooks defines self-esteem in terms of two components. The first, called specific or personal self-esteem, "measures an individual's belief in his or her own virtue and moral self-worth." *Id.* The second, called personal efficacy, "reflects a sense of personal competence, efficacy, or control." *Id.*

139. Bandes explains:

> More often, the difficulty for the trier of fact is in making the empathetic link with the defendant, in seeing the defendant's shared humanity. In either situation, though, the real importance of empathy lies in its counternarrative aspect — it enables the trier of fact to imagine himself in the place of another.

Bandes, *supra* note 132, at 377.

140. *Cf.* Gary D. LaFree et al., *Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials,* 32 SOC. PROBS. 389 (1985); Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors,* 33 WM. & MARY L. REV. 1201 (1992).

mitment triggers the diminished capacity defense. Proponents of the defense contend that the extreme nature of white commitment to community-wide racial supremacy induces a state of mind bordering on delusion. Thus misguided, white lawbreakers perform acts of racial violence without individual or collective remorse.

Like jury nullification and victim denigration, the defense of diminished capacity illustrates the pivotal role of counsel in perpetuating racial violence. The defense directs counsel to put the white lawbreaker's state of mind in legal controversy. It is counsel's duty to assert client claims of diminished capacity and incompetency, whether attributable to emotional disturbance or to insanity.[141] The claim of racial delusion satisfies that duty.[142]

Excusing white lawbreakers from liability on the ground of delusion-inducing racial emotion dilutes the moral force of criminal defense advocacy. Emotion is fundamental to this dilution.[143] The diminished capacity defense depicts white lawbreakers caught up in the emotion of populist resistance.[144] Discarding the image of white savagery, the defense offers the alternative impression of white innocence, an innocence filled with a commitment to community solidarity. Comparable to duress,[145] this commitment to solidarity brings to bear elements of psychological and physical coercion upon individuals enmeshed in the culture of white supremacy,[146] recasting violence as "prejudiced irrationality."[147]

The image of the community-minded white innocent evokes race and the racial body. Tami Spry speaks of "the body that is visible as a cultural symbol."[148] The diminished capacity defense

141. *See, e.g.*, Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?*, 1988 WIS. L. REV. 65.

142. *See* Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113 (1996).

143. On the role of emotion in criminal law, see Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996).

144. For an example of the populist justification for lynching, see the description in Nancy MacLean, *The Leo Frank Case Reconsidered: Gender and Sexual Politics in the Making of Reactionary Populism*, 78 J. AM. HIST. 917, 920, 943-44 (1991).

145. *See generally* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 259-73 (1987); Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331 (1989).

146. *Cf.* David S. Rutkowski, *A Coercion Defense for the Street Gang Criminal: Plugging the Moral Gap in Existing Law*, 10 NOTRE DAME J.L. ETHICS & PUB. POLY. 137 (1996).

147. The phrase originates with Kathryn Abrams. *See* Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2524 (1994).

148. Tami Spry, *In the Absence of Word and Body: Hegemonic Implications of "Victim" and "Survivor" in Women's Narratives of Sexual Violence*, 18 WOMEN & LANGUAGE 27, 29 (1995) (emphasis omitted).

puts forward the black body as a cultural object. According to this defense, the killing of the black body, indeed the act of lynching itself, constitutes an act of empowerment, an act of human agency vital to the identity construction of the white self and the white community. The defense prevails despite its intimation of social pathology.[149]

The modern jurisprudence of the criminal law supports the claim of racial violence as pathology.[150] In its current rendition, the claim suggests that the presence of racially coercive[151] pathology negates the free will[152] and responsibility[153] of the white lawbreaker.[154] This reading, however, flips the standard legal dichotomy of agent-victim or perpetrator-victim on its head.[155] Kathryn Abrams explains that "the categories of perpetrator and victim are understood to be simple and unitary: the perpetrator enjoys full agency, and the victim either lacks as a categorical matter, or loses through the experience of discrimination, virtually all capacity for self-direction."[156] Yet, under the racial delusion defense of agent-as-victim, it is the white perpetrator who lacks the cognitive capacity for independent moral direction and the black victim who invites racial retribution. Discordantly, in a manner akin to disability and incompetence, this cognitive impairment actually warrants greater lawyer solicitousness[157] precisely because it renders moral conscience and punishment irrelevant.[158]

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149. Kathryn Abrams cites a similar tension experienced by women's defense lawyers attempting to navigate "between the need to defend battered women who kill (often through the use of defenses such as 'learned helplessness') and the need for battered women, and women as a group, to project an image reflecting some capacity for agency." Kathryn Abrams, *Complex Claimants and Reductive Moral Judgments: New Patterns in the Search for Equality*, 57 U. PITT. L. REV. 337, 362 n.104 (1996).

150. On pathology and criminal law, see Stephen J. Morse, *Brain and Blame*, 84 GEO. L.J. 527 (1996).

151. On coercion, see ALAN WERTHEIMER, COERCION 144-75 (1987).

152. For a discussion of the metaphysics of volition, see MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 113-65 (1993).

153. *See generally* Wallace, *supra* note 96, at 51-83; Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA. L. REV. 2245 (1992).

154. *Cf.* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1882-85 (1996).

155. *See* Abrams, *supra* note 149, at 348.

156. *Id.* at 348; *see also* Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 324-29 (1995).

157. *See* Jeff McMahan, *Cognitive Disability, Misfortune, and Justice*, 25 PHIL. & PUB. AFF. 3, 35 (1996) (claiming "indirect or derivative moral reasons to be specially solicitous about the well-being of the cognitively impaired").

158. *See* Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1634-37 (1994).

Deriving a lynching defense from the social-psychology of racial delusion privatizes the social issue of racism. Privatization ignores the social undercurrents of hate crime in America.[159] The move from the public to the private sphere, and the corresponding shift from moral evil to scientific pathology, allows the legal profession to evade responsibility for its complicity in maintaining racial violence.

III. Lynching Ethics

Lynching ethics describes the normative system that criminal lawyers employ to justify the racialized defenses of jury nullification, victim denigration, and diminished capacity. Reassembled here from modern and postmodern conceptions of criminal defense representation, that value system sacrifices collective moral deliberation as a regulative ideal[160] to the zealous advancement of individual freedom.[161] Indeed, the systematic objective of criminal defense advocacy is to preserve individual client freedom. Conventionally, freedom comprises both positive and negative rights. Yet, for the criminal defendant, negative rights acquire principal emphasis in erecting a bulwark against state encroachment upon political and civil liberties.

To ensure the preservation of ordered liberties, defense attorneys seek to establish more stringent standards of state conduct in criminal cases.[162] To that end, they espouse the principles of liberal legalism and the rhetoric of rights.[163] The presumption of inno-

159. *See generally* Jack Levin & Jack McDevitt, Hate Crimes: The Rising Tide of Bigotry and Bloodshed (1993); Lu-in Wang, Hate Crimes Law (1996); James B. Jacobs & Jessica S. Henry, *The Social Construction of a Hate Crime Epidemic*, 86 J. Crim. L. & Criminology 366 (1996); Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 Mich. L. Rev. 320 (1994).

