

2002

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Recommended Citation

Anthony V. Alfieri, *Ethics, Race, and Reform*, 54 *Stan. L. Rev.* 1389 (2002).

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Ethics, Race, and Reform

Anthony V. Alfieri*

INTRODUCTION

Deborah Rhode is a highly acclaimed scholar and a distinguished public servant.¹ Prolific in both academic scholarship and popular commentary, she is the author of numerous books, articles, and essays on the law and the legal profession. In an important convergence of her roles as a scholar and a public intellectual, Rhode recently returned to the subject of the profession in a new book titled *In the Interests of Justice: Reforming the Legal Profession*.² Like her prior work, *In the Interests of Justice* profoundly enriches the discourse of ethics and professionalism. Equally important, taken as part of a larger normative enterprise, it inspires others to pursue justice-seeking projects.³

* Professor of Law and Director, Center for Ethics and Public Service, University of Miami School of Law. I am grateful to Adrian Barker, Naomi Cahn, Dennis Curtis, John Ely, Michael Fischl, Clark Freshman, Hilary Gershman, Bob Gordon, Ellen Grant, Patrick Gudridge, Angela Harris, Geoff Hazard, Amelia Hope, Judith Resnik, Deborah Rhode, Tanina Rostain, Austin Sarat, Bill Simon, Jonathan Simon, Karen Throckmorton, and Frank Valdes for their comments and support.

I also wish to thank Shana Augustine, Porpoise Evans, Christina Farley, Ebony Livingston, and the University of Miami School of Law library staff for their research assistance, as well as Kirby Faciane, Mark Poe, and the editors of the *Stanford Law Review* for their patient devotion.

This Essay is dedicated to Deborah Rhode.

1. Rhode recently served as the President of the Association of American Law Schools and as senior counsel to the United States House Judiciary Committee on impeachment. See Deborah L. Rhode, *The Professional Responsibilities of Professional Schools*, 49 J. LEGAL EDUC. 24 (1999); see also DEBORAH L. RHODE, CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT (1998); Deborah L. Rhode, *Conflicts of Commitment: Legal Ethics in the Impeachment Context*, 52 STAN. L. REV. 269 (2000).

2. See DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000).

3. Rhode's founding work and leadership as Director of the Keck Center on Legal Ethics & the Legal Profession at Stanford Law School inspired the development of numerous legal ethics centers elsewhere, including the University of Miami School of Law's Center for Ethics & Public Service.

For many, the subject of contemporary justice in American law at the hands of its heralded profession might prove a daunting project.⁴ Yet, for Rhode, the subject affords an opportunity to enlarge a body of scholarship already stunning in its breadth and virtuosity. Rhode's scholarship engages two main fields of study: equality⁵ and gender,⁶ and ethics⁷ and professionalism.⁸ *In the Interests of Justice* addresses primarily the latter. Rooted in interdisciplinary literature, its genealogy combines multifarious antecedents. On the politics of law and ethics, the book garners from the work of Richard Abel,⁹ Robert Gordon,¹⁰ William Simon,¹¹ and David Wilkins.¹² On gender in

4. Rhode has previously taken up this theme. See Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785 (2001) (discussing the legal profession's unwillingness to take equal justice seriously at a conceptual, doctrinal, or political level); Deborah L. Rhode, *Symposium Introduction: In Pursuit of Justice*, 51 STAN. L. REV. 867 (1999) (pointing out inadequacies in the bar's prevailing ethical norms and resulting costs to the profession and the public).

5. See DEBORAH L. RHODE, *SPEAKING OF SEX: THE DENIAL OF GENDER EQUALITY* (1997); Deborah L. Rhode, *Equal Rights in Retrospect*, 1 LAW & EQUALITY 1 (1983); Deborah L. Rhode, *Sex-Based Discrimination: Common Legacies and Common Challenges*, 5 S. CAL. REV. L. & WOMEN'S STUD. 11 (1995); see also Deborah L. Rhode, *What About Poor Women?*, NAT'L L.J., Oct. 23, 2000, at A17.

6. See Deborah L. Rhode, *Gender and Professional Rules*, 63 FORDHAM L. REV. 39 (1994); Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547 (1993); see also Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181 (1994).

7. See ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION (Deborah L. Rhode ed., 2000); DEBORAH L. RHODE, *PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD* (2d ed. 1998); DEBORAH L. RHODE & GEOFFREY C. HAZARD, JR., *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* (3d ed. 1994); DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* (3d ed. 2001); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985); Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665 (1994); see also Deborah L. Rhode, *Annotated Bibliography of Educational Materials on Legal Ethics*, 11 GEO. J. LEGAL ETHICS 1029 (1998); Deborah L. Rhode, *Legal Education: Professional Interests and Public Values*, 34 IND. L. REV. 23 (2000).

8. See Deborah L. Rhode, *Opening Remarks: Professionalism*, 52 S.C. L. REV. 458 (2001); Deborah L. Rhode, *Professionalism in Professional Schools*, 27 FLA. ST. L. REV. 193 (1999); Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283 (1998).

9. See RICHARD L. ABEL, *AMERICAN LAWYERS* (1989); *LAWYERS: A CRITICAL READER* (Richard L. Abel ed., 1997); *LAWYERS IN SOCIETY: AN OVERVIEW* (Richard L. Abel & Philip S.C. Lewis eds., 1995).

10. See Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255 (1990); Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 FORDHAM L. REV. 709 (1998); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988).

11. See WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29.

12. See David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990); David B. Wilkins, *The Professional Responsibility of Professional Schools to Study and*

law and the profession, it culls from the research of Barbara Babcock¹³ and Judith Resnik.¹⁴ On judgment and the neo-classical lawyer, it draws upon the writing of Anthony Kronman.¹⁵ And in philosophy, it winnows from the texts of David Luban.¹⁶

Rhode's publicly espoused normative commitments and her seamless integration of interdisciplinary materials give her work a strongly reformist cast. Indeed, for Rhode, *In the Interests of Justice* "is a book with a reform agenda" calling for "fundamental changes in professional responsibility and regulation." It strives, she declares, to crystallize "the challenges facing the legal profession." To that end, it urges "a more searching analysis by both the profession and the public about the points at which their interests diverge."¹⁷ That wide-ranging analysis encompasses the conditions of law practice and the distribution of legal services, the advocate's role in the adversary system, the regulation of lawyers' conduct, particularly the "economic, psychological, and political constraints" of lawyer self-regulation,¹⁸ and the structure of legal education. The central premise of the book stems from the notion of the public interest and Rhode's lament that it "has played too little part in determining professional responsibilities."¹⁹

This essay takes up Rhode's premise of a core public interest in American law and society, and seeks to join that interest to identity and community-based reform movements. The essay is divided into three parts. Part I parses *In the*

Teach About the Profession, 49 J. LEGAL EDUC. 76 (1999); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992); David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581 (1998).

