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Race Trials

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"I told Mister Washington / You couldn't find a white man / With his name."[1]

—Yusef Komunyakaa

Introduction

This Article is the third in a series devoted to the study of race, lawyers, and ethics in American law. The opening work of the series explored the rhetoric of race in cases of black-on-white racially motivated violence, citing the defense of Damian Williams and Henry Watson on charges of beating Reginald Denny and others during the 1992 South Central Los Angeles riots.[2] The next work probed racial rhetoric in cases of white-on-black racially incited violence, noting the civil and criminal trial of the Ku Klux Klan in the 1981 lynching of Michael Donald.[3] The work at hand analyzes the rhetorical meaning of race in the recent "double

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1. YUSEF KOMUNYAKAA, *A Good Memory*, *in* NEON VERNACULAR 14, 15 (1993).

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

3. *See* Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063 (1997). On the culture and defense of lynching, see also Anne S. Emanuel, *Lynching and the Law in Georgia Circa 1931: A Chapter in the Legal Career of Judge Elbert Tuttle*, 5 WM. & MARY BILL OF RTS. J. 215 (1996); Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31 (1996).

trial"[4] of Lemrick Nelson growing out of four days of interracial violence in the Crown Heights section of Brooklyn, New York in 1991. This analysis serves three purposes: first, to augment the still-evolving definition of race trials; second, to broaden the discursive map of "race talk" in legal advocacy; and third, to determine whether the practice of race talk in advocacy meets current ethical standards of representation or warrants alternative regulatory standards. No doubt the size of the Nelson trial record and the weight of the literature brought to bear in this case counsels a more tentative, and perhaps gingerly, approach to the subject of race trials than may be found here. The instant approach admittedly overreaches both in its descriptive breadth and prescriptive scope. My hope is that a sustained course of study will in time cure these deficiencies. The challenge in this Article, and in others to come, is to cast descriptively and to recast prescriptively our understanding of race trials toward a renewed vision of racial dignity and community in American law and society.

The Article is divided into seven Parts. Part I traces the genealogy of the project under way. Part II scrutinizes race trials in the context of the prosecution and defense of racially motivated violence. Part III describes the double trial of Lemrick Nelson. Part IV surveys the current regulation of race trials under ABA rules.[5] Part V proposes alternative race-conscious regulation based on the teachings of Critical Race Theory. Part VI enumerates objections to this proposed race-conscious regulatory scheme. Part VII concludes in an attempt to reconfigure race trials by reconstructing racial identity, reimagining racialized narrative, and reforming race-neutral representation.

The vision of practice underlying this larger inquiry rests on a Critical Race Theory-inspired ethic of good lawyering. The ethic adopts a race-conscious jurisprudence to guide the conduct of lawyers and judges[6] when confronting matters of race. From the outset, that jurisprudence abandons the pretense of a colorblind canon of race neutrality. At the same time, it

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4. By "double trial," I mean trial proceedings involving successive criminal and civil rights prosecutions in state and federal courts. On the legitimacy of successive prosecutions, see Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1 (1995); Susan N. Herman, *Reconstructing the Bill of Rights: A Reply to Amar and Marcus's Triple Play on Double Jeopardy*, 95 COLUM. L. REV. 1090 (1995); Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. REV. 609 (1994) (all arguing for the complete or partial elimination of the dual sovereignty exception to double jeopardy doctrine).

5. The survey draws on three ABA rule clusters: the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980); the MODEL RULES OF PROFESSIONAL CONDUCT (1997); and the STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE (1992).

6. The judicial regulation of race comes under statute and rule. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(5)-(6) (1990). Regulatory authority declares the adjudicative responsibility to perform judicial duties without bias or prejudice and to require lawyers to refrain from acts of bias or prejudice, except when warranted by the demands of legitimate advocacy. *See id.* A full account of that regulatory scheme will be undertaken in an upcoming project.

rejects the color-coded claims of racial partisanship and prejudice. Instead, it seeks to develop a color-conscious, pluralist approach to advocacy that honors the integrity of diverse individual and collective racial identities without sacrificing effective representation. Critical Race Theory sketches an analytic framework suitable to that approach. The double trial of Lemrick Nelson furnishes a case study in which to pursue it.

I. A Genealogy of Method

The starting point of the instant project is race, specifically the role of race within the lawyering process. That process engages the complex labor of advocacy ranging from interviewing and counseling to trial and appellate practice.[7] Typically, American law schools consign the teaching of the lawyering process and the ethics of lawyering to the margins of the curriculum. Likewise, law schools generally relegate research on the process and law of lawyering to the periphery of scholarship. Both tendencies impoverish legal education. To an extent, the emergence of the theoretics of practice movement,[8] coupled with the methodological shift in ethics across other disciplines,[9] promises to alleviate somewhat the destitution of the legal academy in developing an integrated theory and practice, indeed a praxis, of advocacy.[10]

Ending the intellectual poverty of lawyering praxis in contemporary legal education requires the assimilation of interdisciplinary materials spanning literature, history, jurisprudence, and more. Literature in particular holds special significance to many scholars of the lawyering

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7. For broad exposition of the lawyering process, see generally GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY (1978); HOWARD LESNICK, BEING A LAWYER: INDIVIDUAL CHOICE AND RESPONSIBILITY IN THE PRACTICE OF LAW (1992); JAMES E. MOLITERNO & JOHN M. LEVY, ETHICS OF THE LAWYER'S WORK (1993); THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY (1994).

8. The theoretics of practice movement encompasses clinical and interdisciplinary research. For useful surveys, see Symposium, *Lawyering Theory: Thinking Through the Legal Culture*, 37 N.Y.L. SCH. L. REV. 1 (1992); Symposium, *Political Lawyering: Conversations on Progressive Social Change*, 31 HARV. C.R.-C.L. L. REV. 285 (1996); Symposium, *Poverty Law Scholarship*, 48 U. MIAMI L. REV. 983 (1994); Symposium, *Theoretics of Practice: The Integration of Progressive Thought and Action*, 43 HASTINGS L.J. 717 (1992).

The recent emergence of field study-based clinical law journals contributes to this research. *See, e.g.*, Stephen Ellmann et al., *Foreword: Why Not a Clinical Lawyer-Journal?*, 1 CLINICAL L. REV. 1 (1994); *From the Editors*, 1 T.M. COOLEY J. PRAC. & CLINICAL L. at vii (1997).

9. The methodological embrace of philosophy and literature signals this shift. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988); THOMAS L. SHAFFER, AMERICAN LEGAL ETHICS (1985) (both utilizing philosophical approaches in examining legal ethics); *see also* David B. Wilkins, *Redefining the "Professional" in Professional Ethics: An Interdisciplinary Approach to Teaching Professionalism*, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 241 (discussing Harvard's interdisciplinary legal ethics program).

10. Ultimately, the promise of theory-practice integration within the legal academy is likely to go unfulfilled. The disdain of theoreticians for practice and the antipathy of practitioners toward theory virtually condemns the enterprise of integration.

process. Captivated by the law and literature movement,[11] these scholars borrow from the analysis of the "law as literature" and from the investigation of the "law in literature."[12] The study of the law as literature inspects narrative and story in legal discourse.[13] The study of the law in literature scans legal representations in literary texts.[14]

Although both strands of the law and literature movement illuminate the symbolic and rhetorical meaning of sociolegal discourse, the treatment of the law as literature proves most useful to an analysis of narrative and story in legal advocacy. That analysis goes beyond the instrumental, outcome-oriented values engrafted on narrative and story to ponder the intrinsic values motivating litigant speech and conduct. Frequently, the intrinsic values of individual dignity and community integrity motivate litigant behavior.[15]

Consider the notion of individual dignity. Liberal theory champions this notion, fostering a jurisprudence of dignitary rights in constitutional, statutory, and common law arenas. Constitutional prohibitions against unwarranted governmental intrusion on the private realm of the individual[16] and the family[17] build from these rights. Legislative enactments establishing protective procedures for the dissemination of state-acquired information confer similar rights of privacy on individuals.[18]

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11. For helpful overviews of the law and literature movement, see STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES (1989); MARTHA C. NUSSBAUM, LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE (1990); RICHARD POSNER, LAW AND LITERATURE: POSSIBILITIES AND PERSPECTIVES: A MISUNDERSTOOD RELATION (1988); IAN WARD, LAW AND LITERATURE: POSSIBILITIES AND PERSPECTIVES (1995); ROBIN WEST, NARRATIVE, AUTHORITY, AND LAW (1993); JAMES BOYD WHITE, ACTS OF HOPE: CREATING AUTHORITY IN LITERATURE, LAW, AND POLITICS (1994).

12. On the origins of this distinction, see Robert Weisberg, *The Law-Literature Enterprise*, 1 YALE J.L. & HUMAN. 1 (1988).

13. *See* L.H. LARUE, CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY 2 (1995) (critiquing fictions in the law); NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW 1 (David Ray Papke ed., 1991) (noting the presence of narrative in all "things and activities we consider 'legal'").

14. *See* RICHARD H. WEISBERG, POETHICS: AND OTHER STRATEGIES OF LAW AND LITERATURE (1992); RICHARD H. WEISBERG, THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION (1984) (both discussing the frequent use of legal themes in fiction).

15. For discussions of intrinsic values in advocacy, see Clark D. Cunningbam, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1385, 1366-87 (1992) (explicating client race-based dignitary interests); Tanina Rostain, *The Company We Keep: Kronman's* The Lost Lawyer *and the Development of Moral Imagination in the Practice of Law*, 21 L. & SOC. INQUIRY 1017, 1020 (1997) (book review) (endorsing lawyer participation "in the articulation of public commitments embodied in the law").

16. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (invalidating statutes prohibiting the use and distribution of contraceptives by married persons); Eisenstadt v. Baird, 405 U.S. 438, 443 (1972) (invalidating statutes prohibiting the distribution of contraceptives to unmarried persons).

17. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) (striking down a municipal zoning ordinance regulating household occupancy).

18. *See* Privacy Act of 1974, 5 U.S.C. § 552a (1994 & Supp. II 1996), *amended by* 5 U.S.C.A. § 552a (Supp. 1997).

Common law doctrine in the area of tort safeguards the same set of rights.[19] Whether tied in constitutional or common law bundles, dignitary rights establish the freedom of individuals and groups to secure appropriately tailored treatment from private and public legal agents as well as their affiliated institutions. This settled line of rights stops short of establishing the guarantee of community integrity.

Relative to individual dignity, the notion of community integrity seems underdeveloped in liberal theory.[20] Community integrity means something more than the physical geography of inclusion and exclusion exemplified by the concept of school or zoning districts. Integrity is not simply about the power to define and to control racialized space.[21] Rather, it is about the collective norms governing that space, especially their meaning and imagery.[22] Community integrity in this way recalls Robert Cover's notion of a *nomos*.[23] To Cover, a *nomos* signifies a "present world" constituted by community values.[24] Existing in tension, these values draw from "an extant state of affairs" and from "visions of alternative futures."[25]

In race cases, community integrity reflects the tension between the reality of racial subordination expressed in cultural inferiority, socioeconomic inequality, and political disenfranchisement, and a vision of racial transcendence in cultural aesthetic, socioeconomic opportunity, and political empowerment.[26] Both the present reality and future vision of community integrity are identifiable in constitutional, statutory, and common law realms. Constitutional recognition of state public nuisance statutory abatement schemes ratifies a sense, albeit narrow, of community integrity founded on collective social welfare and moral opprobrium.[27] Legislation creating local community development programs with participatory

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19. *See* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 740 (1989).

20. One example of an underdeveloped strand of community integrity in liberal theory is the constitutional doctrine of associational rights in matters of intimacy and politics. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986) (contemplating whether homosexual activity constitutes protected association); NAACP v. Alabama, 357 U.S. 449 (1958) (considering the claim of associational protection of a membership list). *See generally* Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

21. *See* Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994).

22. *See generally* AVIAM SOIFER, LAW AND THE COMPANY WE KEEP (1995).

23. *See* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983).

24. *Id.* at 9.

25. *Id.*

26. On the interplay of racial aesthetics, see John M. Kang, *Deconstructing the Ideology of White Aesthetics*, 2 MICH. J. RACE & L. 283 (1997) (discussing white-dominated aesthetic paradigms and their reflection of racial interplay in culture and society).

27. *See, e.g.*, Bennis v. Michigan, 116 S. Ct. 994 (1996) (upholding Michigan's public nuisance abatement scheme).

mandates amplifies that sense of integrity.[28] Common law rooted racially restrictive covenants reaffirm community integrity, lamentably in an odious fashion.[29]

The intrinsic values of individual dignity and community integrity conflict in procedural and substantive contexts. Out of this conflict, procedural safeguards may preserve individual dignity but undercut community integrity. The doctrine of federal intervention illustrates this clash. Cast in broadly permissive terms, the doctrine permits a nonlitigant applicant to join an action when he establishes an interest relating to the property or transaction at issue that in his absence may go unprotected or when the applicant's claim of interest and the main action enjoy a question of law or fact in common.[30] In *Martin v. Wilks*,[31] a district court order below denying intervention thwarted a group of white firefighters in their collateral attack on consent decrees mandating municipal affirmative-action plans.[32] The denial stemmed from application of the "impermissible collateral attack" rule.[33] Previously, this majority rule precluded collateral attacks on consent decrees by nonparties. Rejecting an implied rule of mandatory intervention, the Supreme Court held that the attribution of preclusive effect to a failure to intervene was inconsistent with federal rules of joinder and intervention.[34] The Court reasoned that historic traditions of adequate notice, knowledge, and representation protected the "rights of strangers" against deprivation in prior proceedings when the opportunity to intervene was unfairly burdened.[35] The fact that these third party participatory rights violated the integrity of community racial judgments on affirmative action held little consequence.

Likewise, substantive protections afforded individuals may offend community integrity. Court decrees ordering the deinstitutionalization and reintegration of people with mental disabilities in local settings, for example, may provoke community opposition.[36] Typically, such opposi-

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28. *See generally* PETER MARRIS & MARTIN REIN, DILEMMAS OF SOCIAL REFORM: POVERTY AND COMMUNITY ACTION IN THE UNITED STATES (2d ed. 1973); DANIEL P. MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING: COMMUNITY ACTION IN THE WAR ON POVERTY (1969).

29. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948) (invalidating state common law enforcement of racially restrictive covenants under the Equal Protection Clause).

30. *See* FED. R. CIV. P. 24(a), (b).

31. 490 U.S. 755 (1989).

32. *See* United States v. Jefferson County, 28 Fair Empl. Prac. Cas. (BNA) 1834 (N.D. Ala. 1981), *aff'd*, 720 F.2d 1511 (11th Cir. 1983).

33. *Wilks*, 490 U.S. at 760-61. For a thoughtful discussion of the normative underpinnings of the rule in *Wilks*, see Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965 (1993); *see also* Douglas Laycock, *Due Process of Law in Trilateral Disputes*, 78 IOWA L. REV. 1011 (1993); Susan P. Sturm, *The Promise of Participation*, 78 IOWA L. REV. 981 (1993).

34. *See Wilks*, 490 U.S. at 765.

35. *See id.* at 762.

36. *See* Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63, 80-112 (1991).

tion gains ground for protest under municipal zoning ordinances[37] and common law property rules.[38] Motivated by fear of increased crime and decreased property values,[39] these forms of statutory and common law protest seek to override the dignity-based participatory rights of the disabled.

Moreover, intrinsic values collide against instrumental calculations in advocacy. The collisions occur over the competing claims to narrative privilege asserted among lawyers, clients, and judges. Acts of privilege dictate the form, content, and order of narrative—elevating some, degrading and extinguishing others. Clients privilege narratives in their lawyer communications, pretrial disclosures, and courtroom testimonies. Lawyers privilege narratives as well, inscribing their preferences in the body of pleadings, motions, and briefs. They reiterate that privilege in negotiation, at trial, and on appeal. Judges privilege narratives in their evidentiary rulings, findings of facts, and conclusions of law.

In race trials, lawyers as well as clients and judges compete to control the racialized form and content of narrative. Because of its material importance to claims of legal status and entitlement, race informs the structure of narratives and the telling of stories in criminal as well as in civil actions. As a result, race bears directly on claims of sociolegal identity and truth in the courtroom.[40] Robin West remarks that "legal and political stories often constitute, not just symbolize, legal or moral truth."[41]

The pursuit of historical truth occupies an important place in the work of lawyering practice scholars, especially in affording insight into the cruel dynamics of court-sanctioned racial subordination. Recent studies documenting the private law of slavery chart the interlocking development of advocacy and adjudication in the history of racial status designation.[42] This research, sometimes pursued under the rubric of the

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37. *See, e.g.*, City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) (overturning a city ordinance requiring a special permit for homes for the mentally ill under the Equal Protection Clause).

38. *See, e.g.*, Mehta v. Surles, 720 F. Supp. 324 (1989), *aff'd in part and vacated in part*, 905 F.2d 595 (2d Cir. 1990) (upholding the use of a preexisting easement by a community residence for mentally disabled persons).

39. *See* Peter Margulies, *Building Communities of Virtue: Political Theory, Land Use Policy, and the "Not in My Backyard" Syndrome*, 43 SYRACUSE L. REV. 945, 957 (1992).

40. The notion of character is bound up in the construction of identity. At trial, racial character may be constructed and contested through narrative. For a careful examination of the racialized construction of character at trial, see Ariela Gross, *Pandora's Box: Slave Character on Trial in the Antebellum Deep South*, 7 YALE J.L. & HUMAN. 267 (1995).

41. Robin West, *Constitutional Fictions and Meritocratic Success Stories*, 53 WASH. & LEE L. REV. 995, 1009 (1996).

42. For illuminating studies tracking the development of the private law of slavery through property rights advocacy and adjudication, see Andrew Kull, *The Enforceability After Emancipation of Debts Contracted for the Purchase of Slaves*, 70 CHI.-KENT L. REV. 493 (1994); Thomas D. Russell, *A New Image of the Slave Auction: An Empirical Look at the Role of Law in Slave Sales and a*

New Historicism,[43] defines law broadly to encompass legal texts, instruments, rituals, and discourses.[44] It treats texts and constructs as situated cultural artifacts that are "historically contingent and perpetually contested and renegotiated."[45] Adherents of the New Historicism discover little coherence or unity in local cultural contexts. Instead, they find a rhetorical struggle for discursive power cloaking a material struggle for political dominance.[46]

Additionally, the politics of jurisprudence play an integral part in framing the lawyering process critique of racial status. A rough union of movements shape the post-Realist methodology of practice jurisprudence, including Critical Legal Studies,[47] feminism,[48] and Critical Race Theory.[49] Of these movements, only Critical Race Theory interrogates the construction of racial identity and hierarchy in American law. Combining cultural and social criticism, Critical Race theorists track the political, societal, and economic forces sustaining racial status hierarchies under the legal precept of racial inferiority.[50] Unfortunately, their collective account[51] suffers from a lack of thick description regarding the contextually situated advocacy practices that mold hierarchy.[52]

Conceptual Reevaluation of Slave Property, 18 CARDOZO L. REV. 473 (1996); *see also* Mark Tushnet, *New Histories of the Private Law of Slavery*, 18 CARDOZO L. REV. 301 (1996) (exploring the use of legal materials to explain the ideology of slavery).

43. On the genealogy of the New Historicism, see William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065, 1070-72, 1084-86 (1997).

44. *See* Robert W. Gordon, *Foreword: The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023, 1029 (1997).

45. *Id.*

46. *See* Fisher, *supra* note 43, at 1072.

47. For an early assessment of CLS theory and practice, see generally Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509 (1984).

48. On feminist theory and practice, see generally Naomi R. Cahn, *Styles of Lawyering*, 43 HASTINGS L.J. 1039 (1992); Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599 (1991); Ann Shalleck, *The Feminist Transformation of Lawyering: A Response to Naomi Cahn*, 43 HASTINGS L.J. 1071 (1992).

49. For a sweeping account of Critical Race Theory and practice, see generally Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997).

50. On the historical inception of the precept of racial inferiority, see generally A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS (1996).

51. For comprehensive surveys of the literature of Critical Race Theory, see generally CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995); for a feminist perspective on Critical Race Theory, see CRITICAL RACE FEMINISM (Adrien Katherine Wing ed., 1997).

52. Borrowed from cultural anthropology, the notion of thick description has gained wide currency in the legal scholarship of practice. *See generally, e.g.*, LAW STORIES (Gary Bellow & Martha Minow eds., 1996) (rendering participant-observer accounts of the law and legal advocacy to enrich the socio-legal understanding of practice contexts). Accordiugly, the absence of situated advocacy analysis from

Pressing for an enriched jurisprudential account of the lawyering process in race cases through the study of civil and criminal trials may strike some as frivolous. Advocacy, they may assert, is a practical vocation of limited jurisprudential respectability. Certainly, for advocates, results denote the measure of success, not aesthetics. On this yardstick, endeavoring to combine disparate jurisprudential movements already freighted with incommensurable norms and methods ostensibly to acquire the mien of respectability seems pointless.

Cries of pragmatic and interdisciplinary protest notwithstanding, the risks of errant speculation seem justified in light of the reconstructive purpose of this enterprise. Furthermore, given the prior works in this series,[53] it seems plain that the enterprise neither crudely misappropriates the teachings of adjacent disciplines nor blithely advances a project of utopian recovery.[54] Instead, the enterprise weaves multiple strands of theoretical and practical analysis into a broad investigation of the status of race, racialized narrative, and race-neutral representation in law, lawyering, and ethics.

To that end, the project focuses on the rhetoric of race or "race-talk" in the prosecution and defense of racially motivated violence in civil and criminal law proceedings. The contexts of civil and criminal law advocacy contain a clutch of problematic assumptions about race. The first concerns the uncontroversial *absence* of race from the training regimens and ethical canons of advocacy. Standard skills training and ethics instructional materials used in law school and in continuing legal education programs routinely omit mention of race in discussions of lawyering and ethics.[55] That omission usually passes without complaint.[56]

The second assumption pertains to the colorblind *form* of advocacy narratives employed in courtroom practice and in negotiation.[57] Within these contexts, advocacy narratives encompass not only legal rule and

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the Critical Race Theory literature is noteworthy. *See* Anthony V. Alfieri, *Black and White*, 85 CAL. L. REV. 1647 (1997), *reprinted in* 10 LA RAZA L.J. 561 (1998) (reviewing CRITICAL RACE THEORY: THE CUTTING EDGE, *supra* note 51, and CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 51).

53. *See supra* notes 2-3 and accompanying text.

54. Robert Gordon denotes a narrative of recovery as "one in which the legal system is seen as ready to be guided to recover the purity of its original principles." Gordon, *supra* note 44, at 1023. Hence, it is "often accompanied by a jeremiad lamenting recent lapses and corruptions." *Id.*

55. *See, e.g.*, ROBERT P. BURNS ET AL., EXERCISES AND PROBLEMS IN PROFESSIONAL RESPONSIBILITY (1994).

56. For an example of dissent, see Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 384-91 (1997).

57. Critical scholars attack the claim of colorblind negotiation. *See, e.g.*, Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1375-83 (examining theories of prejudice and its relation to alternative dispute resolution); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1579-81 (1991) (explicating subordinate status of black women in mediation proceedings).

policy, but also factual guilt and innocence. The content of those narratives may veer from the covert, color-coded expression of racial animus[58] to the overt race-conscious assertion of invidious stereotypes.[59]

The third assumption refers to the *neutral* quality of adversarial representation. Here, neutrality differs from nonpartisanship. By any measure, partisanship and moral nonaccountability remain the twin benchmarks of the adversarial system.[60] Lawyers continue to serve as partisan representatives of assumed causes, steadfast yet often unaccountable to client, court, and public-at-large. Nonetheless, the qualities of neutrality persist, adorning the adversarial process procedurally and spatially. Even in hard fought court contests, lawyers strive to maintain a ritual pretense of race-neutrality. The procedures governing trial and appellate practice—pleadings, motions, hearings—encourage this pretense. The physical setting of the courtroom—the symmetry of counsel tables and the umpireal distance of the bench and jury box—spatially reinforces the image of even-handed neutrality.

Each of the above assumptions carries a reasoned explanation that rationalizes racialized modes of civil and criminal advocacy as either natural or necessary. Several logics support the invocation of a naturalist and a necessitarian justification for these assumptions. They include the logic of objectivity, the logic of form, and the logic of process. Depending on context, the logics may overlap or shift in emphasis as they play out in lawyer argument, judicial reasoning, and media commentary.

The logic of objectivity ties racialized narrative to empirical fact. This correlation suggests that a racialized narrative merely *describes* a naturally racialized world. Description in this sense implies a value-neutral activity undisturbed by the tricks of emotion or cognition. Coolly dispassionate acts of description, it is said, render the world of race *out there* discoverable and verifiable.

The logic of form equates racialized narrative with overt bias and prejudice. The gravamen of this claim is discriminatory *intent*, deliberately manifest and invidious. Without evidence of this requisite intent, there is no bias. Forging a link between intentional discrimination and racialized narrative limits the regulatory scope of lawyering and ethics standards to only demonstrably conscious forms of bias and prejudice. To cabin the

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58. Racial animus may animate expressions in the law and in the media. *See* Christo Lassiter, *The O.J. Simpson Verdict: A Lesson in Black and White*, 1 MICH. J. RACE & L. 69, 69-83 (1996).

59. On the systematic use of negative racial stereotypes in the criminal justice system, see JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 42-43 (1997).

60. *See* LUBAN, *supra* note 9, at 7, 12, 393-403 (examining the normative underpinnings of partisanship and nonaccountability claims); *see also* Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673 (1978) (tracing moral nonaccountability claims to the adversarial system).

regulation of the lawyering process in this manner leaves unconscious or uncorroborated forms of bias and prejudice wholly beyond the reach of court supervision and sanction. The same equation precludes the recognition and regulation of unconscious bias or prejudice exhibited in racially disparate policies and practices.