160. On Kantian moral deliberation, see Paul Guyer, *The Value of Agency*, 106 Ethics 404, 405-20 (1996) (book review).

161. For a discussion of liberty as either a collective social reaction or an elite ideology, see Warren Sandmann, *The Argumentative Creation of Individual Liberty*, 23 Hastings Const. L.Q. 637, 638 (1996).

162. Barton Ingraham explains:

> The most common rationalization given for the higher and stricter standards and rules in criminal cases is the greater severity of its sanctions (punishments) as well as its social consequences (stigma, disrepute). Another common rationalization is the greater need in criminal cases for protection of the individual against the massive forces and resources of the state.

Barton L. Ingraham, *The Right of Silence, the Presumption of Innocence, the Burden of Proof, and a Modest Proposal: A Reply to O'Reilly*, 86 J. Crim. L. & Criminology 559, 574 (1996).

163. French explains: "Rights talk, which points toward rules and principles and currently has great moral weight, is based on a story about the relationship between the state and its component individuals just as individual narratives are." French, *supra* note 86, at 426.

cence, the right to remain silent, and the burden of state proof beyond a reasonable doubt[164] all testify to the strength of liberalism in asserting private rights against the state and its penal incursions.

Grasping the injunction of zealous criminal defense advocacy requires engagement with liberal theory, particularly its vision of state power, corruption, and malice. Consistent with the tradition of liberal political theory, David Luban attributes state power, and its abuse, to advantages in police and prosecutorial resources, criminal procedure, political legitimacy, and bargaining position.[165] Based on this balance of state advantages, Luban recommends the professional norm of zealous advocacy to criminal defense lawyers.[166] Nonetheless, suspicious of presumptive absolutes, he warns that this role-derived norm is rebuttable.[167]

Luban's broadly framed version of the zealous advocacy defense contrasts sharply with William Simon's narrowly tailored formulation.[168] Simon rejects the categorical use of zealous advocacy in the criminal sphere, endorsing only the selective use of aggressive defense tactics when warranted by substantive justice objections to unjustly harsh or discriminatory punishment, especially if traceable to political disenfranchisement.[169] That categorical rejection evinces a fundamental disagreement over the meaning and requirement of deception in criminal defense advocacy. For Luban, criminal defense advocacy necessitates deceptive defense tactics.[170] For Simon, deception imperils the moral self-conception of defense lawyers and, consequently, risks alienation and loss of moral integration.[171]

Deception is central to the ideology and practice of racialized defenses. Although generally absent from accounts of the motivations of criminal defense lawyers,[172] deception permeates the advo-

164. *See generally* Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases,* 86 YALE L.J. 1299, 1301 (1977).

165. *See* David Luban, *Are Criminal Defenders Different?,* 91 MICH. L. REV. 1729, 1730-52 (1993).

166. *See id.* at 1755-57.

167. *See id.* at 1757-58; *see also* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 129-33 (1988).

168. *See* William H. Simon, *The Ethics of Criminal Defense,* 91 MICH. L. REV. 1703, 1703 (1993).

169. *See id.* at 1724-25.

170. *See* Luban, *supra* note 165, at 1760-61.

171. *See* William H. Simon, *Reply: Further Reflections on Libertarian Criminal Defense,* 91 MICH. L. REV. 1767, 1772 (1993).

172. *See, e.g.,* Roy B. Flemming, *If You Pay the Piper, Do You Call the Tune? Public Defenders in America's Criminal Courts,* 14 L. & SOC. INQUIRY 393 (1989) (book review); Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defend-*

cacy function, distorting client identity and condemning the search for truth, even the contingent truth realized in particularized contexts.[173] Both modern and postmodern accounts of criminal defense practice renounce the search for truth. Uninterested in the moral commitments accompanying fragmentary moments of historical truth, the accounts find relevance only in the machinery of adversarial justice.

A. *The Modernist Justification*

The modernist justification of racialized defenses hinges on lawyer commitment to the institutional values of the adversarial system. Performing within this system, criminal defense lawyers internalize adversarial norms, meanings, and roles.[174] Norm-internalization, Allan Gibbard explains, "involves tendencies toward action and emotion, tendencies that are coordinated with the tendencies of others in ways that constitute matched adaptations, or are the results of matched adaptations."[175]

Consider the norm of role-differentiated morality.[176] Applied to the matched prosecution-defense adaptations of the adversarial system, role-based differentiation severs professional morality from personal and community morality, enabling the criminal defense lawyer to serve in the guise of Monroe Freedman's "champion against a hostile world."[177] Rooted in the Sixth Amendment notion

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ers, 106 HARV. L. REV. 1239 (1993); Abbe Smith, *Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer,* 21 N.Y.U. REV. L. & SOC. CHANGE 433 (1994).

173. *See* Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case,* 47 STAN. L. REV. 39, 39-43 (1994).

174. *See* ALLAN GIBBARD, WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT 55-82 (1990) (distinguishing between "*accepting* a norm" and "*being in the grip of* a norm"); *see also* Arthur Isak Applbaum, *Professional Detachment: The Executioner of Paris,* 109 HARV. L. REV. 458, 473-86 (1995); David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times,* 9 GEO. J. LEGAL ETHICS 31, 86 (1995) (urging restoration of parity between the two modes of norm-adoption: internalization and acceptance); Cass R. Sunstein, *Social Norms and Social Roles,* 96 COLUM. L. REV. 903, 947 (1996) (asserting that "people usually do not choose norms, meanings, and roles; all of these are (within limits) imposed").

175. GIBBARD, *supra* note 174, at 71.

176. *See* ALAN H. GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS 20-33, 155 (1980); David Luban, *Introduction* to THE ETHICS OF LAWYERS, at xi, xii-xiv (David Luban ed., 1994); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues,* 5 HUM. RTS. 1 (1975).

177. Monroe E. Freedman, *Legal Ethics and the Suffering Client,* 36 CATH. U. L. REV. 331, 332 (1987).

of adversarial fairness,[178] the norm of role-differentiated morality commands "fair process" and, by extension, effective counsel.[179]

The modernist account of lynching ethics defines the role-derived norm of effective representation in terms of the traditional axioms of neutral partisanship[180] and moral nonaccountability.[181] Partisanship, Rob Atkinson explains, "entails advancing client ends through all legal means, and with a maximum of personal determination, as long as the ends are within the letter of the law."[182] Neutrality, Atkinson adds, "lets the professional claim personal disinterest in, or even antipathy toward, client ends and moral nonaccountability for helping to advance them."[183]

The complementary norms of neutral partisanship and moral nonaccountability envisage criminal law practice as a technical, apolitical craft.[184] The practice of racialized defenses clearly entails technical expertise. But neither the accumulation nor the application of that expertise precludes politics, in this case the identity-making and community-defining politics of race.