13. See SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE, AND THEORY (Barbara Allen Babcock, Deborah L. Rhode, Nadine Taub, Ann Freedman, Rhonda Copelon & Wendy Webster Williams eds., 2d ed. 1996); Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175 (1983).

14. See Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995); Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296 (1996).

15. See ANTHONY KRONMAN, *THE LOST LAWYER* (1993); see also MARY ANN GLENDON, *A NATION UNDER LAWYERS* (1994); SOL M. LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION* (1994). Compare Marc Galanter, *Lawyers in the Mist: The Golden Age of Legal Nostalgia*, 100 DICK. L. REV. 549 (1996) (examining Kronman's claim of declining virtue within the legal profession).

16. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); DAVID LUBAN, *LEGAL MODERNISM* (1994); *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* (David Luban ed., 1983).

17. P. 3 (bemoaning lawyers' pursuit of "their own and their clients' interests at the expense of broader public concerns").

18. Pp. 2-3 (describing the "self-regarding tendencies of self-regulating processes").

19. P. 2 (complaining that "[t]oo much regulation has been designed by and for lawyers").

Interests of Justice for its guiding principles of reform. Part II links race and reform to the criminal justice system, specifically with respect to the prosecution and defense of racial violence. Part III connects identity and community to lawyer-engineered reform strategies.

I. LIBERAL REFORM

In eight elegant chapters, *In the Interests of Justice* takes up the foremost issues of the day in the American legal profession. Starting from the notion of a modern profession, Rhode establishes both the predicate and the metric of the *public interest* at once to guide and to gauge social progress. Unlike others who hastily invoke the shibboleth of the public interest to advance the ends of a group or an ideology, Rhode declines the crude embrace of self-interest and elides the tendency to closet sociolegal definition with rigid demarcation. Instead, she introduces the concept of the public interest in an open, other-regarding sense, as an unbounded field to be mapped and redrawn periodically.²⁰

The openness or receptivity to plural interpretation of the public and its diverse interests amounts to more than a liberal gesture. For Rhode, this stance comes as an article of faith tied to the twin belief in liberal dialogue and feminist reasoning. Rendered favorably, liberal dialogue offers deliberative modes of reciprocity and mutual respect in the service of shared contractarian or communitarian ends. When confronted by difference (race, class, gender) and the clash of identity, dialogue often falls into disagreement over the means to and the wisdom of such ends. Less trusting of liberal legalism, feminist reasoning strives to overturn hierarchical modes of logic based on power and privilege in order to uncover and liberate suppressed forms of egalitarian and inclusive reckoning. By turns pragmatic and contextual, feminist analysis seeks to reintegrate suppressed forms of reasoning into the multiple texts (oral, written, and symbolic) of everyday social practice to better create the conditions for democratic dialogue. Feminist dialogue entails reciprocity and mutuality deepened by an intuitive trust presumed to be beyond the atomistic rationality of liberal individualism.

Rhode engages liberal and feminist methods to decipher the dominant epistemological, interpretive, and discursive practices of the legal profession. Deftly and tenaciously, she dismantles these practices and their normative underpinnings discovering deep and perhaps irreconcilable conflicts between the profession and the interests of the public. She locates this abiding and perhaps insoluble conflict in the structure of the profession, its adversary

20. Rhode's unbounded definition of the public interest provokes Austin Sarat's charge of analytic slippage into a "definitional and conceptual morass." See Austin Sarat, *The Profession Versus the Public Interest: Reflections on Two Reifications*, 54 STAN. L. REV. 1489, 1495 (2002).

system and juridical institutions, and its regulatory canons. To Rhode, neither legal education nor professional reform may possess the forces necessary to shed the weight of oppressive sociolegal structures that cabin the freedom and efficacy of lawyers in serving the public interest.

Rhode initiates her conflict analysis broadly, surveying the countervailing interests and perspectives of the public and the profession.²¹ The survey discloses "a profession permanently in decline." Citing "structural factors" of discontent and an ever-widening "distance between professional ideals and professional practice," Rhode bewails a "lost . . . connection to the values of social justice" exacerbated by "symbolic crusades and policy paralysis."²² For the public and its popular culture, that normative forfeiture results in harsh attributions of lawyer avarice, accusations of amoral advocacy, and democratic incredulity about "the tension between money and justice."²³ For the profession,²⁴ such abdication causes consternation over the growing delivery of legal services by nonlawyers,²⁵ the declining pro bono commitment of lawyers and law students,²⁶ the rise of overzealous advocacy,²⁷ and the continuing underrepresentation of women and minorities in established status hierarchies.²⁸ To Rhode, these breaks in the idealized vision of lawyers explain the "dispiriting disjuncture between current norms and traditional aspirations"²⁹ and the consequent culture of discontent infecting the profession and the public.

21. Pp. 1-22.

22. Pp. 1-2.

23. Pp. 3-6, 7, 8.

24. Pp. 8-16.

25. P. 4; see Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981) (discussing constitutional standing of unauthorized practice doctrine); Ralph C. Cavanagh & Deborah L. Rhode, *The Unauthorized Practice of Law and Pro Se Divorce*, 86 YALE L.J. 104 (1976).

26. Pp. 6, 13; see Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415 (1999) (discerning factors that encourage voluntary and mandatory pro bono programs); Deborah L. Rhode, *Social Responsibility and the Legal Profession: Making Pro Bono Mandatory?*, 9 RESPONSIVE COMMUNITY 41 (1999) (citing the responsibility of bar associations to establish mandatory pro bono hours on a per annum basis); Deborah L. Rhode, *Essay: The Pro Bono Responsibilities of Lawyers and Law Students*, 27 WM. MITCHELL L. REV. 1201 (2000) (outlining rationale for pro bono involvement, the characteristics and experiences that foster such participation, and the strategies most likely to increase it).

27. P. 7; see Robert W. Gordon, *Why Lawyers Can't Just Be Hired Guns?*, in ETHICS IN PRACTICE, *supra* note 7, at 42, 42-45.