The logic of process associates racialized narrative with instrumental forces *outside* the law and the adversarial system. According to this logic, it is unruly external forces—politics, economics, culture, and society—that intrude upon the neutrality of the law and the legal process, deforming the field in search of certain racial end-results. The presumption at work here is that the internal structure of the law—its rules, agents, and institutions—harbors a race-free, or at least race-neutral, environment. The received legitimacy of the rule of law under the regime of liberal legalism hinges on the maintenance of that environment.

Having sorted out the logics of objectivity, form, and process, turn now to their deployment under naturalist and necessitarian advocacy rationales. A naturalistic justification of racialized advocacy relies heavily on appeals to objectivity and form. For the naturalist, race and racial hierarchy constitute incontrovertible facts of the sociolegal world. Evidentiary assertion of "race facts" in the different forms of advocacy—pleadings, trial arguments, appellate briefs—is not just warranted, therefore, but compelled.

The command of competent representation fuels the sense of compelled racialized advocacy. At the same time, it threatens zealous overreaching. Prevention of incompetent or overzealous forms of advocacy hangs on the purportedly self-correcting mechanisms of the adversarial process.[61] Among the mechanisms intended to safeguard the adversarial process from excess and inadequacy, two stand out in abstract, formalist terms: bar discipline and court sanction.[62] Unsurprisingly, neither bar disciplinary archives nor court sanction records evince a widespread intolerance of racialized advocacy in concrete, everyday practice.[63]

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61. For a critique of the institutional context of the adversarial process for failing to engender and to enforce desirable ethical norms, see David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1145 (1993); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992) [hereinafter Wilkins, *Who Should Regulate Lawyers?*].

62. *See* MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 65-83 (1990).

63. For extensive discussion of the regulatory failure to deter racism, sexism, and ethnic bias in the legal profession, see 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); *see also* Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TULANE L. REV. 1739, 1790-92 (1993) (finding meager evidence of professional discipline for lawyer use of racial imagery and stereotypes in the courtroom). *Compare* Eva S. Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 GEO. J. LEGAL ETHICS 1 (1994) (defending criminal lawyers' use of bias and prejudice as a legitimate form of aggressive advocacy).

Disapproval of this sort would seem to defy the process-based mandate of competent representation. Derived from a modernist sensibility,[64] the naturalistic defense of racialized narratives springs from faith in the condition of objectivity, the purity of form, and the perfectibility of process.

A necessitarian justification, by comparison, rests more extensively on corrupted process values in defending racialized advocacy. Driven by the imperatives of the adversarial system, those values harness the associated logics of objectivity and form to advance the goals of representation, even if the end goals suffer from race-infected motive. This harnessing corrupts objectivity and reduces form to an instrumental function.

To the necessitarian, objectivity operates in a weak sense specific to the legal system. This situated sense of objectivity initially comes from rival proffers of and objections to evidence. Deficiencies in witness recollection and record preservation, inconsistent rules of admission, and the ad hoc determinations of local triers of fact all work to enhance the sense of closed courtroom objectivity. Imbued by this sensibility, lawyers rebuff claims of *true* objectivity, implicitly accepting the contingent nature of evidentiary rulings and findings of fact.

Similarly, for the necessitarian, form fulfills a limited function peculiar to the legal system. This performative function binds to racialized narratives in order to carry out the substantive purposes of advocacy. At no time do purposive advocates entertain the belief that narrative forms of constitutional, statutory, or doctrinal law exist untainted by the racialized norms of politics, culture, and society. To the contrary, they acknowledge and exploit racialized norms to advance the chosen purposes of representation. Rooted in a postmodern sensibility, the necessitarian justification of racialized narratives emanates from a loss of faith in objective judgment, ideal form, and fair process.[65]

Confronting the above sets of assumptions and rationales presents two tasks. The threshold task is to demonstrate that the assumptions behind the practices of colorblind and color-coded advocacy rest on a deeply contested vision of racial harm and community. From there, the task is to show that the explanations accompanying such assumptions prove too much, begging hard questions about the proper place of racial identity and discourse in advocacy. To an extent, the prior works in this series all square to take on such tasks. Whether they rise to meet the challenges posed remains to be

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64. On the modernist sensibility in lawyering, see Anthony V. Alfieri, *Impoverished Practices*, 81 GEO. L.J. 2567, 2590-2660 (1993) (providing a broad discussion of formalist and instrumentalist visions of modern lawyering).

65. On the postmodernist stance in lawyering, see Anthony V. Alfieri, *Stances*, 77 CORNELL L. REV. 1233, 1248-57 (1992).

seen. The next Part seeks to establish the framework for assessing race trials.

II. Race on Trial

This Part frames race trials in the context of the prosecution and defense of racially motivated violence. The framework borrows from the jurisprudence of Critical Race Theory, particularly the concepts of racial identity, racialized narrative, and race-neutral representation. The foundation for erecting this framework is American history.

The history of American law provides numerous examples of race trials, as here oftentimes arising out of incidents of interracial violence.[66] Indeed, race and law produce a volatile mix exemplified by the trials of John Brown,[67] the Scottsboro Boys,[68] and the Black Panthers.[69] Although celebrated, these trials obscure the commonplace presence of race in civil and criminal proceedings held daily in state and federal courts.

Searching the abundant field of American race-infected trial histories leads to a confrontation with the juridical embodiments of racial identity, racialized narrative, and race-neutral representation. Whether expressed in word or deed, the presence of race at trial is alone insufficient for purposes of *racial* demarcation. Race trials go beyond mere race talk. To be sure, such talk is a necessary condition of race trials. An equally important condition concerns the presence of racial status distinctions and hierarchies. In race trials, those distinctions acquire moral relevance.

The cultural internalization of status distinctions and hierarchies, Jack Balkin points out, "*make* traits morally relevant."[70] The traits, he explains, provide not only "signs of positive and negative associations" but also "permissible proxies for inferences about character, honesty, ability, and judgment."[71] For Balkin, social and cultural "traits are morally irrelevant only to persons not in the grip of that particular hierarchy."[72]

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66. *See, e.g.*, JOHN WILLIAM SAYER, GHOST DANCING THE LAW: THE WOUNDED KNEE TRIALS (1997).

67. *See* Robert A. Ferguson, *Story and Transcription in the Trial of John Brown*, 6 YALE J.L. & HUMAN. 37 (1994) (describing Brown's trial for leading the 1859 slave revolt at Harper's Ferry).

68. *See* DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (rev. ed. 1979); JAMES GOODMAN, STORIES OF SCOTTSBORO (1994).

69. *See* David N. Rosen, *Rhetoric and Result in the Bobby Seale Trial*, *in* LAW'S STORIES 110 (Peter Brooks & Paul Gewirtz eds., 1996).

70. J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2366 (1997) (emphasis in original).

71. *Id.*

72. *Id.* Balkin adds:

> A characteristic becomes "morally irrelevant" precisely when we understand the status hierarchy it is based on to be unjust. Only then do we become embarrassed to use the trait as a signifier of, or a proxy for, positive or negative associations. Our objection to

Race trials highlight the moral and legal relevance of inferiority and inferior status. To grasp this relevance, return again to Balkin's conception of status hierarchy and its hold on "insular" low status groups.[73] To Balkin, subordinate groups "suffer from any number of forms of exclusion and separation that mark off social superiors from social inferiors—ranging from housing patterns and membership in social organizations and family alliances, to business contacts and the ability to form political coalitions."[74] Within this wide range of social life, he notes, the shared experience "is not geographical isolation, but forms of separation and exclusion—in whatever sphere of life—that connote social inferiority."[75]

By definition, then, race trials posit the moral relevance of status hierarchy. Elaboration from this predicate requires the application of Critical Race Theory to the practice contexts of law, legal institutions, and sociolegal relations. Together, these contexts implicate procedural and substantive laws, judges and juries, parties, victims, and attorneys, and lastly politics, culture, and society.

Several propositions are crucial to the application of Critical Race Theory to practice. The first asserts the contested status of racial identity in advocacy and in adjudication. The second points to the shifting character of racialized narratives in the same settings. The third refers to the competing nature of colorblind, color-coded, and color-stereotype claims under the adversarial rubric of race-neutral representation. The next subpart considers the notion of racial identity.

A. Racial Identity

Law is embroiled in the politics of identity.[76] It names parties, defines their speech and conduct, and assigns their rights and duties. Its judgments declare, enjoin, and award the tangible and the intangible benefits of race and racial privilege. Legal judgments of identity originate in constitutional norms, statutory standards, and common law rules, gradually developing through case-by-case adjudication. Discourses of

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> the moral relevance of the characteristic is really our objection to the system of social meanings and the hierarchy of social status that uses this trait as a criterion for judgment.

Id. at 2366-67.

73. *See id.* at 2372 (relating insularity "to the various and mutually supporting forms of social division that simultaneously symbolize, enact, and reinforce social superiority and inferiority" (footnote omitted)).

74. *Id.*

75. *Id.*

76. On the politics of identity in advocacy and adjudication, see MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW (1997); Martha Minow, *Not Only for Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647 (1996).

constitutionalism, legislation, and the common law construct identity in terms of color and community.

The colors of black and white dominate liberal legal discourse. Pronouncements of racial identity in law[77] and legal scholarship advert not only to the colors of black and white but to the categories of blackness and whiteness.[78] Consolidated in the black-white dichotomy,[79] those references flow from essentialist practices of social and cultural construction.[80]

The sociolegal construction of race is intimately tied to color.[81] Symbolic of difference and hierarchy, color permits the "naturalization of racial distinctions."[82] Nathaniel Gates addresses the "process of differentiation" under the black-white dichotomy.[83] Citing the "binary opposition" of color, he maintains that the counterposition of the "deviant

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77. Juridical pronouncements of racial identity often take the form of classification. *See, e.g.*, Gabriel J. Chin, *The* Plessy *Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 173-74 (1996); Alex M. Johnson, Jr., *Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law*, 84 CAL. L. REV. 887, 895-903 (1996).

78. *See* Ariela J. Gross, *"Like Master, Like Man": Constructing Whiteness in the Commercial Law of Slavery, 1800-1861*, 18 CARDOZO L. REV. 263, 265-66 (1996); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993). *See generally* CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefancic eds., 1997). Legal scholars allude increasingly to racial identity in autobiography. *See, e.g.*, JUDY SCALES-TRENT, NOTES OF A WHITE BLACK WOMAN (1995).

79. On the advent of the black-white paradigm, see Juan Perea, *The Black-White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 127 (1997); Francisco Valdes, *Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 LA RAZA L.J. 1, 5-7 (1996) (citing the exclusion of Latina/o, Asian-American, and Native American experiences from Critical Race Theory).

80. On essentialist practices of social construction, see IAN F. HANEY LOPEZ, WHITE BY LAW (1996); Paula C. Johnson, *The Social Construction of Identity in Criminal Cases: Cinema Verité and the Pedagogy of* Vincent Chin, 1 MICH. J. RACE & L. 347 (1996) (discussing the social construction of Asian-Americans). On essentialist practices of cultural construction, see L. Amede Obiora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275, 279, 292-98 (1997) (noting that "the individual's formation of a sense of humanity, self, and identity is invariably contingent on a cultural context"); *see also* Leti Volpp, *(Mis)identifying Culture: Asian Women and the "Cultural Defense"*, 17 HARV. WOMEN'S L.J. 57, 64-73 (1994) (addressing legal construction of Asian-American women as the "other"); Colin Webster, *The Construction of British 'Asian' Criminality*, 25 INT'L J. SOC. L. 65 (1997) (discussing popular discursive construction of young Asian masculine criminality in British localities).

81. *See* D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 471-78 (1993) (explicating the American lexicon of blackness); Nancy Shoemaker, *How Indians Got to Be Red*, 102 AM. HIST. REV. 625, 643-44 (1997) (noting the cultural construction of physical racial differences and categories under changing political and social alignments).

82. E. Nathaniel Gates, *Estranged Fruit: The Reconstruction Amendments, Moral Slavery, and the Rearticulation of Lesbian and Gay Identity*, 18 CARDOZO L. REV. 845, 854 (1996); *see also id.* (remarking that in seventeenth and eighteenth century America "variations in culture, coloration, and other physical attributes were progressively seized upon as a means of social differentiation between what subsequently became the 'white' and 'black' populations" (foomotes omitted)).

83. *Id.* at 855.

'black'" against the "normative 'white'" engenders "a sense of 'natural' or inherent otherness."[84] For Gates, the naturalization of the racial other in American history "served to justify an escalation of the degree of dominion exercised over all persons of African extraction."[85] That dominion continues in the identity judgment of inherent black criminality.

The judgment of black criminality stems from color-coded inferences and color-conscious stereotypes about racial community. The inferences and stereotypes join to effect a kind of "conceptual liquidation" of identity.[86] Liquidation obliterates individual qualities in favor of general group traits, promoting a conformity of expectation and behavior. The notion of "conforming nonlitigants" put forward by Christopher Peters elucidates this tendency.[87] Peters explains that "[n]onlitigants who conform to a court-created rule *imagine* themselves to be litigants who will be bound by that rule."[88] When blacks, particularly young black males, conform to the norm of criminality, they do so precisely because they imagine themselves one day to be defendants who will be bound by it. This normatively *bounded* quality persists even though the norm itself spawns contradictory "double narratives" of racial defiance and deviance.[89] Those narratives and their corresponding imagery saturate the discourse of racialized criminal court advocacy. Yet, here the norm at issue is not merely court-created. It is a state-wide norm manufactured by the agents and institutions of the criminal justice system. Conformity in this sense implies nothing like a predisposition to commit criminal acts or even historical evidence of such acts. Rather, conformity suggests that blacks recognize and accommodate the norms of a criminal justice system antagonistic to their rights and interests. Accommodation signifies both white power and black resistance. The tensions accompanying the historical white-black accommodationist dynamic infect public policy, theology, and education. The literature of Critical Race Theory attests to the complex dynamic of power and resistance in circumstances of racial accommodation.[90]

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84. *Id.* at 852; *see also id.* at 855 (commenting that the "notion of a 'natural' racial group rests upon the ideological postulation that there are certain closed units, that are essentially endo-determined and dissimilar to other social units").

85. *Id.* at 855; *see also* THE JUDICIAL ISOLATION OF THE "RACIALLY" OPPRESSED (E. Nathaniel Gates ed., 1997).

86. *See* Lynette Seccombe Eastland, *Defending Identity: Courage and Compromise in Radical Right Contexts*, *in* CASE STUDIES IN COMMUNICATION AND DISENFRANCHISEMENT: APPLICATIONS TO SOCIAL HEALTH ISSUES 3, 13 n.2 (Eileen Berlin Ray ed., 1996) (describing the campaign of the conservative and religious right to define gay men and lesbians "out of existence").

87. Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 372 (1997).

88. *Id.* (emphasis in original).

89. Alfieri, *supra* note 2, at 1309.

90. Accommodations obtained through minority strategies of resistance to white power may be found in policies of immigration, religious exercise, and legal training. The strategies alternately

Faced with individual and community strategies of racial accommodation, identity judgments grow suspect. For individual litigants, identity slips into a public-private dichotomy of the self.[91] Under this well-settled liberal dichotomy, the public self spills into controversy, while the private self remains cloistered. Juridical pronouncements of identity seem riven by this distinction. Issued by judges and lawyers, the pronouncements suggest litigant nonintegration. The legal experience of nonintegration is marked by the suspension or loss of self-identity, a loss indicative of modern-postmodern turmoil over the subject.[92] Modernist jurisprudence celebrates litigants as liberal subjects endowed with free will. Postmodernist jurisprudence countenances a curtailed sense of free-wheeling liberal subjectivity, citing the impediments of cognition, discourse, and social structure.

The turmoil spawned by the law-induced splintering of the public-private self clouds the meaning of individual and collective client identity in advocacy. Consider the categories of identity at play in the law. Take, for example, the core categories of race, gender, ethnicity, sexual orientation, and disability. Each of these categories suffers from the interpretive strain of public-private division. Lawyers impose this division on clients to facilitate the pleading and proof of claims. For clients acting out this logic in the civil or criminal justice system, the public self may acknowledge guilt, while the private self may proclaim innocence.

Lost in this dichotomy is the multifaceted quality of litigant identity. By all counts, identity entails a process of self-imagination encompassing the above-mentioned multiple categories. The categories overlap, combining gender and race;[93] gender, race, and

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acquiesce in, exploit, and oppose white power structures in law, politics, and society. *See* Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 279-97 (1996); Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 787-805 (1997); Gloria Valencia-Weber, *Law School Training of American Indians as Legal-Warriors*, 20 AM. INDIAN L. REV. 5 (1995-1996).

91. *See generally* Symposium, *The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

92. Pierre Schlag nicely grasps this sense of turmoil. He writes:

> Recent questioning of the identity and ontological status of the liberal individual subject—what many of us call simply "the self"—has produced strong reactions in some quarters of the American legal academy. Various poststructuralist arguments have been received as threats to liquidate the autonomous individual subject. Indeed, poststructuralist arguments are received as assaults not just on the idea, but on the very sense of self.

Pierre Schlag, *Law as the Continuation of God by Other Means*, 85 CAL. L. REV. 427, 434 (1997).

93. *See* Bethany Ruth Berger, *After Pocahontas: Indian Women and the Law, 1830-1934*, 21 AM. INDIAN L. REV. 1 (1997); Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 328, 328-43 (1996); Joan R. Tarpley, *Blackwomen, Sexual Myth, and Jurisprudence*, 69 TEMP. L. REV. 1343 (1996); Floyd D. Weatherspoon, *Remedying Employment Discrimination Against African-American Males: Stereotypical Biases Engender a Case of Race Plus Sex Discrimination*, 36 WASHBURN L.J. 23, 27-41 (1996).

ethnicity;[94] gender, race, and class;[95] race and sexuality;[96] race and disability;[97] and, moreover, national origin.[98] This overlap and multiplicity discloses the ambiguity and slippage of identity classifications in the law.[99] The contingent character of identity relates to the indeterminacy of identity classifications.[100] Indeterminacy flourishes under liberal regimes struggling against multiculturalism[101] because the boundary lines of identity categories shift continuously in response to the emerging visibility of cultural difference[102] and the ensuing negotiation[103] and articulation[104] of the meaning of difference outside

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94. *See* Berta Esperanza Hernandez-Truyol, *Las Olvidadas-Gendered in Justice/Gendered Injustice: Latinas, Fronteras and the Law*, 1 J. GENDER, RACE & JUSTICE (forthcoming 1998); 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) (describing the multiple identities of a Latina lawyer).

95. *See* Patricia Hagler Minter, *The Failure of Freedom: Class, Gender, and the Evolution of Segregated Transit Law in the Nineteenth-Century South*, 70 CHI.-KENT L. REV. 993 (1995).

96. *See* Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 282-322 (1995); Sharon Elizabeth Rush, *Equal Protection Analogies—Identity and "Passing": Race and Sexual Orientation*, 13 HARV. BLACKLETTER J. 65, 69 (1997) (discerning the interrelationships of various types of oppression).

97. *See* Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237, 1334 (contending that "[t]he formation of an identity as disabled is powerfully affected by race"); *see also* Wendy E. Parmet & Daniel J. Jackson, *No Longer Disabled: The Legal Impact of the New Social Construction of HIV*, 23 AM. J.L. & MED. 7, 9-12, 27-29 (1997) (describing the popular construction of HIV-infected communities).

98. *See* Stephen Shie-Wei Fan, *Immigration Law and the Promise of Critical Race Theory: Opening the Academy to the Voices of Aliens and Immigrants*, 97 COLUM. L. REV. 1202, 1223-32 (1997) (exploring the interplay of racism and nativism); Adrien Katherine Wing, *A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women*, 60 ALB. L. REV. 943, 954-65 (1997) (examining the effects of race, gender, and national origin on Palestinian and South African women); *see also* Earl M. Maltz, *Citizenship and the Constitution: A History and Critique of the Supreme Court's Alienage Jurisprudence*, 28 ARIZ. ST. L.J. 1135, 1148-62 (1996) (discussing classical juridical construction of alien citizenship).

99. *See* Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 569-71 (1996) (noting ambiguity in the definitional character of political and racial classifications of Native Hawaiians).

100. Other disciplines find the contingent or indeterminate state of identity to be unsurprising. *See* Morton Schoolman, *Toward a Politics of Darkness: Individuality and Its Politics in Adorno's Aesthetics*, 25 POL. THEORY 57, 90 (1997) (explaining Adorno's concept of a contingent or indeterminate state of identity).

101. *See* Robert J. Lipkin, *Can Liberalism Justify Multiculturalism?*, 45 BUFF. L. REV. 1, 34 (1997) (describing the culture of liberalism and its production of an unguided "structure of choice").

102. *See* Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965 (1995) (describing the cultural construction of ethno-racial identity in response to shifting group visibility and invisibility).

103. *See* Barbara Yngvesson, *Negotiating Motherhood: Identity and Difference in "Open" Adoptions*, 31 L. & SOC'Y REV. 31 (1997).

104. Differences in sexual desire and orientation, for example, receive articulation outside law in the queer culture of gay and lesbian communities, and inside law in restrictive adoption and sodomy statutes. *See* David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 449-52 (1996) (discussing the social construction of marriage); Richard R. Cornwall, *Deconstructing Silence: The Queer Political Economy*

and inside law. Part of this fluctuation may be attributed to positive law, part to historical circumstance.[105] Part also may be due to the changing contours of narrative. The next subpart examines racialized narrative.

B. Racialized Narrative

Racialized narratives are found in the decisional law of statutory[106] and constitutional texts.[107] They inform social policy[108] and the politics of law.[109] Despite a burgeoning of stories and narratives in law,[110] turbulence persists over the meaning of race in legal discourse,[111] and the place of racial voice,[112] story,[113]

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of the Social Articulation of Desire, 29 REV. RADICAL POL. ECON. 1, 66-80 (1997) (addressing the cultural construction of homosexuality).

105. The history of same-sex marriage touches both elements. *See* WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME SEX MARRIAGE 15-50 (1996) (tracing the history of same-sex unions and their societal acceptance).

106. *See* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (3d rev. ed. 1974) (cataloguing court-sanctioned statutory restrictions placed on African-Americans in the early twentieth century); April L. Cherry, *Social Contract Theory, Welfare Reform, Race, and the Male Sex-Right*, 75 OR. L. REV. 1037, 1079-85 (1996) (identifying the increase of black women on AFDC as among the factors responsible for punitive reforms); Gareth Davies & Martha Derthick, *Race and Social Welfare Policy: The Social Security Act of 1935*, 112 POL. SCI. Q. 217 (1997) (examining the connection of race to the nationalization of Social Security); *see also* Paul Finkelman, *"Let Justice Be Done, Though the Heavens May Fall": The Law of Freedom*, 70 CHI.-KENT L. REV. 325, 354-57 (1994) (tracing the adoption of the "black codes" in the post-war South).

107. *See* Michael O'Malley, *Specie and Species: Race and the Money Question in Nineteenth-Century America*, 99 AM. HIST. REV. 369, 391 (noting that "[t]he Constitution upheld the sanctity of intrinsic difference when it legitimated racial slavery"); *see also* Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033, 1036 (1997) (demonstrating mutability of identity classifications within constitutional advocacy and adjudication through evidence of the intersectionality of gender and racial categories).

108. *See* JILL QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY (1994).

109. *See* GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA (1993); Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359 (1995) (book review).

110. *See* Paul Gewirtz, *Narrative and Rhetoric in the Law*, *in* LAW'S STORIES, *supra* note 69, at 2.

111. *Compare* Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251, 263-71 (1992) (expressing skepticism toward certain academic strands of narrative and storytelling), *with* Gary Peller, *The Discourse of Constitutional Degradation*, 81 GEO. L.J. 313, 319-29 (1992) (castigating critics of racial narratives for ideological maneuvering).

112. *Compare* Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) (assailing academic and experiential claims of minority scholars to a racially distinctive voice), *with* Colloquy, *Responses to Randall Kennedy's Racial Critiques of Legal Academia*, 103 HARV. L. REV. 1844 (1990) *and* Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990) (repudiating Kennedy's approach to race scholarship); *see also* Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991) (rebuffing opponents of Critical Race Theory for applying hierarchical and majoritarian evaluative standards).

113. *Compare* Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 809 (1993) (discounting epistemological and empirical claims

autobiography,[114] and identity[115] in that discourse. The turbulence extends to narratives in advocacy and in adjudication.

Both advocacy and adjudication narratives declare fact and law. To muster support, the declarations appeal to arguments from nature and necessity. Arguments invoking a natural or a necessary narrative order of things act to compel juridical results, whether or not legal decisionmakers fully comprehend the situation of litigants. Toni Massaro mentions that narratives "can be especially effective in enabling legal decisionmakers to comprehend the situation of litigants unlike themselves."[116] Conversely, they can be equally effective in disabling decisionmakers and, thereby, encouraging mistaken conclusions.[117]

In advocacy, narrative appeals come from lawyers. Wielding power over the form, content, and sequence of narrative, they fashion arguments out of natural and necessitarian rhetoric. This exercise of power rests on the functionalist premise that lawyers possess unsurpassed expertise in law *and* in narrative. Logically extended, this premise produces the centralization of strategic decisionmaking power in the hands of lawyers. Their charge is to deliver the best possible substantive outcome.

Conflating legal and narrative expertise and subsequently cabining decisionmaking power may in fact best serve the client in obtaining substantive benefits. The delivery of benefits confers legitimacy on traditional lawyer-client arrangements and narrative claims. However, when those claims assert a natural state or necessary logic of racial inferiority through

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of "legal storytelling" scholars), *with* Richard Delgado, *On Telling Stories Out in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665 (1993) (discouraging evaluative criteria and emphasizing the difficulty in evaluating outsider scholarship).