The rhetorical politics of racialized defenses proclaims the Model Code and the Model Rules colorblind to matters of identity and community. Declarations of neutrality and neutral principles,[185] however, obscure racial hierarchy. The doctrinal pretense of impartially tracking evidence of discriminatory intent[186] supplies no resolution to the establishment of racial privilege. And yet, this

178. *See, e.g.*, STEPHEN LANDSMAN, THE ADVERSARY SYSTEM (1984); Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118 (1987).

179. *See* Stephen B. Bright, *The Electric Chair and the Chain Gang: Choices and Challenges for America's Future*, 71 NOTRE DAME L. REV. 845, 851 (1996); Gerald F. Uelmen, *2001: A Train Ride: A Guided Tour of the Sixth Amendment Right to Counsel*, 58 LAW & CONTEMP. PROBS. Winter 1995, at 13.

180. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. 1 (1989) ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); *see also* James R. Elkins, *The Moral Labyrinth of Zealous Advocacy*, 21 CAP. U. L. REV. 735 (1992).

181. *See* Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613; Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673-74 (1978).

182. Rob Atkinson, *How the Butler Was Made to Do It: The Perverted Professionalism of* The Remains of the Day, 105 YALE L.J. 177, 185 (1995).

183. *Id.*

184. *See id.* at 186; Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951).

185. *See* Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978); Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1 (1992); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

186. *See* Barbara J. Flagg, *"Was Blind But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993).

is the answer contained in race-neutral proclamations emanating from the politics of racial "nonrecognition."[187]

This same rhetorical politics pronounces jury nullification, victim denigration, and diminished capacity as expressions of private preferences outside the public reach of juridical sanction. Construing racialized defenses as private litigant preferences revitalizes the public-private distinction in law and lawyering.[188] The reinstantiation of that dichotomy encases criminal defense advocacy in the liberal rhetoric of privacy[189] and autonomy.[190] Privacy talk shields racialized advocacy from ethical regulation, effectively granting attorneys and their clients immunity from public scrutiny.

No concession of immunity should go unqualified. To the extent that racialized defenses blend private choice and state enforcement, they come within the meaning of state action.[191] In this way, the defenses expose lawyers and clients to potential liability under antidiscrimination laws as well as relevant disciplinary codes. The treatment of nullification, denigration, and diminished capacity verdicts as the reasoned, deliberative products of a democratic community fails to insulate lawyers against such liability. Rather, that treatment obliterates the civic republican ideal of public reason.[192] The rhetorical politics of race in fact undermines the principles of public, reasoned dialogue that stand at the core of civic republicanism.[193]

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187. *See* Dorothy E. Roberts, *The Priority Paradigm: Private Choices and the Limits of Equality*, 57 U. PITT. L. REV. 363, 366 (1996) ("Color blindness permits racial subordination to continue by leaving intact institutions created by centuries of official and private oppression."); *see also* Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993); Barbara J. Flagg, *Enduring Principle: On Race, Process, and Constitutional Law*, 82 CAL. L. REV. 935 (1994); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

188. *See* Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992); Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENTARY 319 (1993); Symposium, *The Public-Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

189. *Cf.* Linda C. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 119 (1992); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and The Right of Privacy*, 104 HARV. L. REV. 1419 (1991); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991).

190. *See* Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts, and Possibilities*, 1 YALE. J.L. & FEMINISM 7 (1989); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

191. In 1991, the Supreme Court announced that a private party's discriminatory conduct at trial constitutes state action under the Equal Protection Clause of the Fourteenth Amendment. *See* Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614 (1991).

192. *See* Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453, 469 (1996).

193. *See* Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 CAL. L. REV. 329 (1994); Lawrence B. Solum, *Constructing an Ideal of Public Reason*, 30 SAN DIEGO L. REV. 729 (1993).

B. *The Postmodernist Justification*

The postmodernist justification of racialized defenses discards claims of neutrality and stability in law for the contested politics of ideology.[194] Under the postmodern account of lynching ethics, effective representation heeds what Kenneth Anderson calls the "instrumentalist, transactional, mobile ethos of the contemporary professional."[195] That ethos, Anderson remarks, devolves into a devotion to "purely instrumental technique, without a conception of or commitment to the social 'ends' of professional knowledge, except as they are temporarily defined by the market for expert services."[196] Indeed, for the postmodernist, professional devotion imposes a duty to muster the "best arguments" on behalf of a client[197] — arguments that, according to Sanford Levinson, amount to the "crassest, most instrumental" defense possible.[198]

Under the racialized defenses of jury nullification, victim denigration, and diminished capacity, the "best argument" gains credence through white community acceptance. Rendering the moral quality of legal argument contingent on local community approbation trivializes larger ethical and normative considerations.[199] Lawyering affords no escape from the political and community commitments of normative judgment. Even when the reduction of professional service to "technical assistance" tends "to reduce moral concerns to matters of individual taste, if not idiosyncracy,"[200] it leaves the politics of normativity[201] in advocacy to collective discernment.

Conceived in personal or collective terms, the postmodern politics of normativity problematizes the most basic moral aspiration.[202]

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194. *See* Eliot Freidson, *Professionalism as Model and Ideology, in* LAWYERS' IDEALS/LAWYERS' PRACTICES 215-29 (Robert L. Nelson et al. eds., 1992); Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context, in* LAWYERS' IDEALS/LAWYERS' PRACTICES, *supra,* at 177-214; William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics,* 1978 WIS. L. REV. 29.

195. Kenneth Anderson, *A New Class of Lawyers: The Therapeutic as Rights Talk,* 96 COLUM. L. REV. 1062, 1073 (1996) (review essay).

196. *Id.* at 1063.

197. *See* Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles,* 19 HARV. J. L. & PUB. POLY. 495, 506 (1996).

198. *See id.*

199. *See* Eric Blumenson, *Mapping the Limits of Skepticism in Law and Morals,* 74 TEXAS L. REV. 523, 527-28 (1996).

200. Atkinson, *supra* note 182, at 186.

201. *See* Symposium, *The Critique of Normativity,* 139 U. PA. L. REV. 801 (1991).

202. *See* Blumenson, *supra* note 199, at 531.

Implicitly, moral aspiration carries a claim of objective truth.[203] Parsing that claim, Eric Blumenson notes that however disparaging of value neutrality, a morality-centered aspirational ethics must still "presuppose that objectively correct answers exist and that there is an impartial position from which to distinguish legitimate from illegitimate uses of power."[204]

Levinson condemns the objective posture of an aspirational ethics as incapacitating.[205] For Levinson, the dismissal of a properly instrumental legal argument for reasons of illegitimacy, or the conditioning of retainer and representation on the presentation of a single argument, amounts to incompetence, even if the argument disposed of makes the lawyer "retch."[206] This instrumental position suggests not only the acceptance of adversarial norms,[207] but also the tolerance of formal neutrality exemplified in the treatment of race in the courtroom. It also repudiates Michael Tigar's vision of the false, and apparently rigged, elements of the criminal trial.[208]

The clustering of formal, adversarial norms around the purportedly neutral, objective practice of racialized defenses confirms Gunther Teubner's view that norms " 'constitute' fields of social ac-

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203. *See* Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87, 89 (1996).