28. P. 10; see David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493 (1996) (noting that pool limits and continuing racism play important roles in determining the employment opportunities available to African American lawyers).

29. P. 15.

To repair these fissures, Rhode searches out the nature of lawyer discontent.³⁰ She examines the main sources of that discontent,³¹ their ties to the structure of practice³² with its attendant free enterprise profit-impulse³³ and hollow meritocracy,³⁴ and their susceptibility to alternative practice forms and dynamics.³⁵ She frames this analysis in the context of the adversary system,³⁶ tracing the evolution of the advocate's role,³⁷ sketching the function of partisanship³⁸ and its coincidence with professional interests,³⁹ and proffering alternatives⁴⁰ even in the face of unpopular causes and clients.⁴¹ Expanding further, she fastens the adversarial precept to the American sporting theory of justice,⁴² revealing its procedural foundations,⁴³ its dissonant account of witness testimony,⁴⁴ and its dubious commitment to confidentiality.⁴⁵

Adroitly balancing analysis and critique, Rhode sharpens her conflict inquiry in contemplating reform of the profession. Discounting the rhetoric of reform,⁴⁶ she charts the growth of the profession,⁴⁷ the rising costs of litigation,⁴⁸ and the post-war surge of legal regulation.⁴⁹ She contrasts this burgeoning field with the inadequacy of alternative dispute resolution

30. Pp. 23-48; see Deborah L. Rhode, *The Profession and Its Discontents*, 61 OHIO ST. L.J. 1335 (2000) (clarifying the sources of lawyers' discontent and the dynamics of race and gender bias within private practice).

31. Pp. 24-28.

32. Pp. 28-30.

33. Pp. 31-38.

34. Pp. 38-44; see JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976) (exploring the efforts of elite American lawyers in the twentieth century to accommodate and resist the transformative forces of industrial capitalism, urbanization, immigration, and economic change in the profession); Deborah L. Rhode, *Myths of Meritocracy*, 65 FORDHAM L. REV. 585 (1996) (demystifying claims of equal justice and gender meritocracy within the legal profession).

35. Pp. 45-48.

36. Pp. 49-80.

37. Pp. 51-53, 64-66.

38. Pp. 53-58.

39. Pp. 58-64.

40. Pp. 66-70.

41. Pp. 71-80.

42. Pp. 81-115.

43. Pp. 82-96.

44. Pp. 96-105.

45. Pp. 106-15.

46. Pp. 117-41; see Deborah L. Rhode, *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 989 (1998) (deriding strictures of legal profession's control over legal services).

47. Pp. 118-20.

48. Pp. 120-29.

49. Pp. 124-25.

procedures⁵⁰ and the insufficiency of nonlawyer conflict resolution services.⁵¹ These deficiencies retreat against her bristling critique of institutional lawyer regulation.⁵² In mustering that criticism, Rhode scrutinizes the rationale for regulation,⁵³ especially in advertising and solicitation,⁵⁴ the logic of bar admission⁵⁵ and continuing legal education requirements,⁵⁶ the crux of competence and discipline standards,⁵⁷ the incidence of malpractice,⁵⁸ and the explosion in legal fees.⁵⁹ Within this wide ambit of scrutiny, Rhode closely inspects legal education,⁶⁰ evaluating its structure,⁶¹ its commitment to diversity,⁶² its methods and priorities,⁶³ its professional responsibility curriculum,⁶⁴ and finally its professional values and pro bono opportunities.⁶⁵

50. Pp. 131-35. Compare Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (arguing that settlement sacrifices important public values), with David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995) (suggesting that the settlement process can fulfill the values of openness, legal justice, and advance the creation of public goods).

51. Rhode approves multidisciplinary practice and cross-professional collaboration. Additionally, she calls for "greater access to mediation and alternative dispute resolution programs." Pp. 19, 135-41; see Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701 (1996) (exploring the contributions and limitations of recent bar debates over nonlawyer practice); Deborah L. Rhode, *The Delivery of Legal Services by Non-lawyers*, 4 GEO. J. LEGAL ETHICS 209 (1990) (surveying possibilities and identifying considerations relevant to the unauthorized practice of law that will better serve the public interest within a broader social, economic, and political context).

52. Pp. 143-83.

53. Pp. 144-47; see Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689 (1981) (linking ethics codes to the professional goals of achievement and recognition).

54. Pp. 147-49.

55. Pp. 150-55; see Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L. J. 491 (1985) (assailing the premises and practices of the legal profession's licensing structures by focusing on the administration of bar character mandates).

56. Pp. 156-58.

57. Pp. 158-65.

58. Pp. 165-68.

59. Pp. 168-83; see CAMERON STRACHER, *DOUBLE BILLING: A YOUNG LAWYER'S TALE OF GREED, SEX, LIES, AND THE PURSUIT OF A SWIVEL CHAIR* (1998).

60. Pp. 185-206; see Deborah L. Rhode, *Into the Valley of Ethics: Professional Responsibility and Educational Reform*, 58 LAW & CONTEMP. PROBS. 139 (1995) (denouncing curricular marginalization of professional responsibility courses and institutional denigration of moral responsibility pedagogy); Deborah L. Rhode, *Whistling Vivaldi: Legal Education and the Politics of Progress*, 23 N.Y.U. REV. L. & SOC. CHANGE 217 (1997) (condemning the underrepresentation of women in academic positions of greatest reward, the subordination of women's issues in the core curriculum, and the devaluation of women's capacities and interests in educational contexts).

61. Pp. 187-92.

62. Pp. 192-96.

63. Pp. 196-99.

64. Pp. 200-03.

65. Pp. 203-06.

Rhode concludes that structural reform of the profession must overcome substantial but "by no means insurmountable" obstacles. The focal points for such reform are the public and the profession. For Rhode, the public must gain greater voice in and control over the content and enforcement of legal processes and ethics. Likewise, lawyers faithful to the profession must "assume greater moral responsibility for the consequences of their professional conduct and for the adequacy of their own regulatory processes and working conditions."⁶⁶

Carefully distilled, Rhode's guiding principles of reform celebrate professional autonomy, moral accountability, liberal citizenship, and egalitarian politics. Professional autonomy asserts prudential independence from clients, public and private institutional entities, and the marketplace.⁶⁷ Moral accountability extends the other-regarding responsibilities of practice to courts, third parties, and the public.⁶⁸ Liberal citizenship affirms the reciprocal obligations of shared civic governance that "reinforce ethical values in the service of social justice."⁶⁹ And egalitarian politics assures equal access to justice and equal opportunity in the workplace.⁷⁰ To test these principles, the next section links race and reform in the prosecution and defense of racial violence.