114. *Compare* Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229 (1995) (criticizing the autobiographical style of outsider scholarship), *with* Jerome McCristal Culp, Jr., *Telling a Black Legal Story: Privilege, Authenticity, "Blunders," and Transformation in Outsider Narratives*, 82 VA. L. REV. 69 (1996) (defining autobiography as a legitimate tool for instruction and insight into the lives of outsiders); Richard Delgado, *Coughlin's Complaint: How to Disparage Outsider Writing, One Year Later*, 82 VA. L. REV. 95 (1996) (explaining the important role of autobiography to progress in scholarship and politics); *see also* Douglas E. Litowitz, *Some Critical Thoughts on Critical Race Theory*, 72 NOTRE DAME L. REV. 503, 505, 520-23 (1997) (detecting "fundamental errors or confusions about the proper role of argumentation within the law and the proper methodology of legal scholarship" embodied in the literature of Critical Race Theory).

115. *Compare* Jim Chen, *Unloving*, 80 IOWA L. REV. 145, 149 (1994) (criticizing "racial fundamentalism" in legal scholarship), *with* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1245, 1245-46 (1993) (announcing an "Asian American Moment" in the legal academy). *See generally* Colloquy, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467 (1996).

116. Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 103 (1996).

117. *See* Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769, 794-811 (1992) (describing the intermixing of ideology and narrative in disability determinations).

color-coded inferences or color-conscious stereotypes, they cast doubt on the quality of racial interest representation. More specifically, they tarnish the notion of the lawyer as a "true interest representative."[118]

Interest representation in race trials requires attorney-client negotiation of racial power and reality.[119] Narrative claims of racial inferiority describe only a segment of that sociolegal reality. That segment is itself vulnerable to interpretive contest. Interpretive vulnerability arises from the socially constructed character of inferiority. Contrary to naturalistic reasoning, narratives of racial inferiority carry no inherent meaning. What meaning exists is constructed under a necessitarian guise. To the extent that an alternate measure of meaning exists, call it *true* meaning, it lies narrowly situated in public and private racial contexts largely inaccessible to lawyers' ways of knowing.

The epistemological and interpretive barriers to racial understanding foster a belief in the generalizability of black inferiority across the landscape of individual clients and client communities.[120] For lawyers, judges, and other legal agents struggling with the practical exigencies of advocacy, adjudication, and enforcement, this belief may enjoy its own force of logic. At the same time, that logic exemplifies what Margaret Radin calls the problem of "bad coherence."[121] According to Radin, this problem surfaces when theorists endorse conceptions of truth or goodness and their attendant value systems for reasons of coherence, but fail to recognize that the conceptions condone pervasive systems of institutionalized racism or sexism.[122]

The coherence of black inferiority narratives depends on the construction of racial character and conduct.[123] Subordinating constructions of

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118. The phrase belongs to Christopher Peters as applied to the context of electoral politics. *See* Peters, *supra* note 87, at 366 (defining a "true interest representative" in terms of someone "who is enough like them that it is probable she shares many of their core viewpoints and interests").

119. On attorney-client negotiation of power and reality, see Margaret M. Russell, *Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straitjacket of Legal Practice*, 95 MICH. L. REV. 766 (1997); David B. Wilkins, *Straightjacketing Professionalism: A Comment on Russell*, 95 MICH. L. REV. 795 (1997). *See generally* William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447, 1459-66 (1992); *see also* AUSTIN SARAT & WILLIAM L.F. FELSTINER, DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS 17-23, 53-84 (1995).

120. *See* Alfieri, *supra* note 2, at 1306-20.

121. *See* MARGARET JANE RADIN, REINTERPRETING PROPERTY 29-30 (1993); *see also* William A. Edmundson, *The Antinomy of Coherence and Determinacy*, 82 IOWA L. REV. 1, 10-19 (1996) (dismantling coherence theories of justification).

122. *See* RADIN, *supra* note 121, at 30.

123. *See* HIGGINBOTHAM, *supra* note 50, at 7-67 (tracing the history and nature of the "precept of inferiority"); *see also* Reginald Leamon Robinson, *The Racial Limits of the Fair Housing Act: The Intersection of Dominant White Images, the Violence of Neighborhood Purity, and the Master Narrative of Black Inferiority*, 37 WM. & MARY L. REV. 69, 71-84 (1995) (showing that a "master narrative" invokes whites' power over blacks).

black character and conduct sometimes avoid reference to political and socioeconomic forms of subjugation[124] in part out of deference to white superiority narratives.[125] This reflexive deference frequently receives articulation in the narrative histories of race trials. John Witt comments that "the trial history can provide a narrative that links local histories to a broader public sphere in which issues of power and meaning are actively negotiated."[126] Criticism of this particularized view has been lately heard elsewhere.[127] Witt acknowledges as much, conceding that while narrative histories "contribute enormously to our understanding of particular collections of people at particular moments, they may leave us with a series of abstracted, unconnected stories that cannot link the particular to the general."[128] The larger answer to that criticism depends on the discovery of a common cord connecting racialized trial stories, a cord traceable through historical periods of changing racial status representation. The next subpart explores the historical configuration of race-neutral representation.

C. Race-Neutral Representation

The claim of race-neutral representation derives from the principle of neutrality in adjudication.[129] Central to Legal Process theories of

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124. *See* Regina Austin, *The Black Public Sphere and Mainstream Majoritarian Politics*, 50 VAND. L. REV. 339, 345 (1997) ("A complete understanding of the mechanisms by which blackness is tied to and associated with socioeconomic inferiority is crucial to comprehending the political importance of the black public sphere and to effectuating blacks' notions of the good life.").

125. Racialized superiority narratives reinforce forms of socioeconomic subjugation. *See* Kathleen Neal Cleaver, *The Antidemocratic Power of Whiteness*, 70 CHI.-KENT L. REV. 1375, 1376-77 (1995) (reviewing DAVID R. ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (1991)).

126. John F. Witt, Book Note, *The Klan on Trial*, 106 YALE L.J. 1611, 1611 (1997) (reviewing LOU FALKNER WILLIAMS, THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS, 1871-1872 (1996)).

127. *See* Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 L. & SOC'Y REV. 697, 712-16 (1992) (noting the scholarly tendency to atomize and isolate individual stories rather than connect such stories to larger movements or collective identities).

128. Witt, *supra* note 126, at 1615. Witt asserts:

> The trial narrative has the potential to resolve the problem of parochialism in local narrative. To be sure, a potential for distortion necessarily accompanies attempts to extrapolate broad conclusions from narrow premises, and the trial history cannot entirely avoid this danger. Yet the trial narrative has a double capacity to describe history's particularities while mediating between the particular and the general because it tells a local story at a cultural space in which the central concern is the negotiation of political power broadly construed.

Id.

129. *Compare* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 26-35 (1959) (criticizing the Supreme Court for failing to adjudicate neutrally in segregation cases), *with* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960) (endorsing the Court's segregation decisions), *and* Louis H. Pollack, *Racial Discrimination and*

adjudication[130] noteworthy in the field of federal jurisdiction,[131] the neutrality principle anchors the liberal vision of the rule of law.[132] This colorblind vision animates Anglo-American jurisprudence.[133] Current debates in legal scholarship reflect the continuing vitality of that vision,[134] in spite of the protests of Critical Race theorists.[135]

The renewed controversy engulfing the colorblind vision of neutrality in adjudication[136] and in legislation[137] signals the revival of the Legal Process movement.[138] That controversy pertains directly to the lawyering process and its transformative potential. Brian Leiter mentions that relevance in gleaning "a certain long-standing attitude towards lawyering" from the writings of the Legal Process school.[139] The attitude translates into a race-neutral stance toward advocacy.

Judicial Integrity: A Reply to Professor Wechsler, 108 U. PA. L. REV. 1, 33 (1959) ("[J]udicial neutrality . . . does not preclude the disciplined exercise . . . of [a] Justice's individual and strongly held philosophy.").

130. Modern Legal Process theories of adjudication derive principally from the writings of Henry Hart and Albert Sacks. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); Anthony J. Sebok, *Reading* The Legal Process, 94 MICH. L. REV. 1571 (1996) (book review).

131. The Legal Process theory of jurisdiction comes from the work of Henry Hart and Herbert Wechsler. *See* HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953); Akhil Rced Amar, *Law Story*, 102 HARV. L. REV. 688 (1989) (reviewing PAUL M. BATOR, ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (3d ed. 1988)).

132. *See* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 18-21 (1997) (summarizing various neutrality-oriented conceptions undergirding Legal Process scholarship).

133. *See* Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503, 507-25 (1997); Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REFORM 561 (1988); *see also* G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 290 (1973) (equating institutional conservatism of Legal Process ideals with political conservatism in the area of race relations).

134. *See* Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683 (1992) (contrasting traditional neutrality-oriented legal scholarship with outsider scholarship); Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889, 891 (1992) (discussing the treatment of scholarship "grounded on the phenomenological experience of the individual evaluator").

135. *See* Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803, 822-30 (1994).

136. *See* Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STAN. L. REV. 1 (1991).

137. *See* Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity, and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 1135, 1138-41 (1996).

138. *See* Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1403-11 (1996); Edward L. Rubin, *Legal Reasoning, Legal Process and the Judiciary as an Institution*, 85 CAL. L. REV. 265, 271-78 (1997) (reviewing CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (1996)).

139. *See* Brian Leiter, *Is There an 'American' Jurisprudence?*, 17 OXFORD J. LEGAL STUD. 367, 379 (1997) (reviewing NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995)).

The stance of race-neutrality inspired by the Legal Process movement confers legitimacy on the colorblind practice of advocacy. Legal Process theory offers legitimacy in both strong and weak senses. The strong sense involves client engagement in a participatory process of strategic decision-making guided by the liberal axiom of autonomy.[140] In this sense, client participation serves as a democracy-promoting device consistent with the process ideal of reasoned deliberation.[141] The weak sense entails client inclusion in communication sufficient to establish the objectives of representation. In this limited sense, client participation works as a goal-checking mechanism in accord with the process ideal of informed consent.[142] The next subpart reviews the additional contextual factors shaping race trials.

D. Race-ing Factors

To move ahead in the definitional assembly of race trials, the theoretical backdrop of racial identity, racialized narrative, and race-neutral representation must be set down against the practical contexts of law, legal institutions, and sociolegal relations. The grounded contexts of practice implicate procedural and substantive laws, judges and juries, parties, victims, and attorneys, and finally, politics, culture, and society.

1. Race-ed Law.—Law is race-ed in the texts of speech and conduct. Race inscribes oral and written texts. Additionally, it scripts social texts. Both procedural and substantive law give meaning to race trials. That meaning comes from narrative.[143] Substantive law stocks the ingredients of racialized narrative. Consider the field of civil rights law. In employment discrimination, for example, doctrinal narratives unleash traded accusations of racial animus and race-inferred occupational inadequacy.[144] Similarly, in the field of criminal law, doctrinal narratives speak of racial guilt and innocence as well as racial mercy and desert.[145]

In the same way, procedural law supplies racialized narrative. The rules governing class actions, for example, deal with the commonality of racial community and the adequacy of racial representation. *Hansberry v.*

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140. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) cmt. (1997).

141. On the operation of democracy-promoting devices, see Cass R. Sunstein, *The Supreme Court 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 27 (1996).

142. *See* MODEL RULES OF PROFESIONAL CONDUCT Rule 1.4(b) cmt. (1997).

143. *See* Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141 (1997).

144. *See* BARBARA J. FLAGG, WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS AND THE LAW 39-65, 117-48 (1998).

145. *See* PAUL HARRIS, BLACK RAGE CONFRONTS THE LAW 59-80, 125-46 (1997).

Lee,[146] an acutely formalistic opinion on the preclusive effect of state court judgments enforcing racially restrictive covenants, marks an early realization of the discontinuities of racial community and the conflicts of racial representation.[147] Narratives of racial discontinuity and interest conflict also emerge in the rules regulating intervention.[148] Here again, consider *Martin v. Wilks*. Despite evidence of shared history, geography, and occupation, *Wilks* finds no ground for establishing common racial interest or representation between black and white firefighters, whether designated as original parties or proposed intervenors.

With regard to procedural and substantive rules, lawyers join legislators and judges in race-ing law. Lawyers' motives, however, may be more profoundly mixed. For their motivation may stem from rent-seeking[149] and justice-seeking[150] impulses. Either impulse may contribute to doctrinal development. Yet that development is constrained by the findings and conclusions of judges and juries.

2. Race of Judges and Juries.—The race of judges and the racial composition of juries contribute to the meaning of race trials. The literature of judging often focuses on ideology,[151] rather than race. When racial identity is brought forward,[152] discussion tends toward substantive preference[153] or bias.[154] But little is said of either racial identity, and its derivative ethic, or of emotion in judging.[155] Even the significant work of feminist theorists in developing an ethic of care in judging grants

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146. 311 U.S. 32 (1940).

147. *Hansberry* suggests that the white-black schism undermines cross-racial representation of a racially distinct class. *See* Allen R. Kamp, *The History Behind* Hansberry v. Lee, 20 U.C. DAVIS L. REV. 481, 496-98 (1987).

148. *See* FED. R. CIV. P. 24.

149. *See* Frank B. Cross, *The Role of Lawyers in Positive Theories of Doctrinal Evolution*, 45 EMORY L.J. 523, 527 (1996) (assessing doctrinal impact of lawyer financial interests).

150. *See* JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION (1994) (describing racial justice-based litigation strategies of civil rights lawyers throughout the mid- to late-twentieth century.

151. *See* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIECLE (1997); Duncan Kennedy, *Strategizing Strategic Behavior in Legal Interpretation*, 1996 UTAH L. REV. 785; Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986).

152. *See, e.g.*, Mark V. Tushnet, *The Jurisprudence of Thurgood Marshall*, 1996 U. ILL. L. REV. 1129; Thomas M. Uhlman, *Black Elite Decision Making: The Case of Trial Judges*, 22 AM. J. POL. SCI. 884 (1978); Susan Welch et al., *Do Black Judges Make a Difference?*, 32 AM. J. POL. SCI. 126 (1988).

153. *See* Penda D. Hair, *Justice Blackmun and Racial Justice*, 104 YALE L.J. 7, 7 (1994) (discussing the impact of Justice Blackmun's "struggle for racial justice").

154. *See* 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).

155. *See, e.g.*, Martha C. Nussbaum, *Emotion in the Language of Judging*, 70 ST. JOHN'S L. REV. 23 (1996); Benjamin Zipursky, Deshaney *and Jurisprudence of Compassion*, 65 N.Y.U. L. REV. 1101 (1990).

meager attention to the subject of race.[156] Oddly, the feminist call for degendering the ethic of care through "the extension of its norms and prescriptions to men as well as to women and to the traditionally male domains of our social world"[157] overlooks the equally important task of race-ing or derace-ing that ethic. This oversight seems doubly perplexing because racialized compassion may kindle political attack.[158]

Litigants, by contrast, seem keenly aware of the pivotal role of a racialized judicial ethic in the determination of outcomes. That awareness shaped post-*Brown* school desegregation strategy[159] and even now influences litigation tactics, for instance in voting rights cases.[160] Litigant belief in a racialized ethic of judging seems unshaken by the apparent weakening of the criminal-civil distinction in applicable forms of punishment and procedure,[161] though the belief appears counterintuitive in certain state settings.[162]

The literature on juries also discloses strong litigant views on the subject of racialized judgment.[163] Recent calls for jury reform[164] show that the meaning of the representative jury in a multicultural society is sharply contested.[165] Diversity is at the crux of the contests over the meaning of jury representation.[166] Yet it is a diversity of black and

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156. *See* Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37 (1988); Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988); Robin L. West, *Justice and Care*, 70 ST. JOHN'S L. REV. 31 (1996).

157. Alisa L. Carse & Hilde Lindemann Nelson, *Rehabilitating Care*, 6 KENNEDY INST. ETHICS J. 19, 32 (1996).

158. *See* Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 312-24 (1997). *See generally* Symposium, *On Judicial Independence*, 25 HOFSTRA L. REV. 703 (1997).

159. *See* J.W. PELTASON, 58 LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1978).

160. *See* Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REFORM 79, 101-04 (1996).

161. *See* Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 782-97 (1997) (reviewing challenges to the criminal-civil distinction).

162. *See* Herbert Jacob, *The Governance of Trial Judges*, 31 L. & SOC'Y REV. 3 (1997).

163. *See, e.g.*, Andrew G. Deiss, *Negotiating Justice: The Criminal Trial Jury in a Pluralist America*, 3 U. CHI. L. SCH. ROUNDTABLE 323 (1996) (discussing justifications for a racially representative jury).

164. *See, e.g.*, Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377 (1996) (proposing various reforms in the selection, conduct, and powers of juries).

165. *See, e.g.*, Douglas Gary Lichtman, *The Deliberative Lottery: A Thought Experiment in Jury Reform*, 34 AM. CRIM. L. REV. 133 (1996) (outlining a proportional jury voting scheme); Tanya E. Coke, Note, *Lady Justice May Be Blind, But Is She a Soul Sister? Race Neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327 (1994) (describing the Supreme Court's retreat from the ideal of the representative jury).

166. *See* Kenneth S. Klein, *Unpacking the Jury Box*, 47 HASTINGS L.J. 1325, 1328-34 (1996) (assessing the impact of diversity upon the predictability and perceived legitimacy of jury verdicts).

white, historically a diversity juxtaposing black innocence and white judgment.[167] Developments in the law governing jury selection procedures,[168] particularly concerning the use of peremptory challenges,[169] highlight the enduring presence of a black-white dichotomy. That dichotomy pervades the Supreme Court's decision in *Batson v. Kentucky*[170] and its racial progeny[171] and pushes remedial discussion toward colorblind procedures[172] and racial quotas.[173]

Neither colorblind nor racialized remedies seem likely to enhance jury-defined truth[174] nor to improve juror conduct in matters of delinquency[175] or nullification.[176] The remedies in fact seem more

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167. *See* Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1616-51 (1985) (surveying the research data on jury racial prejudice).

168. *See, e.g.*, Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153 (1989); Jeffrey S. Brand, *The Supreme Court, Equal Protection, and Jury Selection: Denying That Race Still Matters*, 1994 WIS. L. REV. 511.

169. *See* Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21 (1993); Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63 (1993); Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099 (1994).

170. 476 U.S. 79 (1986) (invalidating race-based peremptory challenges); *see also* Jere W. Morehead, *When a Peremptory Challenge Is No Longer Peremptory:* Batson*'s Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection*, 43 DEPAUL L. REV. 625 (1994) (calling for the elimination of peremptory challenges).

171. *See* Purkett v. Elem, 514 U.S. 765 (1995) (per curiam) (approving allegedly race-neutral explanations for peremptory strikes that are neither persuasive nor even plausible); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (extending *Batson* to civil trials); Stephen R. Diprima, Note, *Selecting a Jury in Federal Criminal Trials After* Batson *and* McCollum, 95 COLUM. L. REV. 888 (1995) (urging increased scrutiny of peremptory challenge explanations).

172. *See* Susan N. Herman, *Why the Court Loves* Batson*: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807 (1993); Jean Montoya, *The Future of the Post-*Batson *Peremptory Challenge: Voir Dire by Questionnaire and the "Blind" Peremptory*, 29 U. MICH. J.L. REFORM 981 (1996); Pam Frasher, Note, *Fulfilling* Batson *and Its Progeny: A Proposed Amendment to Rule 24 of the Federal Rules of Criminal Procedure to Attain a More Race- and Gender-Neutral Jury Selection Process*, 80 IOWA L. REV. 1327 (1995).

173. *See* Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704 (1995).

174. Remedial futility notwithstanding, colorblind and color-conscious prescriptions continue to be advanced. *See* Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS L. REV. 95 (1996).

175. The racial motive behind juror delinquency-based misconduct remains clouded. For a thorough inquiry of the general subject, see Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796-1996*, 94 MICH. L. REV. 2673, 2708-51 (1996).

176. *Compare* Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149 (1997), *and* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995), *with* Andrew D. Leipold, *The Dangers of Race-Based Jury Nullification: A Response to Professor Butler*, 44 UCLA L. REV. 109 (1996), *and* Richard St. John, *License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking*, 106 YALE L.J. 2563 (1997) (all debating the legal, political, and historical status of jury nullification).

likely to distract judicial reformers from the principal issue of jury fact-finding competence.[177] At bottom, jury truth-seeking competence turns on the eradication of cognitive bias[178] and, more specifically, racially discriminatory bias.[179] Race-based cognitive bias infects parties, victims, and attorneys alike.

3. Race of Parties, Victims, and Attorneys.—The race of parties, victims, and attorneys helps calibrate the meaning of race trials. At trial, meaning is a function of position. The notion of positionality[180] suggests a diversity of meanings linked to status and the conduct emanating from status. Conceding this diversity does not negate that the sociolegal relationships of party, victim, and counsel are bound up in positions of racial dominance and subordination.[181] Consider first the race of the party. Party racial identity may influence the scope of the lawyer-client relationship with respect to both the means and the ends of representation. Lucie White discovers means-related conflicts in the mixed context of gender, race, and poverty.[182] William Simon finds ends-related conflicts in the more punitive context of race and crime.[183] Clark Cunningham encounters both sets of conflicts in debates over the nature, wisdom, and satisfaction of intrinsic, non-instrumental client goals.[184]

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177. For a comparative analysis of jury fact-finding competence emphasizing substantive law variation, see Darryl K. Brown, *Structure and Relationship in the Jurisprudence of Juries: Comparing the Capital Sentencing and Punitive Damages Doctrines*, 47 HASTINGS L.J. 1255, 1291-97 (1996).

178. On cognitive distortions in juror decisionmaking, see Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991).

179. For studies of race-based jury deliberative bias, see Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63 (1993); Clem Turner, Note, *What's the Story? An Analysis of Juror Discrimination and a Plea for Affirmative Jury Selection*, 34 AM. CRIM. L. REV. 289, 292-307 (1996).

180. *See* Amartya Sen, *Positional Objectivity*, 22 PHIL. & PUB. AFF. 126, 143 (1993) (noting the positional nature of ethical reasoning and rationality).

181. *See* Mary Kay Thompson Tetreault & Frances A. Maher, *"They Got the Paradigm and Painted It White": Maximizing the Learning Environment in Higher Education Classrooms*, 4 DUKE J. GENDER L. & POL'Y 197, 198 (1997). Tetreault and Maher note:

> While always defined by gender, race, class, and other significant dimensions of societal domination and oppression, position is also always evolving, context-dependent, and relational, in the sense that constructs of maleness create and depend on constructs of femaleness, and blackness and the term "of color" are articulated against ideas of whiteness.

Id.

182. *See generally* Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

183. *See generally* William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213 (1991).

184. *See* Cunningham, *supra* note 15, at 1366-87.

Next consider the race of the victim.[185] Discussion of victim racial identity arises in civil as well as criminal law situations. The experience of claimant revictimization, along the lines of race and gender, reported in civil rights litigation confirms the relevance of this discussion.[186] The same experience extends to the criminal prosecution of rape.[187] The expanding victims' rights movement, and associated legislation, may provide an opportunity to diminish that experience.[188] At the same time, it may enlarge the opportunity to inject race into the courtroom and, hence, distort racial identity. Evidence gleaned from prosecution and sentencing practices in rape[189] and capital[190] cases where white victims accuse black defendants shows the serious potential for such distortion. The resurgence of victim impact statements in capital cases,[191] fueled in part by the Supreme Court's recent reversal of field in *Payne v. Tennessee*,[192] increases the likelihood of racial distortion.

Finally consider the race of counsel. In spite of the limited acknowledgement of the importance of counsel identity in the early literature on race and law,[193] more recent work demonstrates a growing interest in the racial identity of counsel. Derrick Bell ignited this work by divulging the substantive conflicts dividing lawyers, clients, and communities in the litigation of school desegregation

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185. *Cf.* Devon W. Carbado, *The Construction of O.J. Simpson as a Racial Victim*, 32 HARV. C.R.-C.L. L. REV. 49 (1997) (explaining the sociolegal construction of racial and gender categories in the public process of victimization).

186. *See* KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY (1988) (reporting that civil rights litigation may reinforce plaintiff victimization and powerlessness).

187. *See* Kristin Bumiller, *Fallen Angels: The Representation of Violence Against Women in Legal Culture*, 18 INT'L J. SOC. L. 125 (1990); Patricia Yancey Martin & R. Marlene Powell, *Accounting for the "Second Assault": Legal Organizations' Framing of Rape Victims*, 19 L. & SOC. INQUIRY 853 (1994); *see also* Elizabeth Anne Stanko, *The Impact of Victim Assessment on Prosecutors' Screening Decisions: The Case of the New York County District Attorney's Office*, 16 L. & SOC'Y REV. 225, 229 (1981-1982) (noting the pivotal role of victim credibility assessments in prosecutorial charging decisions).

188. For a careful parsing of the legislative byproduct of the victims' rights movement, see Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691 (1997).

189. *See* Coker v. Georgia, 433 U.S. 584 (1977) (invalidating the application of a state death penalty for the crime of rape).

190. *See* McCleskey v. Kemp, 481 U.S. 279 (1987) (requiring a factual showing of defendant-specific discrimination in spite of extensive evidence of state-wide systemic racial bias).

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

192. 501 U.S. 808 (1991) (overruling *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989), and concluding instead that the Eighth Amendment contains no per se bar on the use of victim-impact evidence).

193. *See* JACK GREENBERG, RACE RELATIONS AND AMERICAN LAW 22 (1959) (discussing briefly the role of black lawyers).

cases.[194] Clark Cunningham uncovered similarly vexing conflicts in the white defense of black criminal defendants.[195] Inverting the white-black paradigm so often steering the attorney-client relationship, David Wilkins later exposed tensions in the *black* defense of *white* defendants.[196] Subsequently moving to widen Bell's antecedent investigation of the civil rights movement, Wilkins recently disclosed long standing tensions in the black bar's vision of client and community obligation.[197] Together, these conflicts and tensions establish that racial identity influences the status and interaction of parties, victims, and attorneys. Fixed by their place in the legal system, each set of actors is ensnared in the strife of racial politics, racialized culture, and racist society.