204. Blumenson, *supra* note 199, at 529. The presupposition of objectivity and impartiality also afflicts the experiential decisionmaking of pragmatism. *See* James R. Hackney, Jr., *The Intellectual Origins of American Strict Products Liability: A Case Study in American Pragmatic Instrumentalism*, 39 AM. J. LEGAL HIST. 443, 452 (1995) (noting that pragmatists' "appeal to experience was not a value neutral appeal: the implications of the experience appealed to by individual pragmatists was shaped by their own value orientation").

205. *See* Levinson, *supra* note 197, at 507.

206. *Id.*

207. *See* GIBBARD, *supra* note 174, at 75; Luban & Millemann, *supra* note 174, at 86-87. Gibbard observes:

> Accepting a norm is something that we do primarily in the context of normative discussion, actual and imaginary. We take positions, and thereby expose ourselves to demands for consistency. Normative discussion of a situation influences action and emotion in like situations. It is then that we can speak of norms as governing action and emotion, and it is through this governance that normative discussion serves to coordinate. Internalizing a norm is likewise a matter of coordinating propensities, but the propensities are of a different kind: they work independently of normative discussion.

GIBBARD, *supra* note 174, at 75.

208. *See* Michael E. Tigar, *Defending*, 74 TEXAS L. REV. 101, 109 (1995). Tigar notes:

> In the courtroom arena, there is a symbolic equality of defense and prosecution. We understand that in fact the balance of resources almost always tips in favor of the government, and this is particularly so in high-profile cases where high officials have announced an intention to take the defendants' lives. The defendant is not given a choice whether to participate in the unequal contest. The inequality is just another device of the system-called-justice. The lawyer's job is to expose the device, deploying the signs of justice against the signs of system-called-justice. The signs of justice include empowering the jury, calling on the tribunal to respect its oath, exposing contradiction — bringing out solid reasons why the judge and jurors should go beneath the surface of things.

Id. at 109-10.

tion," and that such "fields of action in turn reconstitute legal norms."[209] For the postmodern defender of lynching, adversarial norms concededly legitimize the language of racial hierarchy and, hence, reproduce race relations of domination and subordination. By the same admission, relations of racial superiority and inferiority reentrench norms of inequality. To break down hierarchical race relations, the next Part proposes a reconstructed ethic of lynching defenses based on a commitment to a morality of character and community grounded in the norms of virtue, citizenship, race consciousness, and spirituality.

IV. Lynching Ethics Reconstructed

Both Simon and Luban draw on the notion of moral commitment in constructing the concepts of ethical discretion[210] and activist counseling.[211] Although laudable, these shared visions of moral action fail to resolve the controversial status of race, racialized strategy, and race-neutral representation in the law and ethics of criminal defense lawyering. Confronting the status, strategy, and substance of racial representation in lynching necessitates amplification of the ethic of race-conscious responsibility.

The ethic of race-conscious responsibility demands a transformation of the liberal regime of colorblind criminal defense practice from the perspective of race. *Race-ing* the ethics of lynching defenses challenges the identity-making practices of criminal lawyers, especially the tendency to associate racial difference with deviance and inferiority and, thus, to reenact racial subordination in advocacy. That challenge requires the reintegration of law, morality, and legal ethics. Reintegration flows from the adoption of foundational norms and values.

The call for the restoration of values in the legal profession resonates in the current ethics literature.[212] The prevailing criminal defense ethics of lynching sustains a thin normative conception of professionalism deficient in virtue, citizenship, community, and spirituality. Mired within this conception, alternative notions of

209. Gunther Teubner, *Regulatory Law: Chronicle of a Death Foretold,* 14 Current Legal Theory 3, 22 (1996).

210. *See* William H. Simon, *Ethical Discretion in Lawyering,* 101 Harv. L. Rev. 1083, 1083-84 (1988).

211. *See* David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper,* 1986 Am. B. Found. Res. J. 637, 640-41.

212. *See, e.g.,* Mary Ann Glendon, A Nation Under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society (1994); Anthony T. Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession (1993).

professionalism[213] and regulation[214] lapse into repose. The silence of that repose is attributable to the liberalism-based exclusion of public moral pronouncement[215] from the lawyer-client relationship. Liberalism offers a private, contractarian basis for the lawyer-client relationship that emphasizes the priority of technique, procedure, and perspectivelessness.[216]

Envisioning the lawyer-client relationship as a private, contractual order permits the exploration of certain background regulatory norms,[217] such as reciprocity.[218] The norm of reciprocity treats the racialized defenses of jury nullification, victim denigration, and diminished capacity as the efficient, transactional product of lawyer-client value consensus. Rather than assail the defenses for inefficiency,[219] citing for example the external costs to character and community, the ethic of race-conscious responsibility attacks the premise of private, moral consensus as overbroad. On this view, reciprocity proves counterfactual and moral dialogue degenerates into an expedient maneuver. The normative embrace of virtue, citizenship, multi-racial community, and spirituality signals the redemptive search of moral activism.

A. *Virtue*

The norm of virtue strengthens the moral content of the ethic of race-conscious responsibility through legal reasoning and prac-

213. *See* THOMAS L. SHAFFER & MARY M. SHAFFER, AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION 196-217 (1991); Robert W. Gordon & William H. Simon, *The Redemption of Professionalism?, in* LAWYERS' IDEALS/LAWYERS' PRACTICES, *supra* note 194, at 230-57; Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar,* 70 N.Y.U. L. REV. 1229, 1256-63 (1995).

214. *See* David B. Wilkins, *Who Should Regulate Lawyers?,* 105 HARV. L. REV. 799 (1992).

215. *See* MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 123-67 (1996) (discussing civic virtue and the public good in the early American republic).

216. For a discussion of perspectivelessness, see Kimberlé W. Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education,* 11 NATL. BLACK L.J. 1,2 (1989).

217. *Cf.* Avery Katz, *Taking Private Ordering Seriously,* 144 U. PA. L. REV. 1745, 1749-53 (1996).

218. *See* Richard H. Pildes, *The Destruction of Social Capital Through Law,* 144 U. PA. L. REV. 2055, 2063 (1996). Pildes contends that the norms of reciprocity contain a specific or local strand which "sustains ongoing relationships between specific parties . . . in direct, one-to-one interactions . . . [as well as a generalized strand which] is a more global predisposition to be motivated by norms of reciprocity and cooperation even when acting in new settings or with new agents outside some previously established relationship." *Id.* at 2064 (footnote omitted).