II. RACE AND REFORM

For more than two centuries, race has vexed the American legal profession in matters of both law and politics. Although mindful of this troubling history, *In the Interests of Justice* addresses the interwoven chronicles of race and the profession only in passing. To be sure, Rhode has engaged the subject with considerable vigor elsewhere.⁷¹ Others have likewise exhibited vitality in studying race in legal education and in the profession, particularly as it impacts upon the treatment of clients and the role of lawyers.⁷² The strands of race,

66. Pp. 207-12, 213.

67. P. 213 ("Individual clients' concerns are entitled to deference, but not to the exalted position they now occupy in the profession's moral universe.").

68. P. 213 ("Lawyers' primary responsibility should run to the system of justice and to the core values of honesty, fairness, and good faith that sustains it.").

69. Pp. 209, 213 (directing lawyers "to consider all the societal values at issue in particular practice settings").

70. P. 209 ("The public deserves reasonable access to legal assistance and to legal processes that satisfy basic standards of fairness, integrity, and efficiency.").

71. See, e.g., Rhode, *The Professionalism Problem*, *supra* note 8, at 317 (emphasizing guiding principles of diversity and racial difference in the American legal profession).

72. See Alex M. Johnson, Jr., *The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist's Perspective*, 95 MICH. L. REV. 1005 (1997); David B. Wilkins, *Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*, 11 GEO. J. LEGAL ETHICS 855 (1998); David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502 (1998); David B. Wilkins, *Partners Without Power? A Preliminary Look at Black Partners in Corporate Law Firms*, 2 J. INST. STUD. LEGAL ETHICS 15 (1999); David B. Wilkins, *Race, Ethics, and the*

identity, and role extend throughout contemporary American jurisprudence entwining the movements of Critical Race Theory,⁷³ LatCrit Theory,⁷⁴ and Queer Legal Theory.⁷⁵ Similar threads increasingly emerge in the clinical practice literature of lawyers dedicated to civil rights and criminal law advocacy.⁷⁶ Neither clinical nor jurisprudential movements, however, make a sustained effort to fuse racial identity and professional responsibility. Yet, situated at the intersection of legal theory and practice, the study of race and reform in advocacy and ethics implicates considerations of professional role

First Amendment: Should a Black Lawyer Represent the Ku Klux Klan? 63 GEO. WASH. L. REV. 1030 (1995); David B. Wilkins, *Rollin' on the River: Race, Elite Schools, and the Equality Paradox*, 25 LAW & SOC. INQUIRY 527 (2000); David B. Wilkins, *Social Engineers or Corporate Tools?* Brown v. Board of Education and the Conscience of the Black Corporate Bar, in RACE, LAW AND CULTURE: REFLECTIONS ON BROWN V. BOARD OF EDUCATION 137 (Austin Sarat ed. 1997); David B. Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 STAN. L. REV. 1981 (1993); David B. Wilkins, *On Being Good and Black*, 112 HARV. L. REV. 1924 (1999) (reviewing PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA*).

73. Critical Race Theory "focuses on the relationship between law and racial subordination in American society." Kimberlé Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 195, 213 n.7 (David Kairys ed., rev. ed. 1990). See generally, JUAN F. PEREA, RICHARD DELGADO, ANGELA P. HARRIS & STEPHANIE WILDMAN, RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA (2000); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995); CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris eds., 2002); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed. 2000); CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 1997); Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741 (1994) (introducing the first Symposium devoted specifically to Critical Race Theory in an American law review); see also ANGELO N. ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE (1998).

74. See Enid Trucios-Haynes, *Why "Race Matters:" LatCrit Theory and Latina/o Racial Identity*, 12 LA RAZA L.J. 1 (2001); THE LATINO CONDITION: A CRITICAL READER (Richard Delgado & Jean Stefancic eds., 1998); Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 HARV. LATINO L. REV. 1 (1997); Symposium, *Lawyering in Latina/o Communities: Critical Race Theory and Practice*, 9 LA RAZA L.J. 1 (1996).

75. See WILLIAM B. RUBENSTEIN, SEXUAL ORIENTATION AND THE LAW (1997); Nancy D. Polikoff, *Am I My Client?: The Role Confusion of a Lawyer Activist*, 31 HARV. C.R.-C.L. L. REV. 443 (1996); William B. Rubenstein, *Queer Studies II: Some Reflections on the Study of Sexual Orientation Bias in the Legal Profession*, 8 UCLA WOMEN'S L.J. 379 (1998).

76. See Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 5 CLINICAL L. REV. 557 (1999); Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001); Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807 (1993).

and responsibility for civil rights⁷⁷ as well as criminal⁷⁸ lawyers. Prior work in my own hand,⁷⁹ and its accompanying criticism,⁸⁰ struggles to explicate those considerations. That work usefully frames the exposition of Rhode's guiding principles of reform in the context of the criminal justice system, especially with regard to the prosecution and defense of racial violence.

The study of racial violence in law and society begins with an examination of identity, its embodiment in narrative, and its representation in advocacy. Racial representation in the narratives of advocacy animates both the prosecution and the defense of racial violence. It also informs the ethics of the lawyering process, giving rise to colorblind and color-coded norms of representation. Those competing norms mold our vision of the good lawyer in cases of racial violence. Embedded within that vision are familiar axioms of lawyer moral nonaccountability and race neutrality, and crabbed valuations of client dignity and community. The purpose of exploring racial identity, racialized narrative, and race-coded representation is to reconcile those axioms, and the corollary duty of effective representation, with the dignitary interests of clients and communities of color.

Reconciliation may be pursued by investigating race-conscious, community-regarding methods of representation gathered from existing prosecution and defense practices. The practices reveal recurrent lawyer tendencies in constructing racial identity, deploying racialized narrative, and configuring race-coded strategies of representation. Prosecutors and defenders daily construct racial identity in their advocacy tactics. The tactics may include target profiling, plea bargaining, jury selection, trial objections, sentencing recommendations, and even appellate argument. Although distinct, the tactics

77. See ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* (1999); Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997).

78. For debate on the role of criminal lawyers, see David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993) (marshaling a strong justification for the criminal defense function); William Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993) (rejecting a more strident adversarial ethic in criminal defense).