4. Racial Politics, Culture, and Society.—Politics, culture, and society mold the larger context of race trials. Together they mirror and distort the legal interpretation of racial status and discourse. Consider, for example, the culture of racism surrounding the trials of the Scottsboro Boys,[198] Emmett Till,[199] and the Ku Klux Klan.[200] Like the culture of anti-semitism,[201] the culture of racism recognizes but fails to appreciate "cultural *otherness*"[202] in society.

Appreciation of the cultural *other* dictates an alternative conception of social responsibility encouraging reconciliation of the self and other. Urging reconciliation, Leon Trakman proposes an expanded category of responsibility directed toward others that inheres in rights under standard

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194. *See* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

195. *See* Cunningham, *supra* note 15, at 1366-87.

196. *See* David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030 (1995).

197. *See* David B. Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 STAN. L. REV. 1981, 1984 (1993) (discerning competing claims of racial community and professional commitment); *see also* David B. Wilkins, *Social Engineers or Corporate Tools?* Brown v. Board of Education *and the Conscience of the Black Corporate Bar*, *in* RACE, LAW, & CULTURE 137, 138 (Austin Sarat ed., 1997) (seeking to balance the "moral obligations to advance the cause of racial justice" against the "legitimate professional commitments" of advocates in particular cases).

198. *See supra* note 68.

199. *See* CLENORA HUDSON-WEEMS, EMMETT TILL: THE SACRIFICIAL LAMB OF THE CIVIL RIGHTS MOVEMENT (1994); STEPHEN J. WHITFIELD, A DEATH IN THE DELTA: THE STORY OF EMMETT TILL (1988).

200. *See* LOU FAULKNER WILLIAMS, THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS, 1871-1872 (1996); Kermit L. Hall, *Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871-1872*, 33 EMORY L.J. 921 (1984).

201. *See generally* Heribert Adam, *Anti-Semitism and Anti-Black Racism: Nazi Germany and Apartheid South Africa*, 108 TELOS 25, 32-38 (1996).

202. Leon E. Trakman, *Native Cultures in a Rights Empire: Ending the Dominion*, 45 BUFF. L. REV. 189, 193 (1997) (emphasis in original).

liberal accounts of possessive individualism.[203] Trakman explains that "individuals, cultural communities and the State all assume responsibilities to respect the adverse interests of others that are not protected by countervailing rights."[204] The goal of advocacy "is to demonstrate that rights are not simply legal advantages that individuals exercise, sometimes at the expense of others."[205] Rather, Trakman contends, rights also function as a "means towards social cohesion, while responsibilities facilitate that cohesion."[206] To what extent an enlarged conception of rights, moored in reconfigured notions of community harm,[207] may cure or alleviate a culture of racism remains to be answered.

The above discussion presents a tentative framework for the analysis of race trials. The analysis deploys Critical Race Theory in the practice contexts of law, legal institutions, and sociolegal relations to demonstrate the mutability of racial identity, the instability of racialized narratives, and the variability of colorblind, color-coded, and color-conscious claims under race-neutral representation. The analysis also takes account of procedural and substantive laws, judges and juries, parties, victims, and attorneys, and the politics of race expressed in culture and society. The next Part engrafts this multi-pronged analysis on the trials of Lemrick Nelson.

III. The Trials of Lemrick Nelson

This Part describes the double trial of Lemrick Nelson in state and federal court on charges of attempted murder and civil rights deprivation instigated by four days of interracial violence in the Crown Heights section of Brooklyn, New York during August, 1991. The description encompasses both prosecutorial and defense strategies. Because of the unavailability of jury selection records, that description is confined to pretrial motion practice and trial conduct. Notable pretrial motions include the federal prosecution team's adult status transfer motion[208] and the federal defense team's recusal motion based on mixed race and religious

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203. The source of this responsibility lies in the apprcciation of the vulnerability of others. Trakman asserts: "Responsibilities arise because the interests of those to whom they are owed are not adequately protected in law, and because rightholders would be free to ignore them in the absence of such responsibilities." *Id.* at 193.

204. *Id.*

205. *Id.*

206. *Id.*

207. On controverted notions of community harm professed by Critical Race theorists, see GROUP DEFAMATION AND FREEDOM OF SPEECH (Monroe H. Freedman & Eric M. Freedman eds., 1995); SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES (Henry Louis Gates, Jr. et al. eds., 1994); WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (Mari J. Matsuda et al. eds., 1993).

208. *See infra* notes 266-91 and accompanying text.

grounds.[209] Significant trial tactics include race-contaminated opening statements, witness examinations, and closing arguments.

A. Crown Heights

Crown Heights is a racially mixed neighborhood located within the Brooklyn borough of New York City.[210] Of its 207,000 residents, 80 percent are black and approximately 10 percent are Hasidic Jews.[211] Long standing tensions divide the Orthodox Lubavitcher Hasidim and the black community, especially over perceived preferential police treatment.[212] On August 19, 1991, a car traveling in a motorcade escorting Lubavitcher leader Menachem Schneerson through Crown Heights collided with another car, jumped a curb, and struck two black children playing on the sidewalk. The collision killed one child, a seven-year-old boy named Gavin Cato, and seriously injured another.[213]

Within several hours, rumors spread throughout the black community that the emergency medical crew called to the scene of the accident treated and evacuated the Lubavitcher driver of the car rather than the injured children pinned beneath the car. Gathering to protest the neglect of the children, a large crowd of black residents formed, some throwing rocks and bottles. Incited by shouts of "no justice, no peace" and "let's go to Kingston Avenue and get a Jew," a group composed of ten to fifteen young black men broke from the crowd and marched toward Kingston Avenue, a predominantly Jewish enclave five blocks away. Along its path, the group threw rocks and bottles at homes and vandalized cars. Near Kingston Avenue, the group encountered Yankel Rosenbaum, a twenty-eight-year-old Australian Hasidic scholar. Shouting "there's a Jew, get the Jew," the group chased Rosenbaum across the street, then kicked, beat, and stabbed him.[214]

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209. *See infra* notes 334-36 and accompanying text.

210. For historical background on Crown Heights and the events in controversy, see GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 69-106 (1996); RICHARD H. GIRGENTI, A REPORT TO THE GOVERNOR ON THE DISTURBANCES IN CROWN HEIGHTS: AN ASSESSMENT OF THE CITY'S PREPAREDNESS AND RESPONSE TO CIVIL DISORDER, VOL. I (1993) [hereinafter GIRGENTI I]; RICHARD H. GIRGENTI, A REPORT TO THE GOVERNOR ON THE DISTURBANCES IN CROWN HEIGHTS: A REVIEW OF THE CIRCUMSTANCES SURROUNDING THE DEATH OF YANKEL ROSENBAUM AND THE RESULTING PROSECUTION, VOL. II (1993) [hereinafter GIRGENTI II]; JEROME R. MINTZ, HASIDIC PEOPLE 328-47 (1992).

211. *See* GIRGENTI I, *supra* note 210, at 39-41.

212. *See* FLETCHER, *supra* note 210, at 87.

213. *See* John Kifner, *A Boy's Death Ignites Clashes in Crown Heights*, N.Y. TIMES, Aug. 21, 1991, at B4.

214. United States v. Nelson, 68 F.3d 583, 585-86 (2d Cir. 1995). For additional factual summaries of the events in dispute, see *United States v. Nelson*, 90 F.3d 636, 637-38 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 1259 (1997); *Rosenbaum v. City of New York*, No. 92-5414, 1997 U.S. Dist. WL

Police officers alerted to the attack quickly apprehended Lemrick Nelson, at the time a sixteen-year-old black male with no prior arrest record, in flight down a fenced alley. Searching Nelson's pockets, they discovered a bloody knife and related trouser stains, later found to match Rosenbaum's blood type. Having detained him, the police then shackled Nelson's hands behind his back and presented him to Rosenbaum for identification.[215]

Laying mortally wounded atop the hood of a police car, Rosenbaum positively identified Nelson. After spitting blood at Nelson, he asked: "Why did you stab me?" Rosenbaum died of four stab wounds early the next morning.[216] Shortly thereafter, Nelson orally confessed to the stabbing, though he admitted wounding Rosenbaum only once. Four days of unrest, marred by rock and bottle-throwing, followed the deaths of Cato and Rosenbaum.[217]

B. Prosecution Strategies

Critical Race theorists view law as an instrument of racial subordination and emancipation. Along with others, they conceive of state and federal trial courts to be operating to facilitate that subordination,[218] for example, in the criminal prosecution of rape.[219] Grave social meaning attaches to subordination of this kind.[220] For criminal prosecution and punishment convey a community's "moral condemnation"[221] censuring criminal behavior as wrong and conduct as blameworthy even when that conduct betrays indifference,[222] or when individual culpability and fault fall unclear.[223]

528584, at *1-4 (E.D.N.Y. Aug. 22, 1997); and *People v. Nelson*, 647 N.Y.S.2d 438, 439-40 (N.Y. Crim. Ct. 1995).

215. Record at 492-94, *People v. Nelson* (N.Y. Sup. Ct. 1991) (No. 10358/91); *see also* Edward Frost, *Crown Heights Defense Hits Inconsistencies—Prosecutor Emphasizes Statements in Summation*, N.Y.L.J., Oct. 27, 1992, at 1; Patricia Hurtado, *Jurors Grilled in Hasid Slaying*, NEWSDAY, Sept. 21, 1992, at 21.

216. *See* GIRGENTI II, *supra* note 210, at 46-47; Patricia Hurtado, *Cop: Teen Blamed Beer for Stabbing*, NEWSDAY, Oct. 3, 1992, at 11.

217. *See Crown Heights Notebook*, N.Y. TIMES, Aug. 25, 1991, at 37.

218. For inquiry into the racially subordinating role of trial courts in the antebellum South, see Thomas D. Russell, *South Carolina's Largest Slave Auctioneering Firm*, 68 CHI.-KENT L. REV. 1241 (1993).

219. *See* Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 596 (1997) (mentioning the ongoing exploitation of racist stereotypes in rape prosecution and sentencing).

220. On the production of social meaning in criminal law generally, see Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 362-65 (1997).

221. *Id.* at 383.

222. *See* Samuel H. Pillsbury, *Crimes of Indifference*, 49 RUTGERS L. REV. 105, 151-52 (1996) (discussing the punishment of crimes evincing a general indifference to the value of others).

223. *See* John L. Diamond, *The Myth of Morality and Fault in Criminal Law*, 34 AM. CRIM. L. REV. 111, 131 (1996) (distinguishing evidentiary categories of defendant culpability).

1. Charging Decisions.—Prosecutorial charging decisions represent the site of conscious and unconscious racism. An expanding literature documents the role of conscious and unconscious racism in law generally[224] and in the criminal justice system specifically.[225] Curiously, the initial contributions to this literature scarcely address the influence of race on prosecutorial discretion and restraint in charging.[226] Unhappily, this scarcity cannot be taken to suggest the absence of racial calculus from charging decisions.[227] Like any act of legal agency in a racialized context, the act of naming a black defendant in the body of a criminal indictment carries racial significance.[228]

At first blush, the *Nelson* case suggests the exercise of racial restraint. The record offers no palpable evidence of conscious racism in the intentional conduct[229] of state and federal prosecutors or evidence of a disparate racial impact[230] in the discernable pattern of cases spearheaded by prosecutors. This paucity of hard evidence leaves only the potential inference of unconscious racism for review.[231]

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224. *See* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992); RICHARD DELGADO, THE COMING RACE WAR? AND OTHER APOCALYPTIC TALES OF AMERICA AFTER AFFIRMATIVE ACTION AND WELFARE (1996); JOHN HOPE FRANKLIN, THE COLOR LINE: LEGACY FOR THE TWENTY-FIRST CENTURY (1993).

225. *See* JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM (1996); Joseph F. Sheley, *Structural Influences on the Problem of Race, Crime, and Criminal Justice Discrimination*, 67 TUL. L. REV. 2273 (1993).

226. *See* FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 174-76 (1970); Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246 (1980); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981) (all briefly addressing the role of race in prosecutorial discretion).

227. *See* Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 L. & SOC'Y REV. 531, 552-54 (1997).

228. *Compare* Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255 (1994) (cautioning the critical view of the criminal justice system as an instrument of racial oppression), *with* David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's* "Politics of Distinction," 83 GEO. L.J. 2547 (1995), *and* Janai S. Nelson, Note, *Disparate Effects in the Criminal Justice System: A Response to Randall Kennedy's Comment and Its Legacy*, 14 NAT'L BLACK L.J. 222 (1997) (both criticizing Kennedy for underestimating the extent of institutionalized racial bias in the criminal justice system).

229. On the handling of intent standards in race cases, see Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1178-93 (1991).

230. On the application of disparate impact tests in race cases, see Matthew F. Leitman, *A Proposed Standard of Equal Protection Review for Classifications Within the Criminal Justice System That Have a Racially Disparate Impact: A Case Study of the Federal Sentencing Guidelines' Classification Between Crack and Powder Cocaine*, 25 U. TOL. L. REV. 215 (1994); Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 FORDHAM L. REV. 523 (1991).

231. For discussion of unconscious racism, see Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); *see also* David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1307-11 (1995) (finding evidence of congressional unconscious racism in crack cocaine sentencing legislation).

Building on the work of Paul Brest,[232] Carol Steiker defines unconscious racism in terms of the "unconscious inability or unwillingness to accord blacks 'the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to [whites].'"[233] The strongest ground for inferring unconscious racism in *Nelson* involves the naming or selection of the defendant himself. Prosecutors enjoy broad, though not unfettered, discretion in making this selection. Nevertheless, under *Wayte v. United States*,[234] selectivity in the decision to prosecute and in the enforcement of criminal laws stands subject to constitutional constraints "according to ordinary equal protection standards."[235] The standards in *Wayte* require a dual showing of discriminatory prosecutorial *effect* and *purpose*.[236]

Tested against these standards, the *Nelson* record falls short. The constitutional standards of proof established in *Wayte* and reaffirmed in *McCleskey v. Kemp*,[237] and more recently in *United States v. Armstrong*,[238] set the evidentiary bar high. In *McCleskey*, the Supreme Court recapitulated the basic principle that a criminal defendant alleging an equal protection violation in the form of state misconduct carries the burden of proving not only purposeful discrimination but specific discriminatory effect.[239] To prevail under *McCleskey*, Nelson would have to prove that he suffered the discriminatory effect of an indictment motivated by prosecutorial racial animus.

In *Armstrong*, the Court revisited the issue of selective prosecution, reiterating that the applicable constitutional standard "is a demanding one."[240] *Armstrong* erects a "'background presumption'"[241] that prosecutors ordinarily pilot the "passive enforcement system"[242] of criminal justice to avoid violations of the equal protection component of the Due

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232. *See* Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976) (exploring the "unconscious" workings of "racially selective sympathy and indifference").

233. *See* Carol S. Steiker, *Remembering Race, Rape, and Capital Punishment*, 83 VA. L. REV. 693, 710 (1997) (book review) (quoting Brest, *supra* note 232, at 8).

234. 470 U.S. 598 (1985).

235. *Id.* at 608.

236. *See id.*

237. 481 U.S. 279 (1987).

238. 116 S. Ct. 1480 (1996).

239. *McCleskey*, 481 U.S. at 292, 297 (rejecting statistical evidence of race-based sentencing disparity as insufficient to support an inference that state capital decisionmakers acted with a specific discriminatory purpose).

240. *Armstrong*, 116 S. Ct. at 1486.

241. *Id.* (quoting United States v. Mezzanatto, 513 U.S. 196, 203 (1995)).

242. Wayte v. United States, 470 U.S. 598, 608 (1985).

Process Clause of the Fifth Amendment.[243] Rebutting that presumption requires the presentation of "clear evidence"[244] demonstrating that the prosecutorial "administration of a criminal law is 'directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive' that the system of prosecution amounts to 'a practical denial' of equal protection of the law."[245] Here, as in *Wayte*, a claimed denial of equal protection would center on proof of discriminatory purpose *and* effect.[246] *Armstrong* teaches that, in a race case, evidence of a discriminatory effect "must show that similarly situated individuals of a different race were not prosecuted."[247]

Although the *Armstrong* Court's announcement of an absolute requirement of a "similarly situated" showing in race cases does not render a selective prosecution claim "impossible to prove,"[248] it heightens the obstacles already posed by the existing jurisprudence of intent applicable to race-based attacks on prosecutorial charging decisions.[249] Admittedly, similar barriers rise up against claims of race-based discrimination in employment[250] and in commercial transactions, such as banking and insurance.[251] Yet, pressing such claims in a commercial or a workplace setting seems less daunting than in a criminal context where defense teams may be thwarted in adducing evidence of intent due to the unavailability or unreliability of discovery.[252] The frequent insurmountability of these evidentiary barriers indicates a constitutional indifference to conscious and unconscious racism in the criminal justice system. For additional evidence of indifference, turn to the *Nelson* prosecution itself.

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243. *Armstrong*, 116 S. Ct. at 1486.

244. *Id.* (quoting United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926)).

245. *Id.* (quoting Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886)).

246. *Id.* at 1487.

247. *Id.*

248. *Id.*

249. *See* Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1370-74 (1987) (assessing the doctrinal and evidentiary burdens of marshaling selective prosecution claims); *see also* Drew S. Days III, *Race and the Federal Criminal Justice System: A Look at the Issue of Selective Prosecution*, 48 ME. L. REV. 181 (1996) (citing the federal constitutional duty to take corrective action regarding race-based selective prosecution); Robert Heller, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309, 1315-25 (1997) (urging meaningful judicial review of the federal charging decision given accusations of unconstitutional selective prosecution).

250. *See* Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 961-69 (1993).

251. *See* Willy E. Rice, *Race, Gender, "Redlining" and the Discriminatory Access to Loans, Credit, and Insurance: An Historical and Empirical Analysis of Consumers Who Sued Lenders and Insurers in Federal and State Courts, 1950-1995*, 33 SAN DIEGO L. REV. 583 (1996).

252. *See* Tobin Romero, Note, *Liberal Discovery on Selective Prosecution Claims: Fulfilling the Promise of Equal Justice*, 84 GEO. L.J. 2043 (1996) (urging broad discovery of documents material to claims of selective prosecution).

a. State prosecution.—On August 26, 1991, Brooklyn District Attorney Charles Hynes indicted Nelson charging him with four counts of second degree murder and manslaughter.[253] Originally, Nelson was the only member of the Crown Heights group of young black males identified to be arrested, indicted, and tried for Rosenbaum's murder.[254] In September 1992, Brooklyn Supreme Court Justice Edward Rappaport impaneled a jury composed of twelve Brooklyn residents—six blacks, four Hispanics, two whites—to hear the criminal case.[255]

In October 1992, after a four-week trial[256] and four days of deliberation[257] in Brooklyn Supreme Court, the state jury acquitted Nelson on all four counts of the criminal indictment.[258] The acquittal provoked widespread protests by the Jewish community in Crown Heights and throughout New York City enlisting thousands of Hasidic Jews as well as many local and state politicians.[259] On September 13, 1993, the Brooklyn District Attorney submitted a brief to the U.S. Department of Justice urging Attorney General Janet Reno to prosecute Nelson under federal civil rights public accommodation statutes upon a theory of bias-motivated crime.[260]

b. Federal prosecution.—After initially declining to prosecute, the Justice Department launched a civil rights investigation into the Rosenbaum murder.[261] In August 1994, a federal grand jury indicted Nelson and Charles Price, a forty-three-year-old black man, for civil rights violations (for example, stabbing and incitement) under section 245 of the federal public accommodations

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253. United States v. Nelson, 68 F.3d 583, 586 (2d Cir. 1995).

254. Following Nelson's state criminal acquittal, the Brooklyn District Attorney convened a new state grand jury to consider charges against another suspect, Ernesto Edwards, age 24, alleging that Edwards continued the knife attack upon Rosenbaum. *See* Craig Wolff, *Another Suspect Named in Slaying in Crown Heights*, N.Y. TIMES, Dec. 31, 1993, at A1.

255. The jury held no Jews. *See* Joseph P. Fried, *This Time, Diversity in Crown Heights Jury*, N.Y. TIMES, Feb. 3, 1997, at B3.

256. *See* Robert D. McFadden, *Teen-Ager Acquitted in Slaying During '91 Crown Heights Melee*, N.Y. TIMES, Oct. 30, 1992, at A1.

257. *See* Paul Leavitt, *N.Y. Jews Protest Black Teen's Acquittal*, USA TODAY, Oct. 30, 1992, at A9.

258. *See* McFadden, *supra* note 256.

259. *See* James C. McKinley, Jr., *Crown Heights Resolution Splits Council*, N.Y. TIMES, Nov. 13, 1992, at B1; Joe Sexton, *Appeal Urged in Ruling on Crown Heights Figure*, N.Y. TIMES, Apr. 14, 1995, at B8.

260. *See* Joseph P. Fried, *Hynes Urges Reno to Bring Charges on Crown Heights*, N.Y. TIMES, Oct. 14, 1993, at B3. The brief advanced the novel theory that the private use of a public street is a constitutionally protected activity under § 245 of the Civil Rights Act of 1968. *See* Government's Memorandum of Law in Opposition to Defendant's Pre-Trial Motions at 1-19, *United States v. Nelson* (No. 94-823).

261. *See* Stephen Labaton, *Reno to Take Over Inquiry into Slaying in Crown Heights*, N.Y. TIMES, Jan. 26, 1994, at A1.

statute.[262] Brought by the U.S. Attorney for the Eastern District of New York, the indictment charged Nelson and Price with religion-based interference with Rosenbaum's federally protected activities on a public street.[263]

In January 1997, having rejected a defense motion for recusal alleging his disqualifying religious and social affiliation with the Jewish community, United States District Judge David Trager convened the federal jury trial.[264] On February 10, 1997, following a 24-day trial, the federal jury convicted Nelson and Price of violating Rosenbaum's civil rights.[265]

2. *Pretrial Motions*.—At the pretrial stage of the federal indictment, the U.S. Attorney moved to transfer Nelson to stand trial for adult criminal prosecution, insisting that he defied rehabilitation.[266] The adult status transfer motion sought an order removing Nelson from the purview of the juvenile court system. The change of status would subject Nelson to the harsher sanctions of the federal sentencing guidelines.[267] Finding Nelson potentially susceptible to rehabilitation, Judge Trager denied the motion.[268] On appeal taken by the U.S. Attorney's Office, the Second Circuit vacated that decision and remanded the case for a redetermination of Nelson's prospects for rehabilitation.[269] On remand, Judge Trager reversed his prior decision and ordered Nelson transferred to adult status, citing his unlikely chance of rehabilitation.[270] On subsequent appeal, taken up by Nelson, the Second Circuit affirmed, finding neither an abuse of discretion nor an error of law.[271]

The transfer motion rests on familiar presuppositions regarding age, race, violence, and crime. Those presuppositions infuse juridical assessments of juvenile status with racial meaning. The motion, for example,

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262. *See* 18 U.S.C. § 245(b)(2)(B) (1994); Jane Fritsch, *Using Laws from Reconstruction Era*, N.Y. TIMES, Dec. 31, 1993, at B1.

263. *See* United States v. Nelson, No. 94-823 (E.D.N.Y. 1994).

264. The federal jury consisted of three blacks, four Hispanics, and five whites of whom two were Jewish. *See* Record at 944, *United States v. Nelson* (E.D.N.Y. 1994) (94-823).

265. The jury convicted Nelson of civil rights violations for inflicting at least two of the four stab wounds Rosenbaum suffered. The jury also convicted Price of civil rights violations for inciting the attack upon Rosenbaum. *See* Joseph P. Fried, *2 Guilty in Fatal Crown Heights Violence*, N.Y. TIMES, Feb. 11, 1997, at A1.

266. *See* Alison Mitchell, *Adult Count to Be Sought in Crown Heights Trial*, N.Y. TIMES, Aug. 13, 1994, at 25.

267. The transfer increased the relevant sentencing guidelines from juvenile detention for a maximum of five years to adult imprisonment for life. *See* Abraham Abramovsky, *An Adult in State Court; A Juvenile in Federal Court*, N.Y. L.J., June 2, 1995, at 3.

268. *See* Joe Sexton, *Trial as Juvenile Ordered for Crown Hts. Defendant*, N.Y. TIMES, Apr. 13, 1995, at B3.

269. *See* United States v. Nelson, 68 F.3d 583, 591 (2d Cir. 1995); *see also* Joseph P. Fried, *Ruling Voids Juvenile Status of Crown Heights Case Defendant*, N.Y. TIMES, Oct. 18, 1995, at B4.

270. United States v. Nelson, 921 F. Supp. 105 (E.D.N.Y.), *aff'd*, 90 F.3d 636 (2d Cir. 1996).

271. United States v. Nelson, 90 F.3d 636 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 1259 (1997).

reiterates the "bad kids" trope[272] common to male and female delinquency.[273] Tantamount to profile evidence,[274] this trope also emerges in the context of battered children.[275] A similar notion of "dangerousness" surfaces in state prosecutorial accounts of adult offenders.[276]

The record indicates no attempt by prosecutors to consider alternative explanatory variables or risk factors in the *Nelson* case. Given Nelson's historical circumstances, this absence seems puzzling. Nelson's personal and family history clearly presents a number of risk factors, including an unstable and unsupportive family, an unstable social environment, a mother beset by severe emotional problems from the time of his birth, economic deprivation, and academic underachievement.[277] The literature of juvenile delinquency enumerates parental distress as a risk factor in explicating the criminal behavior of children.[278] Additional risk factors incorporate evidence of a persistently poor parenting role model,[279] family disruption,[280] and diminished resources.[281] Nelson's diagnosed disability[282] and his evident immaturity contribute to his high risk

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272. *See* Cecelia M. Espenoza, *Good Kids, Bad Kids: A Revelation About the Due Process Rights of Children*, 23 HASTINGS CONST. L.Q. 407 (1996).

273. *See* Rachel Devlin, *Female Juvenile Delinquency and the Problem of Sexual Authority in America, 1945-1965*, 9 YALE J.L. & HUMAN. 147, 154-77 (1997) (discussing delinquency and the trope of the "wayward girl").