219. *See* David Charny, *Illusions of a Spontaneous Order: "Norms" in Contractual Relationships,* 144 U. PA. L. REV. 1841, 1848-52 (1996) (claiming that inefficient norms "favor the members of concentrated interest groups, at the expense of more diffuse members").

tice.[220] Cultivating virtue through practical reasoning[221] dictates more than the performance of lawyer role morality.[222] It requires seizing upon the expressive function of law.

Many laws, Cass Sunstein comments, contain an expressive component.[223] According to Sunstein, such laws " 'make a statement' about how much, and how, a good or bad should be valued."[224] The statement materializes in the form of "social meanings, social norms, and social roles."[225] By design, this material valuation alters existing norms and shapes external behavior.[226] The logic of this expressive influence depends on a shared sense of appropriate normative direction.

Both the Model Code and the Model Rules combine expressive functions and justifications. The regulatory decrees of lawyer competence and candor illustrate these common tendencies. For example, the Model Rules mandate "competent representation" of a client, specifying the "legal knowledge, skill, thoroughness and preparation reasonably necessary" to satisfy the nature and circumstances of a disputed matter.[227] Justification for requisite levels of attention and preparation rests on the gravity of "what is at stake."[228] Additionally, the Model Rules require lawyer candor toward the tribunal and, to a lesser degree, the opposing party and counsel.[229] Justification of the duty of candor obtains from the obligation "to avoid implication in the commission of perjury or other falsification of evidence."[230] This obligation allegedly ensures fair competition in the adversarial procedure of marshalling contested evidence.[231]

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220. *See, e.g.*, Reed Elizabeth Loder, *When Silence Screams*, 29 LOY. L.A. L. REV. 1785 (1996); Thomas L. Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME LAWYER 231 (1979).

221. *See* J. David Velleman, *The Possibility of Practical Reason*, 106 ETHICS 694 (1996) (defining the object and justification of practical reasoning).

222. *See* Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 MD. L. REV. 853, 947-77 (1992).

223. *See* Sunstein, *supra* note 174, at 964.

224. *Id.*

225. *Id.*

226. *See id.*

227. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1995); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101 (1980).

228. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 cmt. (1995).

229. *See* MODEL RULES OF PROFESSIONAL CONDUCT at Rules 3.3, 3.4 (1995).

230. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 cmt. (1995).

231. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4 cmt. (1995).

Despite the expressive force and influence of lawyer competence and candor decrees, misconduct in the prosecution[232] and defense of criminal proceedings continues, especially with respect to race.[233] The persistence of lawyer misconduct suggests that the positivist discourse that pervades the Model Code and Model Rules lacks a shared sense of appropriate normative direction sufficient to foster moral virtue.[234] Revitalizing lawyers' sense of virtue through legal education and skills training is likely to prove futile. Put starkly, the standard conventions of legal education and training afford little opportunity for the experiential learning and critical reflection needed to inculcate virtue. Even with the benefit of such opportunity, the resulting sense of professional virtue, backed by a law-induced vision of justice, falls subject to widespread public suspicion.[235]

Practical wisdom stocks no means to rescue virtue from the impoverished training of legal education. If virtue is to be salvaged, it will be recovered from the values of citizenship, multi-racial community, and spirituality.[236] Each of these spheres provides a source of identity crucial to the attainment of virtue. Kenneth Anderson asserts the importance of the individual possession and development of "diverse and cross-cutting identities" extracted from the multiple domains (such as religion and family) of civil society.[237] For Anderson, ethical conduct "depends upon the possession of strong identities outside the profession."[238] Representing race with competence and candor hinges on the strength of attorney-client identities outside of the law and ethics of lawyering.

The identity-making power of citizenship, community, and spirituality builds moral character and virtue from sources outside the law.[239] Like the practice of criminal defense representation, the practice of virtue in advocacy entails both competence and candor.

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232. *See* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives,* 64 FORDHAM L. REV. 851, 890-910 (1995).

233. *See* Elizabeth L. Earle, Note, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism,* 92 COLUM. L. REV. 1212 (1992).

234. *See* Reed Elizabeth Loder, *Tighter Rules of Professional Conduct: Saltwater for Thirst?,* 1 GEO. J. LEGAL ETHICS 311 (1987); Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics,* 80 IOWA L. REV. 901 (1995).

235. *See* Christopher L. Eisgruber, *The Fourteenth Amendment's Constitution,* 69 S. CAL. L. REV. 47, 83 (1995).

236. On the virtue ethics tradition, see Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?,* 69 S. CAL. L. REV. 885 (1996).

237. Anderson, *supra* note 195, at 1072.

238. *Id.*

239. Endorsing the turn to virtue ethics in the discussion of lawyerly professional responsibility, Atkinson urges that:

Competence alone, however, furnishes no moral assurance of advancing a greater social good.[240] Candor at least proffers an "openness to others"[241] essential to the creation of a racially diverse community.[242]

B. *Citizenship*

The norm of citizenship contributes a transformative notion of community obligation to the ethic of race-conscious responsibility. Although political, the norm betrays doubts about the suitability of lawyers' political judgments.[243] The political character of the norm instead pertains to the meaning of lawyer community participation in matters of democratic citizenship that cut across racial lines.

The norm of citizenship encourages lawyer crosscutting community participation in an effort to achieve a fuller individual sense of collective, multiracial identity. Unlike David Abraham's "complete citizen,"[244] the lawyer-citizen seeks more than a "relatively unfettered" sense of community membership and self-governance.[245] Indeed, he seeks the richness of racially diverse citizenship, not merely a state of relative self-sufficiency.[246]

> [W]e must widen our perspective from a focus on particular acts, whether the acts are conceived in terms of their agent's motives or their effects on others. We must include the agent's general dispositions, vices, and virtues—in a word, his or her character. In focusing on character and its development, we see how we are made to do what we do, and, conversely, how what we do and why we do it make us who we are. Most importantly, we learn who we want to be.

Atkinson, *supra* note 182, at 217 (footnotes omitted).

240. John DiPippa observes that the loss of moral community deprives a lawyer of the moral assurance that his work offers morally efficacious service. *See* John M.A. DiPippa, *Lon Fuller, the Model Code, and the Model Rules,* 37 S. TEX. L. REV. 303, 356 (1996).

241. Atkinson, *supra* note 182, at 220; *see also* J. Kevin Quinn et al., *Resisting the Individualistic Flavor of Opposition to Model Rule 3.3,* 8 GEO. J. LEGAL ETHICS 901 (1995).

242. *Cf.* Vogelman, *supra* note 125, at 575 (insisting that "[a]rguments catering to racism or other prejudices are not legally relevant and surely assault the dignity of our courts and are degrading toward our system of justice" (footnote omitted)). *See generally* Colin Croft, Note, *Reconceptualizing American Legal Professionalism: A Proposal for Deliberative Moral Community,* 67 N.Y.U. L. REV. 1256, 1321-51 (1992).