79. See Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995); Anthony V. Alfieri, *(Er)Race-ing an Ethic of Justice*, 51 STAN. L. REV. 935 (1999); Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063 (1997); Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157 (1999); Anthony V. Alfieri, *Prosecuting Violence/Reconstructing Community*, 52 STAN. L. REV. 809 (2000); Anthony V. Alfieri, *Race-ing Legal Ethics*, 96 COLUM. L. REV. 800 (1996); Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 GEO. L.J. 2227 (2001); Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293 (1998).

80. For criticism, see Robin D. Barnes, *Interracial Violence and Racialized Narratives: Discovering the Road Less Traveled*, 96 COLUM. L. REV. 788 (1996); Richard Delgado, *Making Pets: Social Workers, "Problem Groups," and the Role of the SPCA—Getting a Little More Precise About Racialized Narratives*, 77 TEX. L. REV. 1571 (1999); Abbe Smith, *Burdening the Least of Us: "Race-Conscious" Ethics in Criminal Defense*, 77 TEX. L. REV. 1585 (1999); Christopher Slobogin, *Race-Based Defenses—The Insights of Traditional Analysis*, 54 ARK. L. REV. 739 (2002).

share a common lexicon of race captured in the imagery and rhetoric of deviance and inferiority.

Deviant imagery and rhetoric suffuse cases of racially motivated violence, black-on-white and white-on-black. Consider, for example, the 1991 state criminal and 1994 federal civil rights prosecutions of Lemrick Nelson and Charles Price in New York.⁸¹ The prosecutions followed four days of interracial street-fighting between blacks and Hasidic Jews spurred by the motorcade crash death of a seven-year-old black child, Gavin Cato, and the stabbing death of a twenty-eight-year-old Australian Hasidic scholar, Yankel Rosenbaum, in the Crown Heights section of Brooklyn. State prosecutors charged Nelson with second degree murder and manslaughter. A four-week state trial ended in acquittal. Federal prosecutors subsequently charged Nelson and Price with civil rights violations of a Reconstruction era public accommodations statute, claiming interference with Rosenbaum's federally protected public activities.⁸² The twenty-four day trial resulted in convictions and prison sentences of 235 months for Nelson and 262 months for Price.⁸³

At the federal trial, United States District Judge David Trager from the outset announced his "intention to empanel 'a moral jury that renders a verdict that has moral integrity.'"⁸⁴ Judge Trager explained: "[t]his trial is occurring for the same reason Rodney King's trial occurred, the second trial, because the first

81. See Alfieri, *Race Trials*, *supra* note 79, at 1323-39; Jane Fritsch, 2 *Win New Trial in Killing During Brooklyn Unrest—Jury Selection Faulted in Crown Hts. Case*, N.Y. TIMES, Jan. 8, 2002, at A19; see also *United States v. Nelson*, 277 F.3d 164 (2d Cir. 2002); *United States v. Nelson*, 90 F.3d 636 (2d Cir. 1996), *cert. denied*, 520 U.S. 1122 (1997); *United States v. Nelson*, 68 F.3d 583 (2d Cir. 1995); *People v. Nelson*, 647 N.Y.S.2d 438 (N.Y. Crim. Ct. 1995).

82. See 18 U.S.C. § 245(b)(2)(B) (2002). Federal prosecutors also charged Price with aiding and abetting Nelson's violation of 18 U.S.C. § 245(b)(2)(B) and engaging in conduct in further violation of 18 U.S.C. § 2 (2002). See *Nelson*, 277 F.3d at 169-70. The Second Circuit described Price's address to a crowd of community residents as "angry and aggressive," remarking that he "transformed [the crowd] into an explosive mass." *Id.* The court attributed the following statements to Price:

"[I]f it was a black man that did this they would have been gone to jail instead of being pulled inside of an ambulance for safekeeping."

...

"We can't take this anymore. They're killing our children. The Jews get everything they want. The police are protecting them."

...

"What are we going to do about this? Are we going to take this anymore?"

...

"Let's get the Jews" and "Eye for an eye. No justice no peace."

Id. at 170 (citations omitted).

83. *Id.* at 173.

84. *Id.* at 171. The Second Circuit speculated that Trager was "responding to the politically charged nature of the case and to the controversial State court acquittal of Nelson." *Id.*

jury did not represent the community.”⁸⁵ To ensure a “religiously and racially mixed jury” representative of the community and to safeguard the moral integrity of its verdict, Trager took three “unusual steps.”⁸⁶ First, he denied Nelson and Price’s *Batson* challenge⁸⁷ to the prosecutors’ use of five out of nine (55%) of their peremptory challenges to strike African American candidates from the jury pool.⁸⁸ Second, he denied Nelson and Price’s for-cause challenge to a Jewish juror (Juror 108) in spite of the fact that the juror “had expressed grave doubts about his ability to be objective.”⁸⁹ And third, upon excusing an African American empaneled juror for illness, he bypassed the first alternate white juror, removed a second white juror from the panel, and selected—out of order—an African-American juror and a Jewish juror (Juror 108) from a list of alternates to fill the two open places on the jury.⁹⁰ Both Nelson and Price appealed their convictions challenging the prosecutors’ application of the public accommodations statute⁹¹ and Trager’s jury-selection procedures.⁹²

On appeal, the United States Court of Appeals for the Second Circuit concluded that Trager committed reversible error in empaneling a biased juror by “open manipulation of the jury selection process to secure a racially and

85. *Id.* at 171-72. Trager remarked:

I have an agenda here which I have made very clear from the very beginning, to end up with a jury that represents the community that will have moral validity; and if there is a hung jury, that itself will be a statement to both sides about both what is the process and the problems are with our society. To me, justice will be served.

Id. at 172.

86. *Id.*

87. See *Batson v. Kentucky*, 476 U.S. 79 (1986) (establishing constitutional standard for purposeful discrimination in exercise of peremptory challenges during jury selection).

88. African Americans by comparison comprised only 30% of the jury pool. *Nelson*, 277 F.3d at 172, 199 (noting Trager’s “efforts to prevent the final jury from containing too many African Americans and too few Jews”).

89. *Id.* at 199. Juror 108 admitted to the district court that, “he was ‘pretty sensitive’ to issues affecting the Jewish community and that he was ‘disappointed’ by the outcome of defendant Nelson’s state murder trial.” At a second round of voir dire, the district court expressly asked Juror 108 to “look into [his] heart and ask [him]self whether [he] fe[lt] personal emotional internal pressures that would make it such that [he] couldn’t give the defendant[s] here a fair trial.” Juror 108 answered “I don’t know, I honestly don’t know.” *Id.* (citation omitted).