274. *Cf. generally* Myrna S. Raeder, *The Better Way: The Role of Batterers' Profiles and Expert "Social Framework" Background in Cases Implicating Domestic Violence*, 68 U. COLO. L. REV. 147 (1997) (discussing the use of profiles in domestic violence cases).

275. *See* Hope Toffel, Note, *Crazy Women, Unharmed Men, and Evil Children: Confronting the Myths About Battered People Who Kill Their Abusers, and the Argument for Extending Battering Syndrome Self-Defenses to All Victims of Domestic Violence*, 70 S. CAL. L. REV. 337, 363-67 (1996).

276. *See* Richard Collier, *After Dunblane: Crime, Corporeality, and the (Hetero-) Sexing of the Bodies of Men*, 24 J.L. & SOC'Y 177, 179-84 (1997); *see also* Mike Nash, *Dangerousness Revisited*, 20 INT'L J. SOC. L. 337, 348 (1992) (citing the categorical blurring and factual unreliability of statutory "dangerousness" assessments).

277. *See* United States v. Nelson, 921 F. Supp. 105, 109, 112, 114 (E.D.N.Y. 1996).

278. Distress often accompanies adolescent motherhood. *See* Daniel S. Nagin et al., *Adolescent Mothers and the Criminal Behavior of Their Children*, 31 L. & SOC'Y REV. 137 (1997); *see also* Frank L. Mott, *Teen Parenting: Implications for the Mother and Child Generations*, 57 OHIO ST. L.J. 469, 472-73 (1996) (pointing to the negative impact of teen parenting on children's long-term intellectual development and career possibilities).

279. *See* Nagin et al., *supra* note 278, at 143-45; *see also* Nancy A. Naples, *The New Consensus on the Gendered "Social Contract": The 1987-1988 U.S. Congressional Hearings on Welfare Reform*, 22 SIGNS 907, 937 (1997) (noting the "racist constructions of Black men's inadequacy as breadwinners and Black women's deficiency as caretakers").

280. For historical roots of black family disruption, see Thomas D. Russell, *Articles Sell Best Singly: The Disruption of Slave Families at Court Sales*, 1996 UTAH L. REV. 1161 (documenting the legal norm of slave family disruption in spite of Southern discursive practices of paternalism).

281. *See* Nagin et al., *supra* note 278, at 145-47.

282. Lewis maintained that Nelson "was an immature youth" stunted by "an emotional age of [an] 11- or 12-year-old" and "an IQ that ranges around 84." Record at 3042-43, *United States v. Nelson* (E.D.N.Y. 1994) (94-823).

profile.[283] Evidence of community violence manifested in neighborhood gun[284] and drug markets[285] underscores that risk profile.

Prosecutorial conduct in bringing the transfer motion in the face of Nelson's risk profile demonstrates indifference to the juvenile court system[286] and its accompanying theory of rehabilitation.[287] In taking the motion up on appeal to the Second Circuit, prosecutors seemed to adopt a punitive theory of adult incarceration[288] and a primitive theory of culpability.[289] Adoption of that litigation posture occurred without apparent consideration of community psychology issues of system-wide prevention and early intervention strategies[290] and without reference to rehabilitative strategies of education and learning.[291]

3. Trial Conduct.—The elevation of the *Nelson* trial to full federal stature presents an acid test for the deference and obedience of nonjudicial public officials to constitutional norms.[292] But the trial does more than

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283. On the racial underpinnings of high risk evaluations, see Glennon, *supra* note 97, at 1334. Glennon observes: "[A]ccounts of unconscious and structural racism in schools should lead us to consider connections between the overrepresentation of African-American students in special education to other disturbing school practices, including racial disparities in student discipline, ability grouping and school financing." *Id.*

284. On the behavioral influence of guns, see David M. Kennedy et al., *Youth Violence in Boston: Gun Markets, Serious Youth Offenders, and a Use-Reduction Strategy*, 59 LAW & CONTEMP. PROBS. 147, 149-55 (1996).

285. On the behavioral impact of drugs, see Alfred Blumstein & Daniel Cork, *Linking Gun Availability to Youth Gun Violence*, 59 LAW & CONTEMP. PROBS. 5, 8-12 (1996).

286. For critiques of and reform proposals for the juvenile court system, compare Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083 (1991), with Lawrence L. Koontz, Jr., *Reassessment Should Not Lead to Wholesale Rejection of the Juvenile Justice System*, 31 U. RICH. L. REV. 179, 181-82 (1997) and Irene M. Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163 (all debating the merits of juvenile court system abolition).

287. On rehabilitation in the juvenile context, see Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821 (1988); Gordon A. Martin, Jr., *The Delinquent and the Juvenile Court: Is There Still a Place for Rehabilitation?*, 25 CONN. L. REV. 57 (1992).

288. On punitive theories of juvenile incarceration, see Kristina H. Chung, Note, *Kids Behind Bars: The Legality of Incarcerating Juveniles in Adult Jails*, 66 IND. L.J. 999 (1991).

289. On theories of juvenile culpability, see Lee E. Teitelbaum, *Youth Crime and the Choice Between Rules and Standards*, 1991 B.Y.U. L. REV. 351.

290. For a discussion of the value of intervention strategies, see Ronald Roesch, *Creating Change in the Legal System: Contributions from Community Psychology*, 19 LAW & HUM. BEHAV. 325, 330-31 (1995).

291. For an assessment of rehabilitative methods, see Rachel J. Littman, *Adequate Provocation, Individual Responsibility, and the Deconstruction of Free Will*, 60 ALB. L. REV. 1127, 1166-67 (1997). Littman asserts: "Humans can be taught how to be self-reflective and to train their passions. By presuming and encouraging human weakness and environmentally-caused determinism, laws only perpetuate the commonly held idea that individuals are powerless to change themselves or the world around them." *Id.* at 1167 (footnote omitted).

292. On the competing logics of deference and non-deference, see generally Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

subject federal prosecutors to constitutional scrutiny. Like previous race trials, the trial stands out as a "cultural icon" and the courtroom as an arena for the creation of meaning.[293] Robert Cover envisions the courtroom as the site for the creation and the destruction of meaning.[294] For Cover, legal interpretation that creates meaning is jurisgenerative, while interpretation that kills meaning is jurispathic.[295] Here, the meaning constructed is racially tinged.

Fathoming the jurisgenerative and jurispathic tendencies of trial courts requires the study of "trial talk" as discourse.[296] The meaning of trial talk is embedded in oral arguments,[297] witness examinations,[298] and closing statements.[299] Like any jury trial, the *Nelson* trial exhibits structural and discursive constraints that impinge on the full and fair presentation of the facts of a case.[300] Noting these constraints at work elsewhere, George Fisher finds "an inherent limit to the subtlety of the evidence and of the argument—and a limit to the effectiveness of the search for truth"[301] at any jury trial. Echoing this finding, Debora Threedy comments that "[a] trial necessarily involves multifarious relativism."[302] Indeed, whether before a judge or jury, the parties put forward "multiple,

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293. *See* Debora L. Threedy, The Madness of a Seduced Woman*: Gender, Law, and Literature*, 6 TEX. J. WOMEN & L. 1, 34 (1996) (exploring the cultural significance of trials).

294. *See* Cover, *supra* note 23, at 11-44; Robert M. Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 GA. L. REV. 815 (1986).

295. *See* Cover, *supra* note 23, at 11-19, 40-44.

296. On the cultural meaning of trial discourse, see John Fiske, *Admissible Postmodernity: Some Remarks on Rodney King, O.J. Simpson, and Contemporary Culture*, 30 U.S.F. L. REV. 917, 918 (1996). Fiske explains:

> Discourse is not a secondary representation of an independent reality, but partakes in that reality. The nature or truth of an event is determined in part by the discourse into which it is put, and no event contains its own prescription for the correct discourse by which to know and communicate it. To put it another way, any event can be put into discourse in different ways, so the critical relationship is between the different discursive constructions of that event, rather than between a representation of an event and the event itself.

Id.

297. *Cf.* Anthony G. Amsterdam, *Telling Stories and Stories About Them*, 1 CLINICAL L. REV. 9 (1994); Anthony G. Amsterdam, *Thurgood Marshall's Image of the Blue-Eyed Child in* Brown, 68 N.Y.U. L. REV. 226 (1993).

298. *See* Gregory M. Matoesian, *Language, Law, and Society: Policy Implications of the Kennedy Smith Rape Trial*, 29 L. & SOC'Y REV. 669 (1995); Gregory M. Mateosian, *"You Were Interested in Him as a Person?": Rhythms of Domination in the Kennedy Smith Rape Trial*, 22 L. & SOC. INQUIRY 55, 74-89 (1997). *See generally* GREGORY M. MATOESIAN, REPRODUCING RAPE: DOMINATION THROUGH TALK IN THE COURTROOM 98-188 (1993).

299. *See* 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 II": Further Reflections on the Interpenetration of Legal and Popular Storytelling in Closing Arguments to a Jury in a Complex Criminal Case*, 30 U.S.F. L. REV. 931 (1996); Philip N. Meyer, *"Desperate for Love": Cinematic Influences upon a Defendant's Closing Argument to a Jury*, 18 VT. L. REV. 721 (1994).

300. *See* George Fisher, *The O.J. Simpson Corpus*, 49 STAN. L. REV. 971, 992-97 (1997).

301. *Id.* at 996.

302. Threedy, *supra* note 293, at 34.

contradictory narratives."[303] At a jury trial, Threedy explains, "the verdict is *the* authoritative version of what happened."[304] At the same time, "it is as contingent as anyone else's version; a jury verdict only reflects a consensus as to what is most likely to have happened."[305] The discursive limits and narrative contingency of jury trials hamper efforts to construe the full meaning of trial talk.

a. State prosecution.—At the state trial, Assistant Brooklyn District Attorneys Sari Kolatch and James Leeper[306] portrayed Nelson as a knife-wielding youth caught up in the frenzy of religious hatred and violence. In her opening statement, citing the forthcoming testimony of nine police officers concerning the extent of mob violence, Kolatch asserted that Nelson "got caught up in the frenzy of the moment."[307] On direct examination, she bolstered this assertion by eliciting police witness testimony describing a black male making the following statements to an angry mob: "We don't get any justice. They're killing our children. We have to stop this. . . . Jews get preferential treatment, we don't get any justice. . . . If the police aren't going to do anything, we'll do something ourselves. Let's go to Kingston Avenue and get the Jews."[308] In her closing argument, Kolatch claimed that "[Nelson] is sitting here not because he is the product of a police frame-up. . . . He is sitting here because he stabbed Yankel Rosenbaum."[309] Indeed, she insisted: "Nelson was exactly the type of person to get caught up in all of this mob violence."[310] To buttress this claim, she characterized Nelson as a person prone to "getting violently angry, as a person who doesn't see a reason for rules, as a person who makes his own rules."[311] On this basis, Kolatch concluded, "Nelson was exactly the type of person who you would expect to get caught up in the mindless mob violence."[312]

b. Federal prosecution.—At the federal trial, the U.S. Attorney, represented by Valerie Caproni and Alan Vinegrad,[313] focused on racial

303. *Id.*
304. *Id.*
305. *Id.*
306. Both Kolatch and Leeper are white. *See* Telephone Interview with Valerie Caproni, Chief, Criminal Division, U.S. Attorney's Office, Eastern District of New York (Mar. 11, 1998) [hereinafter Caproni Interview].
307. *Brooklyn Trial Opens in Stabbing of Hasidic*, N.Y. L.J., Sept. 24, 1992, at 2.
308. Record at 75-76, *United States v. Nelson* (E.D.N.Y. 1994) (94-823).
309. *See* Edward Frost, *Crown Heights Defense Hits Inconsistencies, Prosecutor Emphasizes Statements in Summation*, N.Y. L.J., Oct. 27, 1992, at 1.
310. Record at 3101-02, *United States v. Nelson* (E.D.N.Y. 1994) (94-823).
311. *Id.*
312. *Id.*
313. Both Caproni and Vinegrad are white. *See* Caproni Interview, *supra* note 306.

animus, relying on about a dozen residents from both the black and Hasidic communities to establish motive.[314] In her opening statement, Caproni "drew a chilling portrait of race hatred run amok," accusing Charles Price of "whipping a crowd of black teenagers into a bloodthirsty frenzy."[315] She adverted to evidence demonstrating that Price "'found, cultivated and nurtured' raw hatred."[316] Caproni added that Price "'pumped up' the mob's fury and told them to go to the main commercial street in Crown Heights 'to get a Jew.'"[317] In his closing argument, Vinegrad asserted:

> Charles Price preached and prodded and provoked that crowd and turned their anger into action. It was not, as the defense would have you believe, a message of pain or sorrow or of seeking justice. It had nothing to do with justice. . . . No, Charles Price did not preach any of that because his message that night was not about getting justice, his message was about getting revenge. . . . He turned them from an angry crowd into a vigilante mob . . . chanting, no justice no peace, and kill the Jews. And Charles Price would have you believe that he was just some pitiful heroin addict that no one would bother paying attention to . . . . Charles Price set that crowd off that night. Heroin user or not, he did. You saw it and heard it at this trial.[318]

C. Defense Strategies

Criminal defense strategies involve weak commitments to the liberal ideals of personhood and community. This weakness is doubtless attributable to the nature of legal training. Standard training regimens, Peter Goodrich observes, draw legal subjects "into a network of relations and an institutional environment modeled upon *legal* definitions and valuations of persons, actions, and things."[319] That environment, Goodrich insists, "by its nature, is competitive, antagonistic, and frequently destructive."[320]

Born of a deformed adversarial environment, defense strategies may be best described as the practice of informal justice.[321] This practice, Richard Ford explains, "uses legal argument as a strictly tactical device,

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314. Record at 3101-02, *United States v. Nelson* (E.D.N.Y. 1994) (94-823).

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.* at 2753-56.

319. Peter Goodrich, *Law in the Courts of Love: Andreas Capellanus and the Judgments of Love*, 48 STAN. L. REV. 633, 675 (1996) (emphasis in original).

320. *Id.*

321. *See* Richard Thompson Ford, *Facts and Values in Pragmatism and Personhood*, 48 STAN. L. REV. 217, 238 (1995) (book review).

with no regard for the formal purposes underlying the law."[322] Tactical considerations give little credence to the search for client or community authenticity. Customarily, authenticity is connected to the notion of the self and subjectivity.[323] Premised on modern psychology and psychiatry,[324] this notion informs the structure of personhood and relationship. Intersubjectivity, here construed as a constituent of love, occurs in the "space and language of relationship."[325] The public expression of an authentic, loving relationship provides the foundation for community. The notion of community authenticity goes largely unnoticed in criminal defense practice, except in the evidentiary context of the hearsay rule when counsel may seek to classify syndrome evidence as a declaration against social interest.[326]

The postmodern embrace of intersubjectivity is unaccompanied by a claim of truth.[327] Under this embrace, claims of client innocence, witness perjury, or judicial bias must establish merely a pretense of authenticity, rather than an actual or absolute sense of truth. Nonetheless, in some circumstances at least, truth may be a prerequisite for or the product of intersubjectivity. The unsettling of truth claims and standards in the legal academy[328] fails to extinguish the yearning for truth expressed in the public response to the conduct of criminal defense strategies.[329] Moreover, it fails to silence the clamoring for *racial* truth. Leonard Baynes reports on the perverse crusade for black identity truth in

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322. *Id.*

323. On the development of subjectivity, see Maureen A. Mahoney & Barbara Yngvesson, *The Construction of Subjectivity and the Paradox of Resistance: Reintegrating Feminist Anthropology and Psychology*, 18 SIGNS 44 (1992).

324. *See* Richard E. Redding, *Socialization by the Legal System: The Scientific Validity of a Lacanian Socio-Legal Psychoanalysis*, 75 OR. L. REV. 781, 802-03 (1996).

325. Goodrich, *supra* note 319, at 661; *see also* Jessica Benjamin, *The Shadow of the Other (Subject): Intersubjectivity and Feminist Theory*, 1 CONSTELLATIONS 231, 244, 243-50 (1994) (positing reciprocity as a condition of conceiving the ethical relationship defined by the mutual recognition of the self and other).

326. For trenchant discussion of this hearsay rule exception, see Edward J. Imwinkelried, *Declarations Against Social Interest: The (Still) Embarrassingly Neglected Hearsay Exception*, 69 S. CAL. L. REV. 1427 (1996); *see also* David Furlow, Note, *Sin, Suffering, and "Social Interest": A Hearsay Exception for Statements Subjecting the Hearsay Declarant to "Hatred, Ridicule, or Disgrace"*, 4 REV. LITIG. 367 (1985) (discussing the history, purpose, and decisional law of the social interest hearsay exception).

327. *See* Pierre Schlag, *Hiding the Ball*, 71 N.Y.U. L. REV. 1681, 1686 (1996) (claiming that "*in saying what the law is, or what it requires, the legal actor must always maintain the aura of authenticity, even if it means faking it*" (emphasis in original)).

328. *See* George A. Martinez, *On Law and Truth*, 72 NOTRE DAME L. REV. 883, 896 (1997) (reviewing DENNIS PATTERSON, LAW AND TRUTH (1996)) (discussing the deficiencies of epistemic theories of truth).

329. *See* Craig M. Bradley & Joseph L. Hoffmann, *Public Perception, Justice, and the "Search for Truth" in Criminal Cases*, 69 S. CAL. L. REV. 1267, 1271 (1996).

law school minority faculty hiring pursued through the careful parsing of color.[330] Like Christopher Ford,[331] Baynes points to the changing construction of race and racial identity in law and society.[332] The unsteady quality of contemporary racial status frustrates the categorical pursuit of an individual or community sense of racial authenticity.

1. Pretrial Conduct.—Prior to the federal trial, in September 1994, the Nelson defense team filed a motion to recuse Judge Trager from presiding over the jury proceedings.[333] The defense maintained that Judge Trager suffered a conflict of interest because "the screening committee that recommended him for the [f]ederal bench was headed by a lawyer [Judah Gribetz] who also heads the Jewish group that joined the call for a federal investigation" of the Crown Heights violence.[334] On October 11, 1994, Judge Trager denied the motion without explanation.[335]

2. Trial Conduct.—The conduct of the defense teams in the *Nelson* trials reveals intriguing commonalities. Throughout the trials, both sets of defense teams assailed the *racial* credibility of police witnesses. Having disputed the evidentiary basis of the indictment, particularly the factual predicate of probable cause, the teams challenged the colorblind legitimacy of the prosecutions and, indeed, the criminal justice system as a whole. Further, the teams depicted Nelson, and later Price, as hapless, ill-fated victims of a racist society.

a. State trial.—At the state trial, Nelson's defense attorney, Arthur Lewis Jr.,[336] accused police officers of lying and fabricating a case against Nelson.[337] Deriding the credibility of police witnesses and the impartiality of the criminal justice system, Lewis claimed that Nelson was "the victim of a frame-up" invented by "a bunch of cops who can't

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330. *See* Leonard M. Baynes, *Who Is Black Enough for You? An Analysis of Northwestern University Law School's Struggle over Minority Faculty Hiring*, 2 MICH. J. RACE & L. 205, 212-21 (1997).

331. *See* Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race Conscious Law*, 82 CAL. L. REV. 1231, 1232 (1994).

332. *See* Baynes, *supra* note 330, at 215, 212-15 (asserting that racial meaning implicates "appearance, documentation, and self-identification" and combines with "ideological and political considerations and with national identity issues").

333. *See* Joseph P. Fried, *Crown Hts. Defense Team to Ask Judge to Step Down*, N.Y. TIMES, Sept. 8, 1994, at B3.

334. *Id.*

335. *See Crown Hts. Judge Won't Step Down*, N.Y. TIMES, Oct. 12, 1994, at B5 (noting that Judge Trager said "he would state his reasons later").

336. Lewis is black. *See* Caproni Interview, *supra* note 306.

337. *See* Alison Frankel, *Offending the Judge May Not Offend the Jury*, AM. LAW., Jan./Feb. 1993, at 89, 90.

even lie straight."[338] During cross examination, in an effort to build a claim of justification, Lewis insinuated that Rosenbaum was a member of a "Jewish security force . . . out there with others on patrol" during the escalating violence.[339] He declared: "my defense is that Yankel Rosenbaum was part of this patrol."[340] Tempering this declaration, he added: "My point is that this was not a retaliation killing. This was a police riot. And it had something to do with the young kids and the police. Not Jews, not whites, or anybody else. That's my defense."[341] At closing argument, Lewis asserted:

> This case is one of the biggest foul-ups imaginable. [The police] couldn't have done worse if they intended to do so . . . no two officers told the same thing about a given occurrence . . . you got some damn dum [*sic*] cops . . . they have lied in this case from beginning to end; and I think they've tried to play people for being foolish.[342]

b. Federal trial.—At the federal trial, Nelson's attorney, Trevor Headley,[343] characterized the indictment as a "rush to judgment."[344] In his opening statement, Headley "attacked the prosecution as catering to political pressures."[345] Inveighing against "[t]he forces that 'were unhappy with [Nelson's] acquittal in state court,'" he complained to the jury that "now [they] want you to bring him to justice and convict him."[346] He also condemned the confession as coerced, mentioning the police failure to determine Nelson's "emotional stability" prior to taking his statement.[347] In his closing argument, Headley reiterated the defense team's earlier denunciation of the U.S. Attorney for selective prosecution, claiming that "they want Lemrick Nelson, that's who they want. So, now, it is a bias crime. Now he did it because [Rosenbaum] was Jewish."[348]

Price's attorney, Anthony Ricco,[349] "portrayed his client as a hapless drug addict who had neither the credibility nor ability to get the mob 'in

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338. Record at 3055-56, *People v. Nelson* (N.Y. Sup. Ct. 1991) (10358/91).

339. *Id.* at 362, 364-65.

340. *Id.*

341. *Id.* at 716, 723.

342. *Id.* at 3024-25, 3053-54, 3055-56.

343. Headley is black. *See* Daniel Wise, *Racial Hatred Key Issue of Nelson Trial*, N.Y. L.J., Jan. 17, 1997, at 1. The defense team also included Christine Yaris and Michael Warren. Yaris is white; Warren is black. *See* Caproni Interview, *supra* note 306.

344. *See* Wise, *supra* note 343, at 1.

345. *Id.*

346. *Id.*

347. *Id.*

348. Record at 2920, *United States v. Nelson* (E.D.N.Y. 1994) (94-823).

349. Ricco is black. *See* Wise, *supra* note 343. The defense team additionally included Darrell Paster. Like Ricco, Paster is black. *See* Caproni Interview, *supra* note 306.

the palm of his hand.'"[350] Ricco described Price as incapable of racial vitriol.[351] He remarked that Price "lives in the neighborhood. People know who he is. When was the last time an addict set you off?"[352]

Taken together, the proceedings comprising the *Nelson* "double trial" seem to bear all the earmarks of a race trial. Both prosecution and defense teams constructed racial identity in terms of the hate-motivated deviance of the individual defendants and the color-coded prejudice infecting their surrounding communities. Moreover, both teams articulated racialized narratives to describe the culture and social structure of those communities. Even at their best, the narratives maintained only a thin veneer of race-neutral representation. More pronounced in its application on the prosecutorial side, that veneer cracks under the weight of race talk disputing the impartiality of the *Nelson* judges, the composition of its juries, the deviance of the parties, the innocence of afflicted victims, the bias of attorneys, and the inflammatory posturing of American politics. The next Part examines the regulation of such forms of racialized advocacy.

IV. Regulating Race

This Part surveys the current regulation of racialized advocacy under the *ABA Model Rules of Professional Conduct*,[353] the *ABA Model Code of Professional Responsibility*,[354] and the *ABA Standards Relating to the Administration of Criminal Justice*.[355] The survey analyzes the regulation of racial bias specific to the prosecution and the defense function. For the prosecution, it examines the prohibition against bias in charging decisions, evidentiary presentation, jury selection, and trial conduct. For the defense, it explores the defense opportunities for bias in advising the accused, controlling and directing the case, advancing claims and contentions, and in making statements to the tribunal, opposing party, and counsel.

A. Prosecution Function

The ABA rules governing the prosecution function are guided by adversarial and institutional norms. The norms charge the prosecutor with the responsibility of acting as a "minister of justice."[356] Under the *Model Rules of Professional Conduct*, that "responsibility carries with it specific obligations to see that the defendant is accorded procedural justice

350. Record at 2920, *United States v. Nelson* (E.D.N.Y. 1994) (94-823).
351. *See id.*
352. *Id.*
353. MODEL RULES OF PROFESSIONAL CONDUCT (1997).
354. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980).
355. STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE (1992).
356. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. (1997).

and that guilt is decided upon the basis of sufficient evidence."[357] Consistent with strict evidentiary sufficiency guidelines, *ABA Standards* prohibit intentional misrepresentation of fact, bad faith or unreasonable allusion to evidence, knowing offers of false or inadmissible evidence, and misstatements of evidence.[358] In addition to evidentiary presentation, the *Standards* regulate extrajudicial public statements that will have a substantial likelihood of prejudicing a criminal proceeding.[359] Most important, the *ABA Standards* ban invidious discrimination on the basis of race in exercising the discretion to investigate or to prosecute.[360] That ban apparently extends to jury selection, witness examination, and jury argument.[361]

Despite ABA and state regulation, the troubling legacy of race trials ingrains the prosecutorial function with a sense of moral crisis. The crisis enmeshes prosecutors in the debate over the place of race in law, lawyering, and ethics. This debate goes beyond the measure of constitutional challenges to prosecutorial charging decisions and peremptory strikes. It goes to the very duty of federal and state governmental officers to hold to a colorblind constitutional faith in the wake of increasing pressure to engage in color-coded stereotypes to obtain right or just results. The temptation to breach the allegedly higher duty of colorblind constitutionalism in advocacy and ethics for reasons of individual justice or the common good introduces doubt into the moral certitude normally guiding the prosecutorial function. This sense of crisis warrants contemplation of new moral dimensions and perspectives in advocacy. Instead of simply ratcheting up moral rhetoric, the task is to revise the moral baseline of prosecution. Revision flows out of the transformative potential inherent in the moral imagination. Tapping that potential requires a renewed pedagogy and practice of faith and spirituality in law.[362] The law, Kenneth Karst reminds us, possesses "expressive power and educative power."[363]

The expression of faith and spirituality in law provides a means to regain moral authority and credibility in the criminal justice system.[364]

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357. *Id.*; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(A) (1980); STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE Standard 3-3.9(a) (1992).