243. Eisgruber explains:

> It is not obvious that lawyers are especially good at reading [constitutional] credos or that they know more than most people about things that a constitutional credo might describe—values, aspirations and characteristics of political identity. The conventions of the profession might actually deaden the political sensibilities of lawyers, making them especially ill-suited to read credos.

Eisgruber, *supra* note 235, at 83.

244. David Abraham, *Liberty without Equality: The Property-Rights Connection in a "Negative Citizenship" Regime,* 21 LAW & SOC. INQUIRY 1, 51 (1996).

245. *Id.; see also* JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION (1991); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes,* 6 GEO. J. LEGAL ETHICS 241 (1992).

246. On self-sufficiency and citizenship, see James W. Fox, Jr., *Liberalism, Democratic Citizenship, and Welfare Reform: The Troubling Case of Workfare,* 74 WASH. U. L.Q. 103,

The concept of citizenship enlivening the lawyer-citizen ideal reaches beyond the private, self-identity of the sovereign subject to hold up a public, racially integrated version of the self. Frederick Dolan finds the self "constituted through a plurality of judgments and narratives of others."[247] For Dolan, this public self is a product of the "plural and variable character of human interaction, especially symbolic or discursive interaction."[248] Even when that interaction embroils the dichotomies of racial hierarchy, this public self may acquire what Dolan describes as "a distinctive, coherent, and stable identity."[249] According to this analysis, identity evolves through language and intersubjective action. The presence of an alternative, public self demonstrates the "linguistic and interpretive character of identity."[250]

The public, self-identity of the lawyer-citizen gives rise to broad community obligations in criminal defense practice. Those obligations include the building and strengthening of interracial communities.[251] Although the communitarian account of race and community is underdeveloped,[252] its component elements of social deliberation and public-private partnership show transformative potential.[253]

C. *Race Consciousness*

The norm of race consciousness forms the core of the ethic of race-conscious responsibility. This norm stands against the violently contested history of race consciousness in American law.[254]

114-49 (1996); Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563 (1996) (book review).

247. Frederick M. Dolan, *Political Action and the Unconscious: Arendt and Lacan on Decentering the Subject*, 23 POL. THEORY 330, 342 (1995).

248. *Id.*

249. *Id.*

250. *Id.* at 343.

251. *See* John A. Powell, *Living and Learning: Linking Housing and Education*, 80 MINN. L. REV. 749, 791-92 (1996) ("Integration makes it possible for those historically excluded from participating in society to be part of a larger community, while necessarily transforming that community.").

252. *See* Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609 (1988); Wendy Brown-Scott, *The Communitarian State: Lawlessness or Law Reform for African-Americans?*, 107 HARV. L. REV. 1209 (1994); Stephen M. Feldman, *Whose Common Good? Racism in the Political Community*, 80 GEO. L.J. 1835 (1992).

253. *See* Charles R. Lawrence, III, *Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819 (1995).

254. *See* RICHARD DELGADO, THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE (1995); T. Alexander Aleinikoff, *supra* note 87; T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 COLO. L. REV. 325 (1992); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758; *see also* Jonathan

The upshot of this contest finds articulation in the "racial rule of differentiation."[255] While subordination often accompanies the application of the rule of differentiation, differentiation itself does not necessarily imply subordination. Nor does the dissonance of racial identity carry such an implication.

The norm of race consciousness hinges on a commitment to multiracial community that honors differentiation and diversity as integral parts of collective dialogue. That commitment urges the exploration of hate speech regulation,[256] especially when community sentiment veers toward violence. The interpretive and physical violence embodied in the racialized defenses of jury nullification, victim denigration, and diminished capacity extends the instant realm of hate speech regulation to the rhetoric of the courtroom.

At the outset, it is important to distinguish the regulation of lawyers' courtroom speech from restrictions on lawyers' extra-judicial statements.[257] In contrast to the regulation of extra-judicial comment, the regulation of courtroom speech instigates broad fear of constitutional intrusion.[258] Allaying this fear requires a race-conscious defense of state intervention in the private and public exercise of speech rights.[259]

In this light, consider Owen Fiss's recent defense of state action.[260] Fiss conceives of the "state as parliamentarian," contending

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Feldman, *Race-Consciousness Versus Colorblindness in the Selection of Civil Rights Leaders: Reflections upon Jack Greenberg's Crusaders in the Courts,* 84 CAL. L. REV. 151 (1996) (review essay).

255. Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence,* 105 YALE L.J. 1, 36-75 (1995).

256. *See, e.g.,* WORDS THAT WOUND (Mari Matsuda et al. eds., 1993); Henry Louis Gates, Jr., *War of Words: Critical Race Theory and the First Amendment, in* SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES 17 (Henry Louis Gates, Jr. et al. eds., 1995).

257. *Cf.* Marcy Strauss, *From Witness to Riches: The Constitutionality of Restricting Witness Speech,* 38 ARIZ. L. REV. 291 (1996); Esther Berkowitz-Caballero, Note, *In the Aftermath of Gentile: Reconsidering the Efficacy of Trial Publicity Rules,* 68 N.Y.U. L. REV. 494 (1993).

258. On the shared social critique of First Amendment doctrine by prewar and post-war progressives, see J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment,* 1990 DUKE L.J. 375; David M. Rabban, *Free Speech in Progressive Social Thought,* 74 TEXAS L. REV. 951 (1996).

259. Such a defense addresses state sanctioned acts of racial discrimination as forms of state action, rather than as " 'neutral background' " facts. Roberts, *supra* note 187, at 390.

260. Fiss observes:

> In intervening in this manner, the state is protecting the speech rights of the blacks, and it can do so only by restricting the range of speech acts in which racists are allowed

that the First Amendment principle of democratic self-governance "does not protect merely choice by citizens, but rather choice made with adequate information and under suitable conditions of reflection."[261] To the extent that racialized defenses constitute an uninformed and unreflective hate-speech-inspired choice of lawyer and client citizens, the justification for governmental regulation gathers force.[262]

Nevertheless, some may object that application of the rule of racial differentiation to regulate hate speech constitutes an " 'invasive preference.' "[263] Pointing to the lawyer-client relationship, Luban defines an invasive preference as "an individual preference for an option that someone else has excluded as a matter of right."[264] He finds evidence of invasive preference when a lawyer overrides the stated preference of a client. Override, Cathy Mansfield suggests, may consist of the "act of taking utilitarian control of a client's story by placing legal construct upon it."[265] Construed as an act of client domination, utilitarian control may arise in other substantive law areas outside of the criminal law.[266] Whatever the substantive law at stake, the crux of hate speech regulation concerns securing voluntary lawyer-client agreement to refrain from harmful, racialized rhetoric. The next section examines the possibility of reaching such agreement through shared spirituality.