90. *Id.* at 199-200.

91. The Second Circuit concluded that 18 U.S.C. § 245(b)(2)(B) was constitutional as applied to Nelson and Price and that the evidence was sufficient to show that both defendants possessed the requisite two-fold intent under the statute. *Id.* at 207-13.

92. See Hiroshi Fukurai, *Social De-Construction of Race and Affirmative Action in Jury Selection*, 11 LA RAZA L.J. 17 (1999) (examining public perceptions of affirmative jury structures mandating racial quotas to engineer racially heterogeneous juries in criminal trials, specifically the jury de medietate linguae, the Hennepin model, the social science model, and a peremptory inclusive selection method); William T. Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 AM. CRIM. L. REV. 1391 (2001) (contending that jury selection irregularities caused by peremptory challenges should be discounted for reasons of harmless error and waiver).

religiously balanced jury.”⁹³ The Second Circuit held that Trager fundamentally “erred in empanelling a juror whose answers at *voir dire* clearly displayed actual bias,” and in seating a jury that “failed both the Sixth Amendment’s and the Due Process Clause’s requirement of impartiality.”⁹⁴ Accordingly, the court of appeals vacated the district court’s judgment of conviction and remanded the case for a new trial before a properly chosen, impartial jury.⁹⁵

Standing alone, Trager’s “highly unusual” and improper “effort to achieve a racially and religiously balanced jury” likely would be consigned to the footnotes of constitutional law and criminal procedure casebooks.⁹⁶ The “crucial complication” posed by his selection methods for the Second Circuit and for reformist purposes pertains not simply to the actions of the district judge, but to the conduct of counsel for the prosecution and the defense. Indeed, notwithstanding the “controversial methods” employed,⁹⁷ Nelson and Price’s counsel expressly consented to the court-initiated plan for empanelling Juror 108 on the jury, despite raising an original for-cause challenge to Juror 108 and reiterating an objection to the district court’s failure to dismiss him. Nelson and Price as well consented to the empanelling scheme on the record.⁹⁸ Equally grave, federal prosecutors approved the scheme. In fact, on appeal, they argued that the defendants’ express consent constituted a waiver, effectively extinguishing their Sixth Amendment and due process rights.

The Second Circuit rejected the argument of federal prosecutors. The court held that the defendants’ consent to the empanelling plan “did not constitute a valid waiver of their claim that the jury before which they were tried was improperly partial.”⁹⁹ Reasoning that parties are not free, even with a trial

93. *Nelson*, 277 F.3d at 169.

94. *Id.* at 213.

95. The Second Circuit discarded as meritless Price’s “claim that the causal link between his speech at the scene of the accident that led to the rioting and violence and the eventual attack on Rosenbaum is insufficient, as a matter of law, to support his aiding and abetting liability for that attack.” Pointing to trial evidence, the court held that it was “unquestionably sufficient for a reasonable jury to find that Price’s speech at the scene of the accident” not only “transformed a crowd that was neither unified nor particularly out of control into an explosive mass,” but also “was a cause in fact of the eventual assault.” *Id.* at 213.

96. *Id.* at 207.

97. Trager exclaimed:

I will not allow this case to go to the jury without 108 as being a member of that jury, and how that will be achieved I don’t know. It may well be just by people falling out. It may well happen, in which event I propose never to make any findings on this issue, and if I can I would seal the whole discussion because I see it serving no one’s interest. I am not sure I can get away with that. I don’t know if the press will allow it, but I don’t think it would serve the public’s interest to have this discussion go on the record, and especially, if I don’t make any findings and I hope that I will not have to make any findings.

Id. at 200.

98. *Id.* at 172. Defense counsel explicitly stated that this method of jury selection “would be agreeable to the defendants.” *Id.*

99. *Id.* at 213.

court's imprimatur, to empanel a jury of a precise "racial and religious mix," the court of appeals concluded that a waiver of a juror's impartiality is unacceptable when obtained by the promise of seating a jury marked by "'desirable' racial characteristics."¹⁰⁰ Civil litigants, the court explained, are not at liberty to agree that an action "should be heard by a jury composed only of members of their own racial or religious groups." Agreements of this kind are "impermissible in light of the [federal] courts' special commitment to equal protection."¹⁰¹ Moreover, the court added, such agreements run afoul of both congressional and Supreme Court commitments to "race neutrality in jury selection."¹⁰² Neutrality, the court proclaimed, enjoins parties from "bending" the judicial system to suit their private "racial and religious preferences."¹⁰³ That injunction invalidates the novel race- and religion-based jury selection procedures and the unusual jury reconstruction plan in *Nelson* whether

100. The Second Circuit expressed "substantial doubts about whether the right to be tried by an impartial tribunal is waivable, at least once a for-cause challenge has been made." *Id.* at 205. Even if waivable, the court continued, "the defendants' acceptance of an improper jury selection plan, only one part of which involved the empaneling of Juror 108, does not constitute a valid waiver," adding that "the right to an impartial fact finder might be inherently unwaivable." *Id.* Ultimately, according to the court of appeals, the exchange was improper "because the benefit to be received by the defendants in connection with the exchange—the replacement by the court of a white juror with an African American juror solely on the basis of race—was itself improper." *Id.* at 211. That "impropriety invalidated any waiver of the defendants' complaint concerning Juror 108's bias that might otherwise be found in their acceptance of the district court's larger plan." *Id.*

101. *Id.* at 213. The court noted that the "violation of equal protection that occurs when a person is excluded from a jury on the basis of his race (or religion) would seem only to be made more serious when the exclusion occurs at the behest not just of the parties but of the court itself, whose duties under the Equal Protection Clause are particularly strong." *Id.* at 207.

102. *Id.* at 208 (citation omitted). The court opined that the "significance of a jury in our polity as a body chosen apart from racial and religious manipulations is too great to permit categorization by race or religion even from the best of intentions." *Id.* at 207-08.

103. *Id.* at 209. At oral argument on appeal, federal prosecutors urged endorsement of the defendants' purported waiver and ratification of Trager's jury selection scheme "just this once," while conceding that court-permitted "waivers of racially and religiously tested jurors . . . should be forbidden in the future, regardless of the parties' consent." *Id.* The Second Circuit recounted the following colloquy:

The Government: There have been cases that this Court has essentially decided that certain procedures were improper and would not be condoned in the future on a prospective basis. That's happened. And this might be such a case.