358. *See* STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE Standards 3-2.8(a), 3-5.5, 3-5.6(a)-(b), 3-5.8(a) (1992).

359. *See id.* 3-1.4(a); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(g) (1997).

360. *See* STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE Standard 3-3.1(b) (1992).

361. *See id.* 3-5.3, 3-5.7(a), 3-5.8(c).

362. *See* THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT (1981); Gordon J. Beggs, *Laboring Under the Sun: An Old Testament Perspective on the Legal Profession*, 28 PAC. L.J. 257 (1996).

363. Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 570 (1997).

364. For commentary decrying the credibility of the criminal justice system, see Thomas D. Barton, *Violence and the Collapse of Imagination*, 81 IOWA L. REV. 1249, 1263 (1996) (book review);

Establishing the credibility of the criminal justice system depends in substantial part on our vision of the moral lawyer. Defined here, moral lawyering works to empower legal agents and institutions, as well as clients and communities, to act morally, indeed to make moral choices in the face of violence and emotionally charged conflicts.[365] Lawyering in this sense is a process of engendering action in others through other-exerted power.[366] The flourishing literature on the lawyering process illustrates empowerment strategies applied in civil rights and poverty law contexts.[367]

Of necessity, moral lawyering contemplates virtue.[368] Robert Araujo finds virtue in the individual quality of discernment employed in assessing where a case *should go* and in attaining a *just end*.[369] Discernment of this sort, Tanina Rostain remarks, involves the ability to mediate between public commitments and individual values,[370] whether one is representing a private citizen or an arm of the state.

Prosecutors may define virtue in terms of "an overriding commitment to doing one's duty."[371] In this way, Tracy Isaacs and Diane Jeske contend, virtue "need not be equated straightforwardly with the moral."[372] Rather, it "may also include a responsibility to the reality of one's situation."[373] The situational allowance of nonmoral considerations to guide deliberations, Isaacs and Jeske explain, arises when moral considerations seem insufficient to yield a judgment of resolution.[374] The situation of the prosecutor in a race trial gives rise to competing moral considerations of public retribution, victim restitution, and defendant

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Stephen B. Bright, *Casualties of the War on Crime: Fairness, Reliability and the Credibility of Criminal Justice Systems*, 51 U. MIAMI L. REV. 413 (1997).

365. *See* Linda G. Mills, *On the Other Side of Silence: Affective Lawyering for Intimate Abuse*, 81 CORNELL L. REV. 1225, 1260 (1996).

366. *See* E. Michelle Rabouin, *Walking the Talk: Transforming Law Students into Ethical Transactional Lawyers*, 9 DEPAUL BUS. L.J. 1, 61-62 (1996) (exploring cognitive dimensions of ethical training).

367. *See* Melanie B. Abbott, *Seeking Shelter Under a Deconstructed Roof: Homelessness and Critical Lawyering*, 64 TENN. L. REV. 269, 309-10 (1997); Ruth Buchanan & Louise G. Trubek, *Resistances and Possibilities: A Critical and Practical Look at Public Interest Lawyering*, 19 N.Y.U. REV. L. & SOC. CHANGE 687 (1992).

368. *See* Robert F. Cochran, Jr., *Lawyers and Virtues*, 71 NOTRE DAME L. REV. 707 (1996) (book review); Lorie M. Graham, *Artistotle's Ethics and the Virtuous Lawyer: Part One of a Study on Legal Ethics and Clinical Legal Education*, 20 J. LEGAL PROF. 5, 27-48 (1995-1996).

369. *See* Robert Araujo, *The Virtuous Lawyer: Paradigm and Possibility*, 50 SMU L. REV. 433, 479 (1997).

370. *See* Rostain, *supra* note 15, at 1031.

371. *See* Tracy Isaacs & Diane Jeske, *Moral Deliberation, Nonmoral Ends, and the Virtuous Agent*, 107 ETHICS 486, 493, 495 (1997) ("Virtue will differ from person to person, but at its core will be an overriding commitment to doing one's duty.").

372. *Id.* at 493.

373. *Id.*

374. *See id.* at 493-94.

culpability. It also touches on the obligation of constitutional community and the matching duty of public citizenship. Balancing the norms of just punishment, constitutional community, and public citizenship dictates consideration of race and racial status in a multiracial context. Even if community, citizenship, and status norms fail to rise above the level of nonmoral consideration, integrating race into a virtue-based situationalist ethic requires contextualized racial judgment.[375]

Teaching virtue[376] in the prosecutorial judgment of race and racial status proceedings[377] demands both an individual and a community account of virtue. The community account unites public and private conceptions of virtue[378] by linking the prosecutorial function to race and citizenship. By connecting race and citizenship,[379] the account tries to rescue the meaning of black citizenship from the deformed characterizations of American law found in cases such as *Dred Scott*[380] and *Plessy v. Ferguson*.[381] Concretely, the account directs prosecutors to protest stigmatizing racial representations of victims and defendants, and their related communities. This directive envisages victims and defendants as clients, rather than antagonists or historical witnesses, of the state. Without protest, prosecutorial representations will foster a sociolegal environment that denies communities of color a full chance at economic and political participation in civil society. Neither economic opportunity nor political power flows from historically subordinated status.

The individual account of virtue urges prosecutors to reject the same stigmatizing representations because they offend the racial dignity and self-respect of victims and defendants of color. Of course, as Bernard Boxill points out, blacks "do not need whites to approve of them to be able to

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375. *See* Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 891 (1997) (book review).

376. *See* Robert P. Burns, *Legal Ethics in Preparation for Law Practice*, 75 NEB. L. REV. 684 (1996). Burns asserts:

> [V]irtues can be taught through a program that compels students to *act* in contexts that require the ethical exercise of lawyering skills and to receive critiques by experienced practitioners who are masters of the virtuous exercise of those skills and are willing to demonstrate and recommend that exercise . . . to their students.

Id. at 691 (footnote omitted).

377. On the determination of racial status, see Sharon Elizabeth Rush, *The Heart of Equal Protection: Education and Race*, 23 N.Y.U. REV. L. & SOC. CHANGE 1, 39-57 (1997) (exploring racial status in the context of children's education).

378. *See* Christian G. Fritz, *Alternative Visions of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate*, 24 HASTINGS CONST. L.Q. 287, 298-304 (1997) (examining the historical merger of public and private virtues).

379. *See* Stuart A. Streichler, *Justice Curtis's Dissent in the Dred Scott Case: An Interpretive Study*, 24 HASTINGS CONST. L.Q. 509, 512-28 (1997).

380. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

381. 163 U.S. 537 (1896).

sustain their self-respect."[382] While conceding the legitimacy of stigma protest, Boxill notes that such protest strays outside regular efforts of persuasion. More extraordinary in purpose, stigma protest sustains self-respect by pronouncing "a defiant oath of allegiance to morality."[383]

Neither account of prosecutorial virtue will erase the problem of moral error. Often the commission of error stems from an insensitivity to the race-based experience of moral diversity. Ronald Dworkin cautions that "[m]oral diversity is sometimes exaggerated."[384] He observes that "the degree of convergence over basic moral matters throughout history is both striking and predictable."[385] For Dworkin, morality stands as an "independent dimension" of human experience, outside diversity.[386] Moral error, however, often springs from the failure to comprehend diversity in light of past errors of moral essentialism. This failure encourages a misplaced sense of moral infallibility.[387] The notion of moral reciprocity may cure this errant sensibility.

Reciprocity, Robert George contends, *ought* to "govern moral debate whenever cultural circumstances or other factors make it possible for reasonable people of goodwill to be mistaken about a putative moral evil."[388] George explains that "reasonable people of goodwill can be mistaken about even serious moral evils when ignorance, prejudice, self-interest, and other factors that impair sound moral judgment are prevalent in a culture or subculture."[389] Moral reciprocity in this way implies mercy. Stephen Garvey ties mercy to the criminal law,[390] offering both

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382. Bernard R. Boxill, *Washington, Du Bois and* Plessy v. Ferguson, 16 LAW & PHIL. 299, 305 (1997).

383. *Id.* at 309.

384. Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87, 113 (1996).

385. *Id.*

386. *Id.* at 128 (defining morality as a "distinct, independent dimension of our experience" capable of exercising "its own sovereignty").

387. Larry Alexander notes that "we operate morally in the world as we find it—a world in which many of its features are the residue of past moral mistakes." Larry Alexander, *Bad Beginnings*, 145 U. PA. L. REV. 57, 81 (1996). Contemporary moral action, according to Alexander, requires us to take account of those mistakes. *See id.* at 81.

388. Robert P. George, *Law, Democracy, and Moral Disagreement*, 110 HARV. L. REV. 1388, 1400 (1997) (book review).

389. *Id.*

390. *See* Stephen P. Garvey, *"As the Gentle Rain from Heaven": Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989 (1996); *see also* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 366-72 (1996) (examining the role of the mercy tradition in the moral assessments deployed in the criminal law); Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 115-22 (1993) (exploring the implications of the mercy tradition in death penalty jurisprudence). Feminists make a similar connection, tying gender to mercy. *See* Lorraine Schmall, *Forgiving Guin Garcia: Women, the Death Penalty and Commutation*, 11 WIS. WOMEN'S L.J. 283, 319-22 (1996); *see also* Jenny Carroll, Note, *Images of Women and Capital Sentencing Among Female Offenders: Exploring the Outer Limits of the Eighth Amendment and*

strong and weak conceptions of merciful compassion.[391] The strong conception "allows the sentencer to consider only those facts and circumstances that are likely to elicit a merciful response."[392] The weak conception "allows the sentencer to consider facts and circumstances that weigh *against* granting mercy."[393] Integration of each of these conceptions into the exercise of the prosecutorial function enhances recognition of the criminal defendant as a fellow citizen instead of an alien other. Deploying the reciprocal morality of citizenship that binds communities through norms of dignity and mutual respect, prosecutors may recognize the devastation of historical segregation inscribed in the tragic behavior and circumstances of Lemrick Nelson. The recognition of tragic citizenship, of citizenship squandered in hate-motivated violence invites at least a sense of sympathy, and with it, an opening for the sentiment of mercy and the possibility of reconciliation. The next subpart considers the issue of race in the discharge of the defense function.

B. Defense Function

ABA rules regulating the defense function are also rooted in adversarial and institutional norms. The norms emphasize the defendant's right to put on a defense.[394] This right correlates with the duty of zealous defense.[395] That defense duty translates into the requirements of competent and adequate representation. Under the *Model Rules of Professional Conduct*, these conditions urge criminal defense counsel to "require that every element of the case be established."[396] *ABA Standards* amplify this requirement stressing the basic duty "to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality

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Articulated Theories of Justice, 75 TEXAS L. REV. 1413 (1997) (inspecting gender-based explanations in death penalty jurisprudence and in women's capital trials). This tie avoids the biological and cultural baggage of gender determinism. *See* Susan H. Williams & David C. Williams, *A Feminist Theory of Malebashing*, 4 MICH. J. GENDER & L. 35, 70-81 (1996).

391. *See* Garvey, *supra* note 390, at 1015-16.

392. *Id.* Garvey continues: "This conception is strong because the sentencer never hears anything about the character of the offender or circumstances of the offense that might persuade her *not* to extend mercy." *Id.* (emphasis in original).

393. *Id.* at 1016. Garvey adds: "Under this conception, mercy is a gift the defendant can seek, but it is also one the state can rightly urge the jury to withhold." *Id.* (emphasis in original).

394. *See* Donald A. Dripps, *Relevant But Prejudicial Exculpatory Evidence: Rationality Versus Jury Trial and the Right to Put on a Defense*, 69 S. CAL. L. REV. 1389, 1402-04 (1996).

395. *See* Charles M. Sevilla, *Criminal Defense Lawyers and the Search for Truth*, 20 HARV. J.L. & PUB. POL'Y 519 (1997). Sevilla declares:

> The task of defense lawyers is to defend their clients honestly and zealously under the constitutional mandate of the Sixth Amendment. This insures that the innocent are protected, that the state's search for truth is monitored, and that a balanced system results. Only in this way will society accept the end result as just.

Id. at 520.

396. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1997).

representation."[397] Cognizant that the duty of effective representation is not absolute, the *Standards* enjoin prejudicial speech and conduct occurring in the form of intentional misrepresentation, extrajudicial public statements, inadmissible reference, bad faith or unreasonable evidentiary allusion, false evidence, or misstated and misleading evidence.[398]

Notwithstanding these constraints, racial narrative dictates the reconsideration of traditional conceptions of effective representation.[399] Reconsideration demands inquiry into the racial content of narrative. Conventional definitions of competence and adequacy condone stigma narratives. Race, criminal defense lawyers argue, acquires special relevance when a defendant is charged with a bias crime[400] or an interracial crime of violence.[401] The argument for the probative value of race makes nothing of truth. For defense lawyers, truth is undiscoverable and, moreover, immaterial. Crudely postmodern, they claim a situated truth[402] linked only to standpoint—the standpoint of judge and jury.[403]

The standpoint theory of truth implied by the criminal defense model in race cases engenders opposition to speech regulation manifested in the form of restrictions on pretrial and trial publicity. That opposition stays clear of the speech-equality tension[404] arising out of the norm of egalitarianism.[405] Instead, it aims at the use of the gag order,[406] rejecting the argument for content-based restrictions on the free speech

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397. *See* STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE Standard 4-1.2(b) (1992).

398. *See id.* at 4-1.2(f), 4-1.4, 4-7.2(c), 4-7.4, 4-7.5(a)-(b), 4-7.7(a)-(b) (1992).

399. For criticism of the adequacy of representation in complex civil and criminal law contexts, see Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045, 1086-1104 (1995); Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEXAS L. REV. 571 (1997).

400. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 392-94 (1992) (noting the racial message in striking down an anti-cross burning statute).

401. *See* Mu'Min v. Virginia, 500 U.S. 415, 422-24 (1991) (citing the need to ask venire members for their racial views).

402. On postmodernist views of situated knowledge, see Dick Pels, *Strange Standpoints: Or, How to Define the Situation for Situated Knowledge*, 108 TELOS 65 (1996).

403. Oddly, this claim carries a vaguely feminist connotation. For penetrating discussion of feminist standpoint analysis, see Nancy C.M. Hartsock, *The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism*, *in* DISCOVERING REALITY: FEMINIST PERSPECTIVES ON EPISTEMOLOGY, METAPHYSICS, METHODOLOGY AND PHILOSOPHY OF SCIENCE 283-310 (Sandra Harding & Merrill B. Hintikka eds., 1983); and Susan Hekman, *Truth and Method: Feminist Standpoint Theory Revisited*, 22 SIGNS 341 (1997).

404. *See* john a. powell, *Worlds Apart: Reconciling Freedom of Speech and Equality*, 85 KY. L.J. 9, 70-76 (1996-1997) (using situated knowledge theory to reconcile the competing ideologies of free speech and equality).

405. *See* Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193, 281-85 (1996) (examining competing claims of free speech and egalitarianism).

406. *See generally* Symposium, *The Sound of Silence: Reflections on the Use of the Gag Order*, 17 LOY. L.A. ENT. L.J. 305 (1997).

rights of trial participants.[407] Advancing a fair trial justification,[408] opponents denounce the gag order as an unconstitutional infringement on lawyer free speech rights.[409]

The *Nelson* case illustrates the lawyer free speech exercise of stigma narratives. Here the stigma of an American black narrative, the narrative of Lemrick Nelson, rises from segregation in education, housing, health care, indeed in the very geography of an urban landscape gerrymandered, redlined, and neglected. Here, in an impoverished segregated neighborhood, stigma narratives take on an almost natural quality approaching neutrality. Here, when they portray a young black man so ill-equipped for civil society that he must tried and sentenced as an adult, we nearly forget that this portrait describes a generation or more of young black men. We forget that the stigma of boyhood mental and physical segregation lies in the incarceration of an adult. We forget that stigma narratives may be undeserving of protected speech.

Examples of racial stigma permeate the trial in the defense teams' substantive law claims and in their statements to the tribunal, opposing party witnesses, and counsel.[410] The stigma of racial accusation and stereotyping is everywhere defensively. It is found explicitly in the federal motion to recuse and in the state and federal charges of police bias. It is found implicitly in the heated exchange with government counsel and in the opposition to the original indictment and status transfer motion.

Opportunities for race-ing narrative with stigmatizing rhetoric and imagery derive in part from attorney-client power inequality. Power directs the allocation of decisionmaking authority over means and ends.[411]

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407. *See* Eileen A. Minnefor, *Looking for Fair Trials in the Information Age: The Need for More Stringent Gag Orders Against Trial Participants*, 30 U.S.F. L. REV. 95 (1995); Mark R. Stabile, Note, *Free Press-Fair Trial: Can They Be Reconciled in a Highly Publicized Criminal Case?*, 79 GEO. L.J. 337 (1990).

408. *See* Charles H. Whitebread & Darrell W. Contreras, *Free Press v. Fair Trial: Protecting the Criminal Defendant's Rights in a Highly Publicized Trial by Applying the* Sheppard-Mu'Min *Remedy*, 69 S. CAL. L. REV. 1587, 1589-99 (1996).

409. *See* Erwin Chemerinsky, *Lawyers Have Free Speech Rights, Too: Why Gag Orders on Trial Participants Are Almost Always Unconstitutional*, 17 LOY. L.A. ENT. L.J. 311 (1997); Michael E. Swartz, Note, *Trial Participant Speech Restrictions: Gagging First Amendment Rights*, 90 COLUM. L. REV. 1411 (1990).

410. *See supra* notes 333-52 and accompanying text.

411. *See* Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 159-61 (1990) (book review) (urging reforms in legal services for the powerless due to inadequacy in the current government monopoly); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 718-21 (1987) (identifying factors causing inequality in attorney-client bargaining power); *see also* Committee on Professional Responsibility, *The Evolving Lawyer-Client Relationship and Its Effect on the Lawyer's Professional Obligations*, 51 THE RECORD (Bar Ass'n of New York City) 443, 451-65 (1996) (noting the traditionally paternalistic professional discretion lawyers exercise in controlling the means of representation); Judith L. Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049, 1058-60 (1984) (comparing paternalist and instrumentalist models of lawyer-client decisionmaking authority).

In this way, it shapes the definition of client interest. Conventional rules of defense ethics construe client interests narrowly in terms of physical freedom. This construction carries intuitive appeal. It also garners support in anecdotal and empirical evidence. Put simply, criminal defendants want to *stay out* of jail. Alternatively, they want to *get out* of jail. These preferences accord with a common sense version of ordinary rationality.[412]

The power of rationality implies moral decisionmaking capacity. Within liberal theory, moral capacity is often equated with the operation of self-regarding logic and self-interested preference.[413] The logic of moral self-interest competes against the public-regarding incentives of the common good.[414] Belief in a common or collective good rests on participatory norms of citizenship.[415] Participatory norms protect clients and client communities against lawyer intervention in judgments of means and ends. The promotion of participatory norms in civil rights[416] and criminal defense[417] contexts offers a method of staving off unwanted

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412. Self-interested claims of ordinary rationality animate public choice theory. *See* David A. Skeel, Jr., *Public Choice and the Future of Public-Choice-Influenced Legal Scholarship*, 50 VAND. L. REV. 647, 651 (1997) (contending that "public choice assumes that all of the relevant players tend to act in their own self-interest").

413. Drawing on the idea of political liberalism, John Rawls endows rational agents "with the powers of judgment and deliberation in seeking ends and interests peculiarly [their] own." *See* JOHN RAWLS, POLITICAL LIBERALISM 50, 280 (1993) (interpreting the freedom of moral persons in terms of the "ab[ility] to control and revise their wants and desires, and as circumstance requires, they accept the responsibility for doing so"). The rational, according to Rawls, "applies to how these ends and interests are adopted and affirmed, as well as to how they are given priority." *Id.* at 50. It applies equally, he adds, "to the choice of means, in which case it is guided by such familiar principles as: to adopt the most effective means to ends, or to select the more probable alternative, other things equal." *Id.* Of course, Rawls cautions, rational agents are neither "limited to means-ends reasoning" nor "solely self-interested." *Id.* at 50-51.

414. Rawls notes that rational agents lack "the particular form of moral sensibility that underlies the desire to engage in fair cooperation as such, and to do so on terms that others as equals might reasonably be expected to endorse." *Id.* at 51, 279 ("The sum of an individual's entitlements, or even of their uncompensated contributions to associations within society, is not to be regarded as a contribution to society.").

415. This view of democratic citizenship echoes Rawls. Expanding the liberal position, Rawls reconceives the foundational meaning of the notion of a "social union" from "a conception of the good as given by a common religious faith or philosophical doctrine" to "a shared public conception of justice appropriate to the conception of citizens in a democratic state as free and equal persons." *Id.* at 304.

416. *See* LUBAN, *supra* note 9, at 317-57 (advocating community participation in lawsuits with political objectives and in class actions); *see also* William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1625-27, 1668-80 (1997) (canvassing lawyer-client and intra-group conflicts in traditional and contemporary civil rights litigation); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1232-42 (1982) (providing examples of direct participation mechanisms in class actions).

417. *See* Jeff Brown, *Disqualification of the Public Defender: Toward a New Protocol for Resolving Conflicts of Interest*, 31 U.S.F. L. REV. 1, 32-33 (1996) (introducing participatory norms

lawyer intervention and resolving difference-based lawyer-client conflicts.[418]

Criminal defense discourse is replete with difference-based narratives. These racialized narratives arise out of lawyer interpretative efforts to grasp and to exploit racial identity and difference. Discourse, Andrew Stark points out, "tends to exhibit a range of interpretive approaches contending over how to understand one particular feature of identity."[419] The discourse of criminal defense theories of excuse[420] pinpoint racial difference. Difference-based narratives emerge in group-specific cultural defenses.[421] Each set of defensive narratives uses essentialist racial rhetoric and imagery to satisfy client acquittal objectives.[422]

The defensive maneuver of unleashing racially essentialist narratives bears reference to the field of Women's Studies. Gayatri Spivak describes the maneuver as a form of "strategic essentialism."[423] In this move, defense counsel imputes a particular character trait to the defendant. The trait normalizes the conduct at issue, characterizing it as natural. For young black males, as here, the trait of violence is commonly assigned to excuse criminal wrongdoing. The turn to strategic essentialism, according to Katherine Franke, entails "consciously choosing to essentialize a particular community for the purpose of a specific political goal."[424] Borrowing from the work of Leti Volpp, Franke adds that "[s]trategic essentialism ideally should be undertaken by the affected community, which

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through the implementation of informed consent procedures regulating the disclosure of client secrets and confidences in defense representation).

418. *See* Mary Maxwell Thomas, *The African American Male: Communication Gap Converts Justice into "Just Us" System*, 13 HARV. BLACKLETTER J. 1, 16 (1997) (noting that black defendants face lawyers who "normally have no concept of the lives or language of the defendants affected by their decisions, leaving defendants with little or no control over how or whether their true story is told").

419. Andrew Stark, *Limousine Liberals, Welfare Conservatives: On Belief, Interest, and Inconsistency in Democratic Discourse*, 25 POL. THEORY 475, 496 (1997).

420. For an overview of criminal defense theories of excuse, see generally Stephen J. Morse, *Brain and Blame*, 84 GEO. L.J. 527, 529-37 (1996); Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331 (1997).

421. *See, e.g.*, Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311 (1991).

422. *See* Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1068-78 (exploring the tensions arising out of the battered woman defense and certain traits commonly attributed to black women); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 398-452 (1996) (discussing racial stereotypes in the context of self-defense claims).

423. *See* Gayatri Chakravorty Spivak, *Subaltern Studies: Deconstructing Historiography*, *in* SELECTED SUBALTERN STUDIES 3, 13 (Ranajit Guha & Gayatri Chakravorty Spivak eds., 1988) (remarking on the strategic use of essentialism to advance political interests).

424. Katherine M. Franke, *Homosexuals, Torts, and Dangerous Things*, 106 YALE L.J. 2661, 2679 (1997) (book review) (quoting Leti Volpp, *(Mis)Identifying Culture: Asian Women and the 'Cultural Defense'*, 17 HARV. WOMEN'S L.J. 57, 95 (1994)).

is best situated to undertake the process of selecting the appropriate circumstances in which to offer cultural information."[425]

Franke's derivative notion of strategic essentialism implies an individual and a community capacity for narrative autonomy. Liberal theory defines the meaning of autonomy in terms of deliberative self-governance.[426] Discursively, autonomy may find deliberative expression in narrative freedom and authenticity.[427] Kathryn Abrams points out that narrative freedom "combines an element of integrity—we act in a way that honors our conception of ourselves—with an element of creativity—we are not constrained to accept the version of ourselves that dominant culture offers us, but are able to engage in subtle acts of reinterpretation."[428]

Susan Williams outlines a narrative model of autonomy that comprises three elements of human capacity.[429] The first concerns self-knowledge.[430] The second involves "a basic sense of self-trust and self-esteem."[431] The third entails "the ability to understand and appreciate the evaluative standards of others."[432] For each of these necessary capacities, Williams explains, "there will in turn be social conditions that either contribute to or hinder the development or exercise of that capacity."[433]

In matters of race, social conditions invite segregated community. For many people of color, only the experience of segregated community affords self-knowledge, trust, and mutual understanding. Williams anticipates the invitation of community, observing that "[t]he narrative model of autonomy incorporates a conception of the self as fundamentally defined by its

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425. *Id.* (citation omitted).