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to engage. In favoring the speech rights of blacks in this way, the state is not making a judgment about the merit — constitutional or other — of the views each side is likely to express, through "fighting words" or otherwise, but only that this sector of the community must be heard from more fully if the public is to make an informed choice about an entire range of issues on the public agenda, from affirmative action, to education, to welfare policy. The state is acting as a parliamentarian trying to end a pattern of behavior that silences one group and thus distorts or skews public debate. The state is not trying to usurp the public's right of collective self-determination, but rather to enhance the public's capacity to properly exercise that right.

Owen Fiss, *The Supreme Court and the Problem of Hate Speech,* 24 CAPITAL U. L. REV. 281, 288 (1995).

261. *Id.* at 288-89.

262. *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine,* 63 U. CHI. L. REV. 413 (1996).

263. David Luban, *Social Choice Theory as Jurisprudence,* 69 S. CAL. L. REV. 521, 551 (1996).

264. *Id.*

265. Mansfield, *supra* note 46, at 918. Mansfield argues: "The act of taking utilitarian control of a client's story by placing legal construct upon it is legitimate only if the attorney distills and interprets the client's story toward the client's goal." *Id.* at 918 (footnote omitted).

266. *See* George P. Fletcher, *Domination in Wrongdoing,* 76 B.U. L. REV. 347 (1996).

D. *Spirituality*

The norm of spirituality completes the ethic of race-conscious responsibility. Contemporary writing on ethics evinces a turn to spirituality in law and the legal profession.[267] A similar shift is visible in the medical profession.[268] In jurisprudence, however, the shift marks a departure from formalism and instrumentalism prompted by the search for values absent from or external to law.[269]

Images of spirituality in law may be traced to "the prophetic vision of justice" in American legal culture.[270] The desire for spiritual fulfillment fills that vision, moving from the ground up out of the drive for self-alteration and context-transcendence in the pursuit of human flourishing,[271] a pursuit basic to the human character.

Transcendence involves more than the self. At bottom, spirituality is tied to the notion of communion and community-building.[272] Without communion with others, the investigation of alternative types of relationships that neither devalue nor exclude race makes no progress. Indeed, the very concept of personhood is contingent on the flourishing of interracial community.[273]

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267. *See, e.g.*, RADICAL CHRISTIAN AND EXEMPLARY LAWYER (Andrew W. McThenia, Jr. ed., 1995); Anthony E. Cook, *The Spiritual Movement Towards Justice*, 1992 U. ILL. L. REV. 1007; Russell G. Pearce, *The Jewish Lawyer's Question*, 27 TEX. TECH. L. REV. 1259 (1996); Thomas L. Shaffer, *Maybe A Lawyer Can Be A Servant; If Not . . .*, 27 TEX. TECH. L. REV. 1345 (1996).

268. *See, e.g.*, Russell B. Connors, Jr. & Martin L. Smith, *Religious Insistence on Medical Treatment: Christian Theology and Re-Imagination*, HASTINGS CENTER REP., July-Aug. 1996, at 23.

269. *See* George A. Martinez, *The New Wittgensteinians and the End of Jurisprudence*, 29 LOY. L.A. L. REV. 545, 575 (1996) (rejecting both formalism and neo-Wittgensteinian approaches for their refusal to justify decisions on the basis of values external to law or results).

270. Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1353 (1995) (claiming that "the prophetic litigator's main contribution is aiding the development of a culture of legal struggle that continually informs and inspires future generations to challenge oppressive practices").

271. *See* Martha C. Nussbaum, *Human Functioning and Social Justice: In Defense of Aristotelian Essentialism*, 20 POL. THEORY 202, 214-23 (1992) (discussing the conditions of human flourishing).

272. *See* Paul J. Heald, *Idealism and the Individual Woman: Madness and Humanity in Bessie Head's A Question of Power*, 5 TEX. J. WOMEN & L. 83, 98-99 (1995).

273. Jane Baron and Jeffrey Dunoff note: "If the flourishing self is constituted in relation to things and people, then personhood and community are connected; the individual is partly a product of his or her social world." Jane B. Baron & Jeffrey L. Dunoff, *Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory*, 17 CARDOZO L. REV. 431, 475 (1996).

The overarching morality of community resides in the general obligation to reconcile competing visions of the common good. This obligation requires lawyers and clients to combat moral disassociation[274] and to eschew narrow self-interest in advocacy. Only a reconstructive morality reconciling individual rights and social responsibilities satisfies that obligation.[275]

Drawn from the jurisprudence of critical race theory,[276] the reconstructive ethic of race-conscious responsibility reasserts the role of lawyers as custodians of community.[277] This custodial responsibility requires entry into spiritual dialogue with clients and communities to establish respect for conscience in opposing racial animus.[278] Fashioned from an ethic of care[279] increasingly celebrated in ethics regimes,[280] spiritual dialogue brings the potential for compassion[281] and empathy into the play of advocacy. Doubtless forestalling the conversion of caring into coercion or paternalism poses challenges.[282] Institutionalizing the ethic of care in state juridical structures presents even greater challenges.[283]

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274. *See* LAURENCE MORDEKHAI THOMAS, VESSELS OF EVIL: AMERICAN SLAVERY AND THE HOLOCAUST 108-13 (1993).

275. *See* Amitai Etzioni, *A Moderate Communitarian Proposal*, 24 POL. THEORY 155, 161 (1996) (maintaining that "individual rights and social responsibilities, just like individual liberties and social definitions of the common good, are not oppositional but complementary — or at least they can made to be").

276. *See* Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985 (1990).

277. *See* Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1066-67 (1990); *see also* Anthony T. Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835, 873 (1987).

278. *See* THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT 111-33 (1981); Emily Fowler Hartigan, *Multiple Unities in the Law*, 36 S. TEX. L. REV. 999 (1995).

279. *See, e.g.*, VIRGINIA HELD, FEMINIST MORALITY: TRANSFORMING CULTURE, SOCIETY, AND POLITICS 30-31, 52-54, 168-70 (1993); JUSTICE AND CARE: ESSENTIAL READINGS IN FEMINIST ETHICS (Virginia Held ed., 1995); NEL NODDINGS, CARING: A FEMININE APPROACH TO ETHICS & MORAL EDUCATION (1984); ROSEMARIE TONG, FEMININE AND FEMINIST ETHICS 80-107 (1993).

280. *See, e.g.*, Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665 (1993).

281. *See* Anthony E. Cook, *The Death of God in American Pragmatism and Realism: Resurrecting the Value of Love in Contemporary Jurisprudence*, 82 GEO. L.J. 1431 (1994).

282. *See* Carrie Menkel-Meadow, *What's Gender Got to Do with it?: The Politics and Morality of an Ethic of Care*, 22 N.Y.U. REV. L. & SOC. CHANGE 265, 285 (1996) (reviewing JOAN C. TRONTO, MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE (1993)).