The Court: How do we do that? Do we say that in this case [we affirm the conviction below] but in the future, if the prosecution agrees to something like this, it is acting at its peril because in the future we will reverse?

The Government: Sounds good.

The Court: What?

The Government: Sounds good.

The Court: Sounds better to you than it does to me, maybe.

The Government: Read it over a few times. You'll get used to it, Judge.

Id. at 209-10.

instigated by the parties¹⁰⁴ or by the trial judge.¹⁰⁵ Even, as here, when the judge's motives are "undoubtedly meant to be tolerant and inclusive rather than bigoted and exclusionary," the Second Circuit maintained that such race-conscious actions succumb to constitutional infirmity.¹⁰⁶

Absent from the substantive repudiation of the jury selection procedures in *Nelson* is an indication that either the trial judge or counsel (for the government or the defense) violated any canon or rule of ethics. The Second Circuit is wholly silent on the subject of ethical breach or censure. This moral silence pervades much of the history of the *Nelson* prosecution and, unsurprisingly, its defense. It is the coded silence of a race trial.

Previously, in several studies of race trials, I pointed to the racialized litigation strategies of the *Nelson* prosecutors and defenders in both federal and state proceedings, citing pretrial adult transfer and recusal motions, as well as trial arguments and statements. I argued that the federal prosecutors' motion to stand Nelson on trial as an adult, and thus subject him to mandatory sentencing guidelines, imbued young black male identity with a caste vision of irredeemable inferiority and inscribed in law a stigmatizing narrative of immutable deviance that belied the social reality of Nelson's age, educational and family background, and unremarkable criminal record. Furthermore, I contended that the defense motion for judicial recusal¹⁰⁷ and the exculpatory claim of diminished capacity, alluding to Nelson's behavioral dysfunction and Price's drug-addled incompetence, similarly evoked a history of racial animus and inferiority, and echoed a race-embroidered narrative of moral depravity.¹⁰⁸

To cure the dignitary harm spawned by racialized trial strategies, I proposed a race-conscious community ethic of professional responsibility for prosecutors and defenders in cases of racial violence.¹⁰⁹ Carved from the norms of liberal citizenship, the ethic urged formal, rather than covertly instrumental, consideration of the role of identity in charging, investigation, pretrial publicity, trial tactics (jury selection, opening statements, direct and cross examinations, objections, and closing arguments), and sentencing. Formal, overt consideration of racial identity, I asserted, enhanced lawyer moral accountability for the dignitary harm that deforms the character of defendants and diminishes the standing of their communities. Heightened public

104. *Id.* The court declared that "it is beyond peradventure that the racial and religious reconstruction of the jury that occurred in this case could not constitutionally have been achieved at the instigation of the parties." *Id.* at 207.

105. *Id.* The court also mentioned that "what the district court could not allow the parties to do, it also could not do of its own motion even with the consent of the parties." *Id.*

106. *Id.*

107. *Id.* at 171 (noting "the district court (Trager, J.), no doubt responding to the politically charged nature of the case and to the controversial State court acquittal of Nelson, made clear his intention to empanel 'a moral jury that renders a verdict that has moral integrity'").

108. See Alfieri, *Race Trials*, *supra* note 79, at 1323-39.

109. See Alfieri, *Race Prosecutors, Race Defenders*, *supra* note 79, at 2253-55, 2261-64.

consideration, I speculated, also may serve to prevent identity-based interracial violence and hate crimes, and moreover, to encourage the participation of communities of color in the criminal justice system through local churches, neighborhood associations, health clinics, and schools. Citizen participation in turn might advance the interests of individual dignity, collective equality, and interracial reconciliation. To that end, borrowing from well-settled traditions of lawyer independence and moral activism, I prodded prosecutors and defenders to deploy identity-based litigation strategies gingerly, allowing race-consciousness to inform the lawyer's advocacy, counseling, and advisory roles while mitigating harm to persons and communities of color. The upshot of this prodding, I fear, is the racialized imbroglio of *U.S. v. Nelson*. Hope of allaying that fear compels a return to Rhode's vision of reform.

III. IDENTITY, COMMUNITY, AND REFORM

The task of linking identity, community, and reform in the criminal justice system is best begun by revisiting Rhode's guiding principles of reform. Rhode values autonomy, accountability, citizenship, and equality. Autonomy pertains to clients, institutions, and the market. Accountability runs to courts, third parties, and the public. Citizenship relates to the reciprocal obligations of democratic governance and service. And equality goes to freedom from oppressive socioeconomic arrangements and to the egalitarian exercise of political rights. Each of these principles struggles in the encounter with the identity and community intricacies of *U.S. v. Nelson*. That struggle comes not from a lack of familiarity with the complexities of identity and community.¹¹⁰ To her credit, Rhode shows fluency in navigating both elite-engineered and community-based reform fostered by identity groups, though unlike Gerald Lopez,¹¹¹ Paul Tremblay,¹¹² and Lucie White,¹¹³ she has declined to develop a

110. See Deborah L. Rhode, *Can a Lawyer Insist on Clients of One Gender?*, NAT'L L.J., Dec. 1, 1997, at A21; Deborah L. Rhode, *Anti-Gay Prejudice Persists in Legal Workplace*, NAT'L L.J., Dec. 16, 1996, at A15; Deborah L. Rhode, *Solomon Amendments Curb Academic Freedom*, NAT'L L.J., Feb. 1, 1998, at A21.

111. See GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992); Gerald P. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603 (1989); Gerald P. Lopez, *Training Future Lawyers to Work With the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305 (1989).

112. See Paul R. Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475 (1999); Paul R. Tremblay, *A Tragic View of Poverty Law Practice*, 1 D.C. L. REV. 123 (1992); Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947 (1992); Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101 (1990).

113. See *HARD LABOR: WOMEN AND WORK IN THE POST-WELFARE ERA* (Joel F. Handler & Lucie White eds., 1999); Lucie White, *On Abolitionist Critiques, "Homeless Service" Programs, and Pragmatic Change*, 19 ST. LOUIS U. PUB. L. REV. 431 (2000);

full-blown ethic of community advocacy for such outsider groups. No single ethic, however, seems likely to resolve the question presented by the consensual racial and religious jurymaning in *U.S. v. Nelson*.