426. *See generally* James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1 (1995). *See also* David Nyberg, *Noble Lies, Narrative Truths, and the Art of Voice: Thoughts on Pragmatic Language and the First Amendment*, 64 U. CIN. L. REV. 1203, 1219, 1219-20 (1996) (construing autonomy to mean self-governing—*i.e.*, it "signifies that a person's wants and purposes are related to each other in a hierarchy ordered on the basis of held values and commitments, that the person is internally organized, has reasons, and chooses accordingly").

427. *See* Susan H. Williams, *A Feminist Reassessment of Civil Society*, 72 IND. L.J. 417, 430-40 (1997) (describing a narrative model of autonomy emphasizing cultural interpretation).

428. Kathryn Abrams, *Redefining Women's Agency: A Response to Professor Williams*, 72 IND. L.J. 459, 459 (1997).

429. Williams explains:

> In this narrative model, autonomy is neither a pre-existing condition to be assumed for all persons, nor is it an end-state that can be taken for granted once achieved. Instead, it is a process, a process that must be continually ongoing in order for a person to be autonomous. Moreover, that process is only possible if the person has developed certain capacities and if her circumstances allow her both the opportunity to exercise those capacities and the resources necessary to act on them.

Williams, *supra* note 427, at 432 (footnotes omitted).

430. *See id.*

431. *Id.*

432. *Id.* at 433.

433. *Id.*

relations to others."[434] To Williams, "autonomy itself is dependent on those relations."[435] Indeed, "the capacities necessary to autonomy can be conceived only within such relations: they are not, even in theory, describable as the characteristics of isolated individuals."[436] In sum, for Williams, the content of the identity used to construct the narrative model of autonomy "is itself composed of socially generated concepts and relations."[437] Deterioration in social conditions and relations brought on by segregation, however, erodes client autonomy and compromises lawyer-client deliberation of community. Autonomy erodes from the deprivations of political and socioeconomic life accompanying segregation. Community deliberation deteriorates from the scarcity of opportunity to consider racial equality and reciprocity in the context of democratic citizenship.

Racialized narratives and racial inequality signal this erosion. Consider race-based deviance theories of excuse. Such theories emphasize passion and provocation. An early antecedent lies in the black rage defense.[438] Racial deviance narratives fit the general category of syndrome evidence.[439] This evidence may encompass abuse,[440] diminished capacity,[441] and socioeconomic deprivation.[442] The erosion of deliberative autonomy norms under these conditions is inevitable.

Yet, race trials may operate under alternative conditions issuing from racial conceptions of identity that honor individual and collective capacities for narrative autonomy and authenticity. Racial conceptions of identity

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434. *Id.* at 435.

435. *Id.* Williams links narrative discourse to social relations existing in context. She comments: "[T]he capacities necessary to exercise narrative autonomy are the product of certain sorts of social relations . . . and require a particular social context in order to be maintained." *Id.*

436. *Id.* Williams notes that "unlike the older model [of autonomy], one cannot be an autonomous person in isolation; one can only be autonomous in relationship with other persons." *Id.*

437. *Id.*

438. *See* HARRIS, *supra* note 145, at 2-7; Kimberly M. Copp, Note, *Black Rage: The Illegitimacy of a Criminal Defense*, 29 J. MARSHALL L. REV. 205, 227-29 (1995); 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, 748-57 (1996) (all describing defense theories based on race-informed behavior).

439. *See* Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461, 463 (1996) (defining syndrome evidence in terms of "a claim that physical or psychological markers reveal its cause, that it has significant and predictable effects on perceptions and behaviors, or that experts can accurately identify individuals who fit within its boundaries").

440. *See* Peter Arenella, *Demystifying the Abuse Excuse: Is There One?*, 19 HARV. J.L. & PUB. POL'Y 703 (1996); Richard J. Bonnie, *Excusing and Punishing in Criminal Adjudication: A Reality Check*, 5 CORNELL J.L. & PUB. POL'Y 1 (1995) (both exploring abuse-related defense strategies used mainly as a form of mitigation).

441. *See* Richard L. Nygaard, *On Responsibility: Or, the Insanity of Mental Defenses and Punishment*, 41 VILL. L. REV. 951, 975-85 (1996) (proposing bifurcation of diminished capacity trial proceedings into performative and remedial phases).

442. *See* Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. J. 9 (1985) (discussing the role of socioeconomic deprivation in the cause and defense of criminal behavior).

containing the capacity for racial respect, trust, and social cooperation potentially may be found within certain collaborative norms of litigation governing fields of practice largely untainted by racialized rhetoric.[443] An authenticity-based conception of identity connects up race with aspirational principles of deliberative autonomy and democracy. That connection works to reconcile the racialized self and community. Reconciliation urges a biracial conception of citizenship that revives the rhetoric of the public interest.[444] Biracial citizenship offers a better account of race relations normatively and historically. The account defines the African-American community by "the prevalence of extended care networks."[445] The networks refer to "circles of commitment that extend beyond immediate kin to people related by ties of friendship, community, culture and shared oppression."[446] Those networks introduce a related conception of the neighborhood as a political entity.[447] The task is to reconstruct the black community as a political entity entitled to protection.

Lisa Kelly asserts that race "transcends place, creating a community that has little to do with geography but everything to do with the larger political and cultural community of color."[448] This larger community, Kelly insists, "generally recognizes the reality of racism, the pleasure of a common culture, and the need to act together to effectuate common interests and to remedy common problems that repeat themselves across geographical divides."[449] The notion of a common culture intimates

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443. *See* Rachel Croson & Robert H. Mnookin, *Does Disputing Through Agents Enhance Cooperation?: Experimental Evidence*, 26 J. LEGAL STUD. 331, 344-45 (1997); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994).

444. On the instability of even prosaic definitions of the public interest, see Patricia M. Wald, *Whose Public Interest Is It Anyway?: Advice for Altruistic Young Lawyers*, 47 ME. L. REV. 3 (1995).

445. Peggy Cooper Davis, *"So Tall Within"—The Legacy of Sojourner Truth*, 18 CARDOZO L. REV. 451, 466 (1996).

446. *Id.* at 466. Davis remarks: "Since the days of slavery, extended care networks have linked African-American people in kinship and friendship groups committed to mutual sustenance, values of nurturance, and social responsibility." *Id.* at 467.

447. *See* Georgette C. Poindexter, *Collective Individualism: Deconstructing the Legal City*, 145 U. PA. L. REV. 607, 648-53 (1997) (envisioning a political neighborhood functioning politically and legally autonomously from municipal government).

448. Lisa A. Kelly, *Race and Place: Geographic and Transcendent Community in the Post-*Shaw *Era*, 49 VAND. L. REV. 227, 234 (1996).

449. *Id.* at 234-35. Kelly adds:

> Transcendent community interests should not be confused with a simplistic belief that the African-American community is a monolithic entity in which all people of color live identical lives in every respect, agree with one another, or even like one another. Nevertheless, color is an immutable psychological fact packed with cultural, historical, and sociological significance that shapes the contours of individual daily lives in ways sometimes subtle and sometimes all too brutally clear. Rhetorical devices that label the recognition of transcendent community interests as "stereotyping" or "stigmatizing" are often used to silence important discussions of race that need to be had . . . .

Id. at 235.

Regina Austin's notion of the "black public sphere."[450] To Austin, the black public sphere "consists of all the markets and audiences that consume the fruits of black creativity, productivity, and sensitivity to the material and moral order of things in America."[451] In this way, according to Austin, the black public sphere "encompasses both politics and economics."[452] Recontextualizing racialized defense strategy in terms of community locates race trials in their appropriate social context.[453] The appeal of local context, however, proves short-lived, for the context of community is multi-faceted. Spurred by historical fragmentation, racial community now appears fatally riven by fissures marked by ethnicity, gender, and sexual orientation. For reasons peculiar to race trials, those fissures recede in the *Nelson* case covered over by simplified expressions of hate. The next Part considers the principal elements of a contextualized racial ethics garnered from Critical Race Theory.

V. Race-ing Ethics

This Part applies the main jurisprudential themes of Critical Race Theory to the issues of racial identity, racialized narrative, and race-neutral representation arising in the *Nelson* trials. The application maps the contingencies of and the tensions internal to racial status and racialized narrative illustrated in the pleadings, motions, and courtroom tactics of the prosecution and defense teams, and in the trial and appellate court rulings adjudicating those strategic practices.

A. Racial Inferiority

Despite differences in the nature of the charges, the conduct of the proceedings, and the ultimate results obtained, both the state and federal trials of Lemrick Nelson constitute race trials. Critical Race Theory helps explain this commonality. At stake in the trials is the symbolic and narrative status of race and racial inferiority. In race trials, the precept of

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450. Austin, *supra* note 124, at 340.

451. *Id.*

452. *Id.* Austin notes:

> The most salient feature of the black public sphere is that it "puts engagement, competition and exchange in the place of resistance, and uses performativity to capture audiences, Black and White, for things fashioned through Black experience."
>
> It is in the black public sphere that black public opinion and a black political agenda are formed. It is in the black public sphere that a conception of the black "good life" is formulated and debated.

Id. (citation omitted).

453. For a deft correlation of context and narrative in the legal construction of race and gender, see Jody Armour, *Just Deserts: Narrative, Perspective, Choice, and Blame*, 57 U. PITT. L. REV. 525 (1996); Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994).

inferiority infects the form and substance of the legal process. The defendant in this process is an object of hate. Here Nelson, guilty of the sin of blackness, falls beyond the redemptive powers of religion and civilization. Hence, he is deserving only of punishment.

The prosecution of Nelson articulates a vision of blackness as original sin. That vision evokes an image of Nelson not only as an object of hate, but also as a deformed subject. Both state and federal prosecutors depicted Nelson and other young black males as enslaved by deviant pathologies of race hatred and mob violence without hope of cure or rehabilitation.[454] The political posturing of local and national lawmakers left this vision of inferiority unchallenged.[455] Federal court construction of the relevant adult transfer statute enacted a similar betrayal, legitimizing the reasonableness of the factual finding of irredeemable black racial inferiority.[456]

The Nelson and Price defense teams reproduced the inferiority precept in their representation. The teams described Nelson as stunted[457] and Price as incompetent.[458] At the same time, they deployed the precept of inferiority to contest the motive, credibility, and neutrality of arresting officers, prosecutors, and federal as well as state judges.[459] The deployment of racialized credibility assessments[460] indicates a hierarchical view of objectivity and truth. On this view, white political and socioeconomic superiority distorts objectivity and deforms truth. Hierarchies of dominant-subordinate race relations, therefore, intimate inherent bias. The next subpart considers whether racial bias gives rise to individual or community harm.

B. Racial Harm

The Nelson and Price defense teams' trumpeting of the rhetoric of inferiority suggests that racialized narratives at times may be wielded strategically to acquit young black males of charges of interracial violence.

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454. *See supra* notes 306-17 and accompanying text.

455. *See* Bob Liff, *Cuomo: Heights Probe to Eye Dinkins' Role*, NEWSDAY, Dec. 18, 1992, at 42 (reporting that New York Governor Mario Cuomo, after meeting with "Jewish leaders," stated: "There is no doubt in my mind that there is in the larger Jewish community, far beyond the Hasidim of Crown Heights or the Jews of Brooklyn or the Jews of the city, a feeling of insecurity, a feeling of disappointment that somehow they are being shunned or worse.").

456. United States v. Nelson, 921 F. Supp. 105 (E.D.N.Y.), *aff'd*, 90 F.3d 636, 640-41 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 1259 (1997); United States v. Nelson, 68 F.3d 583, 589-91 (2d Cir. 1995).

457. *See* Brief for Defendant-Appellee Lemrick Nelson, Jr. at 16-18, United States v. Nelson, 68 F.3d 583 (2d Cir. 1995) (No. 95-1271).

458. *See* Wise, *supra* note 343, at 1.

459. *See* notes 333-352 and accompanying text.

460. *See* Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261, 266-317 (1996) (recounting the historical influence of race on witness credibility).

Acquittal, however, provides no answer to the individual and collective experience of racial stigma-based harm. The proposition that racialized narratives cause harm requires a theory of harm. Civil rights doctrine propounds several theories of harm germane to this inquiry.

Consider first the concept of stigma injury. Embodied in affirmative action,[461] school desegregation,[462] and voting rights[463] doctrine, stigma injury is founded on a classification theory of harm. Under this model, the injury of racial stigma ensues from the state-sanctioned enactment of racial classification. The model of classificatory injury also extends to the color-coded and color-conscious exercise of peremptory challenges under *Batson v. Kentucky*.[464] But extending the substantive parameters of stigma injury fails to cure its conceptual vagueness[465] or its uncertain etiology.[466] Moreover, the strain of extension fails to sever the tie binding status harm to the narrative of black inferiority.[467] Narratives of inferiority portray black defendants as the deviant or deformed representatives of future black generations.[468]

Next consider the notion of expressive or representational harm.[469] Predicated on colorblind principles of participatory citizenship and state regulation of the electoral process, this notion defines injury based on the

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461. *See* Andrew F. Halaby & Stephen R. McAllister, *An Analysis of the Supreme Court's Reliance on Racial "Stigma" as a Constitutional Concept in Affirmative Actions Cases*, 2 MICH. J. RACE & L. 235, 240-47 (1997) (analyzing the constitutional concept of stigma in the context of affirmative action).

462. *See* John D. Casais, Note, *Ignoring the Harm: The Supreme Court, Stigmatic Injury, and the End of School Desegregation*, 14 B.C. THIRD WORLD L.J. 259, 262-64 (1994) (reviewing stigmatic injury in school desegregation cases).

463. *See* Samuel Issacharoff & Thomas C. Goldstein, *Identifying the Harm in Racial Gerrymandering Claims*, 1 MICH. J. RACE & L. 47, 51-54 (1996) (noting the inclusion of stigma harm in voting rights cases).

464. *See also* J.E.B. v. Alabama *ex rel* T.B., 511 U.S. 127 (1994) (extending *Batson* to gender-based classifications).

465. *See* David Flickinger, *Standing in Racial Gerrymandering Cases*, 49 STAN. L. REV. 381, 395-96 (1997).

466. Diagnostic uncertainty plagues attempts to trace the cultural and social etiology of stigma injury. *Compare* Stanislaw Pomorski, *On Multiculturalism, Concepts of Crime, and the "De Minimis" Defense*, 1997 BYU L. REV. 51, 53-69 (examining theories of bias injury), *with* Katheryn K. Russell, *The Racial Hoax as Crime: The Law as Affirmation*, 71 IND. L.J. 593, 607-11 (1996) (exploring theories of sociological injury).

467. *See* Dorothy E. Roberts, *Race and the New Reproduction*, 47 HASTINGS L.J. 935, 943 (1996) ("To this day, one's social status in America is determined by the presence or absence of a genetic tie to a Black parent.").

468. *See* Frankie Y. Bailey, *"The Tangle of Pathology" and the Lawer-Class African-American Family: Historical and Social Science Perspectives*, *in* JUSTICE WITH PREJUDICE: RACE AND CRIMINAL JUSTICE IN AMERICA 49-71 (Michael J. Lynch & E. Britt Patterson eds., 1996).

469. For a deft analysis of expressive harm, see Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 506-16 (1993).

perception of state investment in racial gerrymander.[470] On this definition, the very perception of institutionalized racial bias constitutes harm. Richard Pildes and Richard Niemi liken this categorical harm to the conception of *expressive* harm.[471] Constitutionally cognizable under *Shaw v. Reno*,[472] expressive harm "results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about."[473] Under the model of expressive harm, Pildes and Niemi explain, "the *meaning* of a governmental action is just as important as what that action *does*."[474] Accordingly, state mandated or condoned "policies can violate the Constitution not only because they bring about concrete costs, but because the very meaning they convey demonstrates inappropriate respect for relevant public values."[475]

For Pildes and Niemi, expressive harms implicate the "interpretive dimension of public action."[476] Composed of public understandings and collective norms, this dimension may be roiled by governmental action that conveys the affirmation or rejection of certain commonly held values,[477] such as racial integration or segregation. To advocates and courts clasping on to a theory of expressive harm, neither the general purpose of legislation nor the specific intent of policymakers manifested in the commands of state action warrants traditional modes of constitutional scrutiny.[478] Of greater importance, Pildes and Niemi assert, "is the social message their action conveys or, less positivistically, the message courts perceive the action to convey."[479]

Extrapolating from these models of harm to the modalities of race trials, what matters is attribution, that is, the attribution of "social meaning"[480] to state action. Here, state action comprises state actors and private actors acting in concert with state entities or in accord with state policies and practices. Consider *Shaw v. Reno* in this light. *Shaw* elucidates the constitutional meaning of voting rights when burdened by

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470. *See* John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576 (1997).

471. Pildes & Niemi, *supra* note 469, at 506.

472. 509 U.S. 630 (1993).

473. Pildes & Niemi, *supra* note 469, at 506-07.

474. *Id.* at 507 (emphasis in original).

475. *Id.* Highlighting the centrality of public values, Pildes and Niemi exclaim: "On this unusual conception of constitutional harm, when a governmental action expresses disrespect for such values, it can violate the Constitution." *Id.*

476. *Id.*

477. *See id.* at 507-08.

478. *See id.*

479. *Id.* at 508.

480. Pildes and Niemi remark that the subjective intent actually motivating state action and state actors may be material but not dispositive under an expressive harm approach. *See id.*

race-based state legislation creating majority-black districts.[481] The North Carolina district at issue, containing boundary lines of "dramatically irregular shape," provoked a white claim of unconstitutional racial gerrymander.[482] Concededly designed in a state effort to benefit members of historically disadvantaged racial minority groups, the redistricting plan induced suspicion of race-conscious classificatory decisionmaking.[483]

Writing for the Court, Justice O'Connor declares express racial classifications "immediately suspect" for two reasons: first, because the classifications "threaten to stigmatize individuals by reason of their membership in a racial group," and second, because they tend "to incite racial hostility."[484] To O'Connor, the intertwining of racial classifications within race-conscious gerrymandering schemes, whatever the remedial purposes, "reinforce[s] the belief, held by too many for much of our history, that individuals should be judged by the color of their skin."[485] It is the noxious history of color-coded judgments that, for O'Connor, compels the conclusion that race-based classifications "of any sort pose the risk of lasting harm to our society."[486] Judged to be of higher magnitude in the context of voting, the harm risks the descent away from colorblind aspiration into the balkanized competition of "racial factions."[487]

Reasoning from the premise of feared racial factionalism, O'Connor moves rhetorically to the evocation of segregation and apartheid. That move opens *Shaw* to the concept of expressive or representational harm. Representative democracy infuses the core of that concept. Indeed, for O'Connor, racial gerrymandering "reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole."[488] Condemning that message as pernicious, O'Connor asserts that "[a] reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid."[489] The intolerable resemblance to apartheid, O'Connor continues, "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think

481. *See id.* at 633.
482. *Id.* at 633, 633-34.
483. *See id.* at 633-34, 642.
484. *Id.* at 642-43.
485. *Id.* at 657.
486. *Id.*
487. *Id.*
488. *Id.* at 650.
489. *Id.* at 647.

alike, share the same political interests, and will prefer the same candidates at the polls."[490]

To the extent that it conjures up "impermissible racial stereotypes," O'Connor concludes, that perception is constitutionally fatal to a reapportionment plan.[491] That same perception is equally fatal when applied to a redistricting plan plainly "created solely to effectuate the perceived common interests of one racial group."[492] In these circumstances, O'Connor repeats, "elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole."[493] Encapsulating this logic, Richard Briffault delimits representational harm as "the reinforcement of the stereotype that voters of the same race tend to think and vote alike, and the signal that elected officials should represent only the racial majority."[494] Stitched together, the *Shaw* theories of stigma injury and expressive or representational harm may contribute to the formulation of a new tort[495] based on social contract[496] or group defamation[497] precepts. Undergirding this formulation is a reconfigured sense of a social contract binding among racial groups for the purpose of respecting the dignity of racial identity and of safeguarding against the harm inflicted by infringements upon the integrity of a racial identity narrative. The next subpart explores the implications of a theory of racial harm to the development of a racial ethics.

C. Racial Ethics

Basic to the development of a racial ethics are the issues of scope and fidelity to precedent. Ethical directives may command a broad or narrow regulatory field. The narrow ethical range of current racial regulation stems not only from constitutional commitments to a colorblind faith, but also from doubts pertaining to the institutional competence of appropriate regulatory bodies, such as courts and bar associations.[498] Whatever the elected scope of broadened regulation, the directives exert greater efficacy

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490. *Id.*

491. *Id.*

492. *Id.* at 648.

493. *Id.*

494. Richard Briffault, *Race and Representation After* Miller v. Johnson, 1995 U. CHI. LEGAL F. 23, 38 (1995).

495. *See* Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEXAS L. REV. 1539, 1540-41 (1997) (offering definitional criteria for new torts).

496. *See* Marshall S. Shapo, *A Social Contract Tort*, 75 TEXAS L. REV. 1835, 1844 (1997) (construing tort law "as a catalyst for social cohesion").

497. *See* Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1 (1996) (examining reputational harm as a socially constructed injury).

498. *See generally* Wilkins, *Who Should Regulate Lawyers?*, *supra* note 61.

when linked to the text, structure, and history of traditional ethics rules. Finding linkages in the text, structure, and history of ethics rules involves the discrete interpretive practices of statutory construction, common law parsing, and moral divination. Conceptual disagreement over the constituent elements of those practices unsettles governing rules producing a juridical environment of interpretive chaos.[499] Both linguistic[500] and rule-based[501] indeterminacy contribute to this sense of interpretive chaos.

Nonetheless, ethical rules perform a kind of "mystic function"[502] in matters of race. Espousing race-neutral rhetoric, the rules impose order on the interpretive chaos of color-coded and color-conscious discourse inside the courtroom. To discharge this performative function, the rules embrace "identity speech."[503] That speech, shown here in the form of racialized narrative, effectively stabilizes legal discourse.

Race brings a fixed coherence to legal discourse by associating color-coded and color-conscious narratives with objectivity.[504] Frederick Gedicks explains this association, asserting that "[v]alidity in interpretation depends at some point on a demonstration of objective meaning in the interpretive process."[505] Absent this demonstration, he adds,

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499. Paul Campos discovers chaos in the most basic interpretive practices of advocacy and adjudication. *See generally* Paul F. Campos, *The Chaotic Pseudotext*, 94 MICH. L. REV. 2178 (1996). He explains:

> [I]f the participants in an interpretive practice cannot agree on the basic constitutive elements of that practice—if they disagree about whether when they are "interpreting" a "text" they are searching for a text's author's intentions, or deploying formal rules of meaning, or disputing what constitutes a legitimate author for a certain kind of text, or contesting which texts count for how much in the production of the system's meaning—then this lack of conceptual agreement concerning the nature of the constitutive elements of the practice will itself tend to have a pseudotextualizing effect on those texts the practice is attempting to interpret. And lack of such conceptual agreement, coupled with an insistence on both the absolute necessity and the assumed existence of such agreement, is precisely what identifies an interpretive practice as a chaotic discourse.

Id. at 2224.

500. *See* Timothy A.O. Endicott, *Linguistic Indeterminacy*, 16 OXFORD J. LEGAL STUD. 667, 669 (1996) (defining linguistic indeterminacy as "unclarity in the meaning of linguistic expressions").

501. On ethics rule indeterminacy, see generally David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990).

502. This phrase is taken from Bickel. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 29-33 (2d ed. 1986) (pointing to the legitimation function of Supreme Court review and adjudication); *see also* Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359, 401, 401-03 (1997) (comparing the "mystic function" of the Supreme Court with the myth that courts are authoritative arbiters of the Constitution).

503. *See* William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2442 (1997) (assessing the value of identity speech to the gay community).

504. On the earmarks of narrative coherence in legal decision-making and legislative rule-making, see Jan M. Van Dunné, *Narrative Coherence and Its Function in Judicial Decision Making and Legislation*, 44 AM. J. COMP. L. 463, 465 (1996).

505. Frederick M. Gedicks, *Conservatives, Liberals, Romantics: The Persistent Quest for Certainty in Constitutional Interpretation*, 50 VAND. L. REV. 613, 643 (1997).

"interpretive method cannot designate as valid one among differing interpretations without being random or arbitrary."[506]

Changing accounts of racial identity expressed in racialized narratives fail to weaken the claim of objectivity contained in the ethics rules. Objectivity holds constant because the accounts accrue from the same baseline of racial bias and prejudice. Stretched along this baseline, only the circumstances of bias change. The meaning attached to these circumstances is predictable, not random. Predicting the exact form of narrative, of course, involves the acknowledgement of contingency. For Gedicks, interpretive forms "are contingent and local, peculiar to the case, the judge, and the tradition."[507] As a consequence, the objectivity of racialized narratives articulated under ethics rules exists in a closed interpretive field of the courtroom and the law office.

Surprisingly, the structure of the rules militates against interpretive closure. The structure of the rules opens up the interpretive field of racialized narratives by inscribing unresolved conflicts in lawyer commitments to the law, to the client, and to the tribunal. The conflicts arise from public axioms of lawyer obligation implied in the rules. Unfortunately, racialized narratives describe what Sanford Levinson calls "a singular *public*."[508] The depiction of a singular racial public survives in spite of the presence of "various publics"[509] within communities of color. Reference to a pluralist racial community[510] is a threshold obligation of a racial ethics.

In this preliminary design of a racial ethics, it is appropriate to mark the continuities and discontinuities of racialized advocacy inlaid within conventional rules. Like racialized narratives, racialized practice traditions vary over time and place. Stephen Feldman cautions that "while the *concept* of a tradition helps us to grasp or understand the social construction of reality—our being-in-the-world—we should not attempt to reify or reduce any actual tradition (or even the concept of a tradition) into a single linguistic formulation or a fixed object."[511] The diverse

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506. *Id.*

507. *Id.* at 645.

508. *See* Sanford Levinson, *They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society*, 70 CHI.-KENT L. REV. 1079, 1118-19 (1995) (emphasis in original).

509. *Id.* at 1118.