283. *See* Christopher H. Wellman, *Liberalism, Samaritanism, and Political Legitimacy*, 25 PHIL. & PUB. AFF. 211, 213-14 (1996) (arguing that the political legitimacy of state imposition upon personal liberty turns not merely on the services it provides to the individual but on the benefits it provides others).

E. *Objections*

The ethic of race-conscious responsibility spurs multiple objections. Rather than rehearse past exceptions,[284] this section briefly considers four rapidly emerging objections. The first condemns the imposition of constraints on a criminal defendant's freedom of choice in formulating a defense strategy.[285] The second assails the same constraints for encumbering a criminal defendant's right to trial.[286] The third bemoans the heightened danger of lawyer bad faith in counseling and negotiation,[287] particularly concerning matters of plea bargaining and accelerated disposition.[288] The fourth criticizes the introduction of additional counseling variables for increasing the risk of incurable error.

Each of these four objections deserves more elaborate treatment than is available in this brief article. Nonetheless, the rough contours of a suitable response may be sketched here. Protests regarding feared impediments on a criminal defendant's freedom of choice in devising a defense strategy, however well intentioned, must concede that client freedom is not ordinarily unfettered. Defensive strategy effectively rests on the discretionary judgments of lawyer counsel. The content of that counsel is subject to greater regulation from statutory code and court sanction than from client ministration.

Moreover, disquiet over the hindering of a criminal defendant's right to trial, while legitimate, seems exaggerated. The proposed ethic does nothing to disturb a criminal defendant's Sixth Amendment right to a jury trial. Rather, the ethic limits the tactics obtainable at trial. Those tactics already fall under the constraining ethical supervision and evidentiary governance of courts.

Further, worry about the danger of lawyer bad faith in counseling and negotiation, albeit well placed, appears premature. No procurable evidence, empirical or anecdotal, implies bad faith. Neither does the analogy to plea bargaining, and its associated misconduct, offer a basis for such a presumption.

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284. *See* Alfieri, *supra* note 32, at 1339-40.

285. *See* 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 (1993).

286. *See* Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983).

287. *Cf.* Pamela S. Karlan, *Contingent Fees and Criminal Cases*, 93 COLUM. L. REV. 595 (1993).

288. *See* Stephen J. Schulhofer, *Criminal Justice Discretion As Regulatory System*, 17 J. LEGAL STUD. 43, 53-60 (1988).

Finally, unease concerning the introduction of additional counseling variables, and a corresponding increase in the risk of error, seems groundless. No evidence suggests an escalation of risk. And no presumption of risk finds empirical support. In spite of this insufficiency, the grave consequences of ineffective assistance compel a review of preventive measures, such as enhanced training and supervision in counseling practices.

Beyond this truncated response, the above-mentioned objections warrant consideration of the institutional competence of courts and bar associations in promulgating and enforcing regulations governing the racial conduct of lawyers and clients in criminal defense advocacy. Consideration extends to the enumeration of formal procedural protections designed to safeguard against race-based prejudice in the courtroom and the law office. Implementation of such protections requires new administrative systems and gives rise to the related problems of cost and valuation.

To be sure, the task of assigning a pecuniary value to the deformation of racial identity or monetizing harm to racial community is daunting. Because the nature of the injury is intangible in character, it exceeds the scope of easy economic calculation. Likewise, the task of comparing the actual moral worth or culpability of clients and communities presents alarming difficulties.[289] Nevertheless, roughhewn assessment and open discussion of the potential costs and benefits of racial regulation in the criminal justice system deserves our attention.

CONCLUSION

This article advances a larger, multipronged investigation of racial truth and justice in the criminal defense representation of historical agents of American racial violence. Like prior efforts in this investigation, the article is plagued by an admitted tension between modernist intuition and postmodernist disposition. Lisa Frohmann and Elizabeth Mertz remark that this tension is likely to emerge whenever "analysis moves all events to the level of discourse, stories, and social categories, turning away completely from questions of truth and justice while concentrating on issues of construction, persuasion, and rhetoric."[290] Although the discursive or rhetorical analysis of racialized criminal defense narratives remains critical,

289. *See* Jeanne L. Schroeder, *Some Realism About Legal Surrealism*, 37 WM. & MARY L. REV. 455, 462 (1996).

290. Lisa Frohmann & Elizabeth Mertz, *Legal Reform and Social Construction: Violence, Gender, and the Law*, 19 L. & SOC. INQUIRY 829, 847, 849 n.66 (1994).

lawyers should not, indeed cannot, turn away from the pursuit of truth and justice in evaluating race in America.

The evaluation of the status of race, racialized defense strategy, and race-neutral representation in the law and ethics of criminal defense lawyering suffers profound ambiguity in part born of the tension between modernism and postmodernism within the CRT movement. Angela Harris observes that the dual commitment of race-crits to the modernist, antiracist goals of traditional civil rights scholarship and to the postmodernist, deconstructive methods of internal critique produces different, perhaps incommensurable, interpretive accounts of the legal subject and the practices of objectivity and neutrality in legal reasoning.[291] Embodied in varied narrative forms, the accounts undermine common faith in Enlightenment reason and popular belief in historical truth. Rather than revive the canons of modernism or reject the critical tools of postmodernism, Harris urges race-crits not only to "inhabit" or "live in the tension" generated by modern-postmodern jurisprudential ambiguity, but also to take hold of its reconstructive potential.[292]

Here, as well as in other remedial contexts of normative prescription, modern-postmodern jurisprudential ambiguity confounds the practical investigation of race, particularly study of the ingrained lawyer habits of race-baiting and the discursive traces of racist ideology in advocacy. CRT scholars studying racial remedies, for example, note conceptual uncertainty in the competing notions of affirmative action and discrimination. Indeed, Girardeau Spann notes that unstable goals and mixed motives may sometimes erase the difference between affirmative action and discrimination.[293]

Like justice-based remedial measures, advocacy strategies sometimes require redefinition. The project of redefinition entails a distrust of tradition verging on self-paternalism. The growing cry for the regulation of the self in advocacy signals the move to nonmaterial, psychological claims of spiritual redress[294] on behalf of clients and their communities. Engaging the narratives of individuals and communities of color in critical dialogue demands an understanding of both black and white racial identity. Ultimately, only an under-

291. *See* Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 745-60 (1994).

292. *See id.* at 760.

293. *See* Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 HOW. L.J. 1, 65 (1995).

294. *See generally* Kathy Laster & Pat O'Malley, *Sensitive New-age Laws: The Reassertion of Emotionality in Law*, 24 INTL. J. SOC. L. 21, 28 (1996).

standing of the politics of identity will break the silence of racial subordination in law and ethics.[295]

295. Anthony Chase urges breaking "the precious rule of silence" in law. Chase, *supra* note 87, at 47. He remarks: "The day may come when race will no longer be an issue, but that will be after the process of restructuring our collective unconscious is completed — after the seeds of racism, instilled centuries ago, have been eradicated." *Id.*