Applied to *Nelson*, the question of jurymaning breaks down into three parts: peremptory challenges, for-cause challenges, and race or religion-conscious empaneling. Once again, the first part refers to Trager's denial of Nelson and Price's *Batson* challenge to federal prosecutors' use of 55% of their peremptory challenges to strike African American candidates from the jury pool. Recall that African Americans comprised only 30% of that pool. The second part concerns Trager's denial of Nelson and Price's for-cause challenge to Juror 108, a Jewish juror who had repeatedly acknowledged doubts about his own strained objectivity. The third part involves Trager's decision, upon excusing an African American empaneled juror, to bypass the first alternate white juror, remove a second white juror from the panel, and select—out of order—an African American juror and Juror 108 from a list of jury alternates. Again, further complicating this intentional decision is the fact that the parties and their counsel gave “knowing consent” to the empaneling of a jury “explicitly selected, in part, on the basis of race and religion.”¹¹⁴

Rehearsing the ethical mandates of the federal courts,¹¹⁵ the American Bar Association,¹¹⁶ the U.S. Department of Justice, and assorted advisory groups¹¹⁷ is unlikely to invalidate this outpouring of consent. But engrafting Rhode's guiding principles of reform on the conduct of the *Nelson* prosecutors and defenders may at least illuminate the wrenching trade-offs brokered during identity and community-based advocacy.¹¹⁸ Although this cluster of principles lacks the coherence and specificity that accompanies fuller embellishment, it may prove more demanding in directing socially responsible conduct than conventional ethical standards.¹¹⁹ As such, it may furnish a significant check on

Lucie E. White, *Raced Histories, Mother Friendships, and the Power of Care: Conversations with Women in Project Head Start*, 76 CHI-KENT. L. REV. 1569 (2001); Lucie E. White, *The Transformative Potential of Clinical Legal Education*, 35 OSGOODE HALL L.J. 603 (1997).

114. See *United States v. Nelson*, 277 F.3d 164 (2d Cir. 2002) (nullifying consent obtained in exchange for the improper empaneling of a jury chosen partly on the basis of race and religion).

115. See FED. R. CIV. P. 11.

116. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1983); MODEL RULES OF PROFESSIONAL CONDUCT (2002); STANDARDS OF CRIMINAL JUSTICE (1993).

117. See NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS (1991); UNITED STATES DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL (1998).

118. Rhode views professional regulatory structures and bar ethical codes as an inadequate source of guidance. Pp. 20-21 (mentioning that the “codes offer an unsatisfying mix of vague directives (charge ‘reasonable’ fees), moral exhortation (volunteer pro bono service), and minimal prohibitions (refuse to assist criminal conduct)”).

119. P. 211 (“Many bar standards are insufficiently demanding or overly self-protective.”).

the adversarial excesses of distortion and deception prevalent in trials of racial violence. Curbing character and community distortion in race trials may help improve public accountability of the profession and restore public confidence in the criminal justice system.

Consider first the federal prosecutors' use of 55% of their peremptory challenges to strike African American candidates from a jury pool out of which they comprised only 30% of the total. Barely outside constitutional proscription, the prosecutors seem fettered to a vision of public accountability defined by prevention, deterrence, and retribution, rather than a sense of common racial citizenship and equal participatory rights to enjoy civic governance.

Next consider defenders' for-cause challenge to Juror 108 on the conceded ground of suspect impartiality. Bolstered by repeated juror admissions during two rounds of *voir dire*, the challenge enunciates a fair-minded version of accountability to the law, the court, and the public. That accountability is bound up in the notion of impartial citizenship and equal treatment unsullied by bias.

Last consider prosecutors' and defenders' express consent to the empaneling of a jury chiefly on the basis of race and religion. Safely outside sanction, this joint act of consent strikes an indelicate balance between professional autonomy and public accountability in race cases. The act itself shows meager autonomy from either the client or the state. Its accountability runs narrowly in the same direction, pointedly away from third party rights to jury representation and open public scrutiny of jurymandering. In this way, its reciprocal import for the larger community—exchanging white-for-black and black-for-white—seems more likely to institutionalize racial sentiment than banish it from adjudication.¹²⁰ Unchecked by cross-racial dialogue and egalitarian sympathy, that sentiment may limit equal access to and participation in the trial of race cases. Erecting such an ongoing hindrance to civic access and democratic participation in the juridical institutions of the state operates to "compromise accepted moral values,"¹²¹ a result Rhode counsels against. It is this cardinal objection that may prove fatal to a race-conscious community ethic of professional responsibility for both prosecutors and defenders.

Long debated, race-consciousness is hardly accepted. Facially incompatible with our colorblind, constitutional tradition but enduring in cultural and sociolegal practice, it suffers inconsistent construction in advocacy and adjudication. That inconsistency upsets the meaning of impartiality and the logic of adversarial justice. Interpretive ruptures in the accepted meaning of

120. See Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000) (constructing an organizational theory of racism capable of reconciling statistical evidence of judicial discrimination that systematically harms minority groups with individual judges' proclaimed lack of conscious discriminatory intent in decision making).

121. P. 18.

racial impartiality and systemic disruptions in the adversarial race-ing of trial tactics risk inducing prosecutorial ambivalence and defender anxiety in race cases. Those are the risks of making public progress toward racial equality.

CONCLUSION

In the final analysis, Rhode's thesis of a core *public interest* intrinsic to American law and society offers a thin but hopeful reed of promise for the reform of racialized advocacy and adjudication within the criminal justice system. The difficulty lies in grappling with elite lawyer-engineers over the leadership of such reform efforts and in binding together alliances among identity and community-based movements. Doubtless Rhode's guiding principles of autonomy, accountability, citizenship, and equality will facilitate both political endeavors. To be sure, neither politics nor law can reconcile the competing party, state, and community interests at stake in the criminal and civil rights trials of racial violence. However, they can open and enliven normative dialogue in diverse forums. Dialogues of racial reform present the chance of moving an "unorganized and uninvolved"¹²² public toward community activism and mobilization on behalf of civil and criminal justice initiatives. For Rhode and other agitators of the public good,¹²³ the current "challenge lies in refocusing [public] disaffection in more constructive directions and in identifying ways to bridge the gap between professional and public interests."¹²⁴ Rhode deserves our praise and our help in forging that bridge.

122. P. 7.

123. See Deborah L. Rhode, *Squeezing the Public Good*, 86 A.B.A. J. 120 (2000).

124. P. 8.