510. On community diversity and divergence, see Glen O. Robinson, *Communities*, 83 VA. L. REV. 269, 333-46 (1997).

511. *See* Stephen M. Feldman, *The Politics of Postmodern Jurisprudence*, 95 MICH. L. REV. 166, 198 (1996) (emphasis in original) (footnote omitted). Feldman asserts: "Traditions are neither fixed and precisely bounded entities nor are they passed on to individuals through some precise method or mechanical process. The boundaries of any tradition are always contested, always constituted and reconstituted, and this constant reconstitution always is simultaneously constructive and destructive." *Id.*

traditions of racialized practice, fragmenting into colorblind, color-coded, and color-conscious forms, resist reductionist tendencies of this sort. Yet, continuities of racialized practice may be discerned in numerous settings.

In the criminal setting, for example, continuity runs to the designation of the defense lawyer as the appropriate decisionmaker in determining the means to attain specified client objectives, namely freedom.[512] Determinations entailing issues of racial identity and racialized narrative, however, demand an element of professional competence that lawyers may lack. That incompetence is aggravated by differential lawyer-client normative positions, risk-taking attitudes, and access to information. The transactional inefficiency of an alternative decisionmaking arrangement persuades lawyers to ignore evidence of their own incompetence in the strategic exercise of racial judgment and enunciation of racialized narrative.

A second point of continuity pertains to client consent. The notion of informed consent pervades the ethics rules. Although the rules contemplate a range of consent options of varying transactional cost,[513] all cite to a fundamental client right to direct a choice of outcomes structured on implied liberty and due process interests.[514] Yet, none seriously consider the circumstances and conditions of the "moment of choice"[515] in race cases, even given the ordinary risk of undue influence caused by inequalities of power or circumstance.[516] Racial difference at the level of lawyer-client interaction heightens the element of risk. Moreover, difference may generate special racialized effects, exacting a chilling effect on speech.[517]

A third point of continuity concerns client fidelity. The notion of client fidelity or loyalty is fundamental to the conditions of race-neutral representation. Despite historical variation, such conditions include the presumptions that client self-interest and decisionmaking integrity exist apart from considerations of community harm or politics. These

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512. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) cmt. (1997).

513. On the range of consent under coercive circumstances, see Joshua Cohen, *The Arc of the Moral Universe*, 26 PHIL. & PUB. AFF. 92, 101-11 (1997) (explicating symbolic, distributive, and productive uses of force under slavery).

514. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) cmt. (1997).

515. Scott FitzGibbon & Kwan Kew Lai, *The Model Physician-Assisted Suicide Act and the Jurisprudence of Death*, 20 HARV. J.L. & PUB. POL'Y 127, 149 (1996) (examining the conditions impinging on the exercise of personal autonomy in seeking assisted suicide).

516. *See generally* Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 578-92 (1997) (discussing the presumption of undue influence in fiduciary relationships).

517. *Compare* Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399 (1996), *and* Deborah Epstein, *Free Speech at Work: Verbal Harassment as Gender-Based Discriminatory (Mis)Treatment*, 85 GEO. L.J. 649 (1997), *with* Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627 (1997) (all debating the intersection of harassment law and free speech).

presumptive conditions prohibit client coercion applied in the name of community, politics, or social utility.[518] David Luban notes that coercion of this sort "affronts deep-seated intuitions about human dignity."[519] Paradoxically, the rule-decreed advancement of client self-interest may entail the use of self- or community-subordinating racialized narrative. Failure to use such narrative may constitute ineffective assistance or even malpractice.

Confronting the compelled use of racialized narrative recommends devising a racial ethics that contains, if not a release option freeing lawyers from such use, then at least a remediation option limiting racialized narrative to situations where it may rectify adversarial advantage or deter adversarial deployment, even through retaliation. Failing that, the invention of a racial ethics must break from the text, structure, and history of the ethics rules. Departing from these traditions enables alternative code system designers, whether bar associations or state courts, to build on the discontinuities of client-community interest in favor of an *antifidelity* position. This position reimagines an "ethic of responsibility" for lawyers in race trials. The ethic is based on a notion of legal and political responsibility to an *other*—an individual, group, or community connected to but standing apart from the client.[520] Adoption of that ethic requires provocative value judgments based on an as yet inchoate politics of group and community representation. These moral judgments dictate the abandonment or modification of the norms governing client autonomy and lawyer conflicts of interest in race trials. In their place, designers must uncover alternative norms that will mediate the tension between individual client and collective group interests.[521]

The mediation of client and community interests commences through the forging of links between individual and collective deliberation.[522]

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518. *See* David Luban, *What's Pragmatic About Legal Pragmatism?*, 18 CARDOZO L. REV. 43, 63 (1996) (discussing the tension between pragmatic and dignitary claims in the context of coercion).

519. *Id.*

520. Simon Chesterman mentions a new ethic of "responsibility to justice." *See* Simon Chesterman, *Beyond Fusion Fallacy: The Transformation of Equity and Derrida's* 'The Force of Law', 24 J.L. & SOC'Y 350, 364 (1997). He adds:

> Not only is every case a hard one, in every case the law must be *reinvented.* Responsibility to justice is in this sense a manifestation of the relation to the other, the conditions for which intersubjectivity lie in the to-come. And it is here, in the face of this impossible demand to "address oneself to the other in the language of the other," that the condition of all possible justice lies.

Id. (footnote omitted) (emphasis in original).

521. *See* Kevin C. McMunigal, *Of Causes and Clients: Two Tales of* Roe v. Wade, 47 HASTINGS L.J. 779, 805-07, 810-18 (1996) (citing encroachment on client autonomy in public interest reproductive rights advocacy).

522. *Cf.* Kenneth Ward, *The Allure and Danger of Community Values: A Criticism of Liberal Republican Constitutional Theory*, 24 HASTINGS CONST. L.Q. 171, 197-203 (1996). Ward observes: "Liberal republicans link individual and collective deliberation. The political community emerges as

The goal is to engender a "politics of presence"[523] for individuals, groups, and communities that overcomes racially essentialist narratives.[524] Kathryn Abrams defines this politics "as a society-wide conversation about the political consequences of conceiving people as members of groups rather than as unmarked individuals."[525] Because that conversation may be quickly subverted by the indeterminacy of individual-group boundaries, transforming the antifidelity position into practice requires client-community dialogue. Both trust and mutual respect serve as prerequisites for dialogue[526] employed in reconciling the competing rights of clients and communities.[527] Amy Gutmann and Dennis Thompson define mutual respect in a manner that "requires a favorable attitude toward, and constructive interaction with, the persons with whom one disagrees."[528] Basic to this attitude is a sense of reciprocity[529] grounded in the idea of mutual client-community accountability.[530]

Reciprocity is realized in the practice of deliberative democracy.[531] Distilling the notion of mutual respect put forward by Gutmann and Thompson, Robert George argues that "reciprocity is realized in practice

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people discover values that are consistent with their private interests. Because the community results from individuals' ordering their private interests, political institutions must respect rights that promote individual and collective deliberation." *Id.* at 203.

523. ANNE PHILLIPS, THE POLITICS OF PRESENCE 5 (1995).

524. *See* Note, *The Myth of Context in Politics and Law*, 110 HARV. L. REV. 1292 (1997) (discussing essentialist and antiessentialist tensions in visions of group rights).

525. Kathryn Abrams, *The Supreme Court, Visibility, and the "Politics of Presence"*, 50 VAND. L. REV. 411, 411 (1997) (footnote omitted); *see also* PHILLIPS, *supra* note 523, at 1-26.

526. On dialogue as an element of pragmatic moral problem solving, see Joseph J. Fins et al., *Clinical Pragmatism: A Method of Moral Problem Solving*, 7 KENNEDY INST. ETHICS J. 129, 140 (1997) (using a medical case study to demonstrate the effectiveness of dialogue for moral problem solving).

527. *See* Georgia Warnke, *Law, Hermeneutics, and Public Debate*, 9 YALE J.L. & HUMAN. 395, 406-08 (1997) (discussing the potential for mutual learning in constitutional debates).

528. AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 79 (1996).

529. Robert George remarks:

> Reciprocity is above all a constitutive moral value of deliberative democracy, something that democratic citizens owe to one another as a matter of justice. It is what might be called a "common good" of the political community, a mutual moral benefit to all concerned, even (or perhaps especially) when people find themselves in irresolvable disagreement over fundamental moral issues. As such, the mutual respect citizens owe to one another provides a kind of moral bond between them, their substantive moral disagreements notwithstanding; and it requires them to search for moral accommodation whenever possible.

George, *supra* note 388, at 1394.

530. *See* Stephen K. White, *Weak Ontology and Liberal Political Reflection*, 25 POL. THEORY 502, 518 (1997).

531. *See* Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L.J. 2475, 2503 (1997) ("[I]t seems at least possible for citizens who differ fundamentally over certain basic moral questions to share a 'deliberative' conception of democracy that includes the mutually recognized obligations of citizens to treat those with whom they disagree with civility and respect.").

when, or to the extent that, citizens understand and accept the obligation to justify their positions to those fellow citizens who reasonably disagree."[532] George adds that "people ought to respect the principle of reciprocity whenever they find themselves in disagreement with reasonable people of goodwill, regardless whether they find the position (or even the arguments) advanced by such people to be worthy of respect."[533] To be sure, reciprocity holds no guarantee of client-community interest mediation. Both criminal prosecution and defense regimes privilege client and government interests over community and third party considerations. Yet, reciprocity introduces a new mode of dialogue expressly tied to the creation and recollection of community. In this way, it promises hope of interest convergence and, at the same time, anticipates the protest of interest divergence and ultimate conflict. Whether the application of new forms of race-conscious community-guided regulation to prosecutorial and defense models of legal advocacy produces a sense of interest convergence sufficient to overcome the radical individualism of the adversarial model remains unclear. Nevertheless, reaching out to achieve that result is plainly the ambition of a racial ethics. The next Part considers objections to that ambition.

VI. Objections

This part enumerates objections to the alternative regulatory concept of a race-conscious community ethic of advocacy. Three such objections seem especially powerful. The first goes to the claim of client-community goal correspondence. The second deals with the nature of the attorney-client relationship. The third cuts to the causal connections linking law, culture, and society.

Historically, the claim of client-community goal consensus may be insupportable. Jurisprudentially, it may be unworkable. The historical record of client-community consensus in communities of color is mixed. Instead of concordance, the record is one of conflict and fragmentation. Worse, the claim of deliberative dialogue as a means of building consensus

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532. George, *supra* note 388, at 1394.

533. *Id.* at 1397. George comments:

> By observing the principle of reciprocity in moral and political debate, one is not necessarily indicating respect for a *position* (which one perhaps reasonably judges to be so deeply immoral as to be unworthy of respect), but for the reasonableness and goodwill of the *person* who, however misguidedly, happens to hold that position. The point of observing the requirements of reciprocity is to fulfill one's obligations in justice to one's fellow citizens who are, like oneself, attempting to think through the moral question at issue as best they can.

Id. at 1398.

seems unworkable. The claim more nearly suggests a misguided jurisprudence of democracy predicated on a rebuttable presumption of collective or other-directed deliberation.[534]

The historical and jurisprudential obstacles to achieving client-community goal consensus are in part a function of the adversarial system. Critical Legal Studies scholars and others have long noted the system-wide adversarial tendency to isolate, narrow, and juxtapose the interests of individual litigants against and in competition with collective group or community interests.[535] This incongruency inheres in the liberal conception of adversarialism spawning inconsistencies between the systemic goals of group representation and the functions of individual advocacy. Strategic analysis of this internal inconsistency or weakness indicates that race-conscious community advocacy may produce serious "system-unintended" consequences[536] by operating to subordinate clients in order to meet the goal of collective representation. Most serious of these unintended consequences is the provision of ineffective assistance to the detriment of the client.

A second objection speaks to the unsatisfactory nature of the account given of the attorney-client relationship. According to this objection, the attorney-client relationship can support neither an ethos of "democratic self-perfection"[537] nor a pursuit of client high-risk preferences in litigation strategy.[538] By any measure, the advocacy relationship already suffers the inequities of paternalism in counseling.[539] The potential deception of clients and communities of color in counseling and negotiation

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534. For sharp criticism of deliberative regimes, see Lynn M. Sanders, *Against Deliberation*, 25 POL. THEORY 347 (1997).

535. *See* Peter Gabel, *The Phenomenology of Rights—Consciousness and the Pact of the Withdrawn Selves*, 62 TEXAS L. REV. 1563, 1569-99 (1984).

536. Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479, 507, 506-09 (1997). LoPucki explains:

> In essence, strategic analysis is a modern-day adaptation of Oliver Wendell Holmes's "bad man" theory of the law. Holmes argued that the meaning of a law might be best understood by the use that a bad man might make of it. In systems terms, Holmes's bad man is replaced by a strategist. The strategist may be either a real person, whose actual strategies are observed by the system analyst, or a hypothetical person. The strategist modifies his or her conduct to seek advantages from the system. If the strategist is able to bring about "system-unintended" results, the strategist thereby demonstrates the need for changes in the system.

Id. at 507.

537. On the ethos of this democratic ideal, see Richard Shusterman, *Putnam and Cavell on the Ethics of Democracy*, 25 POL. THEORY 193, 208 (1997).

538. *See* Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 122-30 (1996).

539. *See* David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454; William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); Mark Spiegel, *The Case of Mrs. Jones Revisited: Paternalism and Autonomy in Lawyer-Client Counseling*, 1997 BYU L. REV. 307, 313-20.

aggravates these inequities.[540] Conceiving of the attorney-client relationship as a "play"[541] of roles and identities, and of shared interests and commitments, fails to mitigate the inequities of differential power and status. Whether this differential, or state bar efforts to control its ideological manifestation, carries the risk of liability is unclear.[542]

A third objection runs to the alleged crisis that afflicts race, lawyering, and ethics. From the standpoint of this objection, the cause and cure of the crisis vexing race trials pose a problem of politics, culture, and society, not law.[543] Robin Barnes, for example, argues that race trials show the troubling entanglements of culture and society with the law, rather than the cataclytic force of law itself.[544] But simply acknowledging the majority cultural perception of a *lawless* black community[545] or the minority perception of an *ignorant* white community[546] leaves untouched the assertion of the political and social limits of law.[547] The deterioration of civil rights practice[548] and the weakening of cross-racial or biracial coalitions[549] testifies to those limits.

VII. Conclusion

Having mapped the general structure of race trials, studied an exemplar of such trials, and contemplated the race-conscious community-guided

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540. *See* Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659 (1990). *Compare* Sandra D. Nicks et al., *The Rise and Fall of Deception in Social Psychology and Personality Research, 1921 to 1994*, 7 ETHICS & BEHAV. 69, 73-76 (1997) (discussing the use of deception in social psychological and personality research).

541. Barbara Stark, *The Practice of Law as Play*, 30 GA. L. REV. 1005, 1018 (1996).

542. *See* Ralph H. Brock, *Giving Texas Lawyers Their Dues: The State Bar's Liability Under* Hudson *and* Keller *for Political and Ideological Activities*, 28 ST. MARY'S L.J. 47, 83-92 (1996).

543. *See* Robin D. Barnes, *Interracial Violence and Racialized Narratives: Discovering the Road Less Traveled*, 96 COLUM. L. REV. 788 (1996).

544. *Id.* at 789-93.

545. *See* Richard Delgado, *Rodrigo's Fourteenth Chronicle: American Apocalypse*, 32 HARV. C.R.-C.L. L. REV. 275 (1997); Kofi Buenor Hadjor, *Race, Riots and Clouds of Ideological Smoke*, 38 RACE AND CLASS 15, 30 (1997); *cf.* Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1412 (1997) (discussing the nineteenth century non-Indian understanding of tribes as "lawless").

546. *See* Tracy Isaacs, *Cultural Context and Moral Responsibility*, 107 ETHICS 670, 683 (1997) (analyzing the moral standing of cultural practices and their influence on individual responsibility).

547. *See* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 7 (1987) (enumerating sociolegal barriers to racial equality); RICHARD DELGADO & JEAN STEFANCIC, FAILED REVOLUTIONS: SOCIAL REFORM AND THE LIMITS OF LEGAL IMAGINATION 1 (1994) (delineating a narrow range of reform options available to judges and attorneys).

548. *See* Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 207-37, 243-48 (1997) (discussing the factors reducing the viability of civil rights litigation).

549. *See* Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291, 320-21 (1997) (noting the squandering of historical opportunities to build cross-racial coalitions in American politics).

regulation of participating lawyers, return once more to the question of how to accomplish the tasks of reconstructing racial identity, reimagining racialized narrative, and reforming race-neutral representation while respecting the freedom of legitimate advocacy. Begin with the threshold task of reconstructing racial identity. Some contend that it is possible to destabilize racial identity. Further, they claim that destabilization imposes a liberating effect on the subordinated. Alex Johnson, for example, argues that "[d]estabilizing the marks of 'black' and 'blackness' will have a liberating effect on those previously classified as blacks who have internalized the supremacy and metric of whiteness as the mediating value in determining the worth of an individual based on skin color."[550] This Article offers a less sanguine view about destabilizing the categories of racial identity. It in fact views the search for a "liberating effect" to be perhaps futile. Nevertheless, the futility of manipulating racial identity in order to force an encounter with the racial other should not give rise to a postmodern call for a "less rational, less normative, less 'objective'" sociolegal consciousness.[551] Instead, the call, if it is heard, should go out for racial dialogue.

Calling for racial dialogue without consideration of ethics-rule implementation and enforcement seems fruitless. But enforcement requires the sanction of prosecution. Judith Butler points out that "when political discourse is fully collapsed into juridical discourse, the meaning of political opposition runs the risk of being reduced to the act of prosecution."[552] Prosecution in this sense signals both an act of racial resistance and an admission of racial tragedy. Drawing on the work of Max Weber,[553] Louis Wolcher suggests "an ethic that is inextricably connected to the 'knowledge of tragedy with which all action, but especially political action, is truly interwoven.'"[554] The acknowledgement of tragedy, Maeve Cooke asserts, "is itself a form of moral recognition."[555] Yet, Cooke remarks, "it also suggests that nothing can be done."[556]

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550. Johnson, *supra* note 77, at 931 (footnote omitted).

551. On this call, see Kathryn Temple, *Law's Hidden Face: Reading Narrative Jurisprudence and Its Critics*, *in* LAW AND LITERATURE PERSPECTIVES 352, 373 (Bruce L. Rockwood ed., 1996).

552. Judith Butler, *Burning Acts: Injurious Speech*, 3 U. CHI. L. SCH. ROUNDTABLE 199, 205 (1996).

553. *See* MAX WEBER, *Politics as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 117 (H.H. Gerth & C. Wright Mills eds. & trans., 1958) ("The final result of political action often, no, even regularly, stands in completely inadequate and often even paradoxical relation to its original meaning."); *see also* ANTHONY T. KRONMAN, MAX WEBER 166, 175-82 (1983) (amplifying Weber's view concerning the tragic nature of political action).

554. Louis E. Wolcher, *Pavčnik's Theory of Legal Decisionmaking: An Introduction*, 72 WASH. L. REV. 469, 479 (1997) (quoting WEBER, *supra* note 553, at 117, 120).

555. Maeve Cooke, *Authenticity and Autonomy: Taylor, Habermas, and the Politics of Recognition*, 25 POL. THEORY 258, 281 (1997).

556. *Id.*

Even the call to dialogue holds limited promise that something can be done. Racial dialogue, Richard Banks notes, is "channelled by prevailing, though rarely explicitly stated, beliefs about black Americans."[557] To Banks, "[t]he extent to which individuals, both black and white, gain entry into public debate depends *in part* on the extent to which they accept, or at least fail to challenge, prevailing views about blacks and the underlying assumptions that frame racial debate."[558] Historically, he notes, "[w]hen those beliefs and assumptions posit black inferiority or justify racial inequality, black participation serves to legitimate the very state of affairs that the involvement of blacks suggests has been transformed."[559] Accordingly, "interracial dialogue about race, rather than leading to new understandings, heightened sensitivities, and more nuanced insights, might perpetuate existing power disparities and entrench racial subordination."[560]

Nonetheless, surely Banks does not rule out the bonds of cross-racial normative commitment. Shared normative commitment is a precondition for deliberative community.[561] A further condition, Eric Yamamoto cautions us, involves interracial justice, specifically "a commitment to antisubordination *among* nonwhite racial groups."[562] Efforts to press anti-subordination initiatives thrive in a communicative environment untainted by racism. The unlikelihood of the emergence of a "racism-free communicative environment,"[563] however, encourages the turn to the more modest goal of empathy.

Renewed calls for empathy in race-infected contexts are now widely heard,[564] even in contemporary politics.[565] Their recurrence has led to

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557. R. Richard Banks, *The Political Economy of Racial Discourse*, 9 YALE J.L. & HUMAN. 217, 237 (1997) (reviewing HARLON L. DALTON, RACIAL HEALING: CONFRONTING THE FEAR BETWEEN BLACKS AND WHITES (1995)).

558. *Id.* at 237-38 (emphasis in original).

559. *Id.* at 238.

560. *Id.*

561. *See* Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 97 (describing the appropriate environment for effective civic deliberation).

562. Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 UCLA ASIAN PAC. AM. L.J. 33, 34 (1995) (emphasis in original) (footnote omitted).

563. Frank I. Michelman, *Must Constitutional Democracy Be "Responsive"?*, 107 ETHICS 706, 723 (1997) (book review) (discussing democratic citizenship and the import of content based restrictions on free speech).

564. *See* Lucie E. White, *Seeking "... The Faces of Otherness ...": A Response to Professors Sarat, Felstiner, and Cahn*, 77 CORNELL L. REV. 1499, 1508-09 (1992); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989); *see also* Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); Thomas Morawetz, *Empathy and Judgment*, 8 YALE J.L. & HUMAN. 517 (1996); Cynthia V. Ward, *A Kinder, Gentler Liberalism? Visions of Empathy in Feminist and Communitarian Literature*, 61 U. CHI. L. REV. 929 (1994).

565. *See* CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES 3-40 (1996).

a distinction between authentic and inauthentic empathy. Richard Delgado, for example, points to *real* empathy, defining such empathy in terms of "putting the client first and getting fully inside the client's mind and experience."[566] Counterpoised against this teaching is false empathy and the empathic fallacy.[567] False empathy, Delgado explains, occurs when "a white believes he or she is identifying with a person of color, but in fact is doing so only in a slight, superficial way."[568] For Delgado, empathy requires a double consciousness realized in the ability to "view[] experience from two perspectives at once."[569]

Double or multiple consciousness gives rise to the second task of reforming racialized narratives. Like Kenji Yoshino's gay closet, racialized narrative is "oppressive even in its protective aspects."[570] The task is to search for instrumentally useful, "winning" narratives that avoid the reification of racial stereotypes.[571] In sum, the goal is to present what Leti Volpp describes as "more complex and contextualized descriptions" of the sociolegal world of racial violence.[572]

Striving to recontextualize description alters the practice of race-neutral representation. That practice rationalizes racial subordination under the norm of color-blindness. Moreover, it sanctions the continuity of racial subordination under modes of reformist legal rhetoric.[573] Recontextualizing practice in the criminal context requires an epistemic shift in the symbolic and discursive construction of race that moves toward a pluralized interpretation of race. The move in this direction involves no

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566. Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61, 70 (1996); *see also* DELGADO, *supra* note 224, at 4-36.

567. Delgado, *supra* note 566, at 70-71; *see also* Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1261 (1992) (citing the "*empathic* fallacy") (emphasis in original).

568. *See* Delgado, *supra* note 566, at 70. Delgado adds: "[W]hen a white empathizes with a black, it's always a white-black that he or she has in mind. The white surmises what he would be like if he were black, but with his same wants, needs, perspectives, and history. All grounded in white experience of course." *Id.* at 71 (footnote omitted).

569. *Id.* at 72; *see also* Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 9 (1989).

570. Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1801 (1996). Yoshino notes that the protective aspects of the gay closet hold "sinister long-term implications," particularly in the negative impact on gay political mobilization. *Id.* at 1800.

571. *See* Leti Volpp, *Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1616 (1996) (linking sociolegal descriptions and pernicious cultural stereotypes).

572. *Id.* at 1616; *see also* Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post-Modern, Multi-Cultural World*, 1 J. INST. STUDY LEGAL ETHICS 49, 62 (1996) (envisioning a legal system denoted by "a greater multiplicity of stories being told, of more open, participatory and democratic processes, yielding truths that are concrete, but contextualized, explicitly focusing on who finds 'truth' for whose benefit").

573. On the uses of reformist rhetoric, see Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN L. REV. 1111 (1997).

clear-cut break, but rather a process of subversion intended to destabilize received interpretations of race. That process lays challenge to the natural and necessitarian justification for the preservation of racial status inequality.

The hoped-for consequence of practicing a race-conscious community ethic is to be left with the plural, contested, and ambiguous meanings of race in legal discourse. Revealing these meanings is an ongoing process of narrative and symbolic disclosure. We can commence that process by following Robert Gordon's direction to liberate the political imagination of lawyers "*by revealing suppressed alternatives*" embedded in material conditions and symbolic systems.[574] The resulting upheaval will be marked by a loss of transcendent truth about racial status and race relations.[575] The identity distortions of racialized narratives signal lost opportunities for relations of racial unity.[576] That result would ring tragic were there a semblance of unity within our reach.

574. Robert W. Gordon, *An Exchange on Critical Legal Studies Between Robert W. Gordon and William Nelson*, 6 LAW & HIST. REV. 139, 178 (1988) (emphasis in original).

575. *See* David M. Adams, *Objectivity, Moral Truth, and Constitutional Doctrine: A Comment on R. George Wright's* "Is Natural Law Theory of Any Use in Constitutional Interpretation?," 4 S. CAL. INTERDISC. L.J., 489, 499 (1995) (contending that transcendent truth "no longer has any real purchase" for accounts of moral experience).

576. *See* Leslie Wilson, *Lost Opportunity: African-American Populism*, 104 TELOS 89, 95 (1995) (documenting the late nineteenth century collapse of the populist opportunity for racial reconciliation).