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RACE-ING LEGAL ETHICS

*Anthony V. Alfieri**

Last year I began work on a long-term project studying the historical intersection of race, lawyers, and ethics in the context of the American criminal justice system. Informed by the jurisprudential movement of Critical Race Theory (CRT),¹ the project investigates the rhetoric of race or "race-talk" in criminal defense advocacy and ethics dealing with racially motivated acts of private violence. The first part of this ongoing project, inaugurated in the recent essay "Defending Racial Violence,"² explores the rhetoric of race in cases of black-on-white violence. The second part, now in progress, examines such rhetoric in cases of white-on-black violence, specifically in the context of lynching. A third part, soon to be commenced, will survey the rhetoric of race in cases of racially motivated acts of public violence.

In search of a starting point for this larger, multipronged project, I turned to the 1993 trial of Damian Williams and Henry Watson in Los Angeles County Superior Court on charges of attempted murder and aggravated mayhem arising out of the beating of Reginald Denny and seven others during the South Central Los Angeles riots of April 1992. To win acquittals, the Williams-Watson defense teams refuted evidence of intent and voluntary conduct required to prove criminal liability for murder and mayhem. The defense relied on a "group contagion" theory of mob violence-incited diminished capacity. Invoked as a partially exculpatory defense, the theory suggests that young black males as a group, and the black community as a whole, share a pathological tendency to commit acts of violence in mob situations and, by extension, in other social situations.³ Both Williams and Watson are young, male, and black. Denny is white.

The troubling conjunction of race, racialized defense strategy, and purportedly race-neutral ethics in the context of the Williams-Watson trial prodded me to develop tentative, working hypotheses regarding the rhetoric of race in criminal defense advocacy. In "Interracial Violence and Racialized Narratives: Discovering the Road Less Traveled,"⁴ Robin Barnes challenges these descriptive and prescriptive hypotheses. Because Barnes's critique implicates issues vital to the application of Critical Race

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1. For a helpful overview of the jurisprudential elements constituting CRT, see *Critical Race Theory: The Cutting Edge* (Richard Delgado ed., 1995); Symposium, *Critical Race Theory*, 82 Cal. L. Rev. 741 (1994).

2. Anthony V. Alfieri, *Defending Racial Violence*, 95 Colum. L. Rev. 1301 (1995).

3. See *id.* at 1311.

4. Robin D. Barues, *Interracial Violence and Racialized Narratives: Discovering the Road Less Traveled*, 96 Colum. L. Rev. 788 (1996).

Theory to practice, I will first clarify the challenged hypotheses and then meet her objections.

In "Defending Racial Violence," I observed that the rhetorical structure of criminal defense stories of black-on-white racial violence reflects the dissonance of competing narratives of deviance and defiance that construct the identity of young black males in terms of *both* bestial pathology and insurrectionist rage.⁵ That dissonance produces racialized narratives of "good" and "bad" young black men, thus reducing racial identity to an essentialist dichotomy of good/bad moral character.⁶ Distilling the complex, multilayered experience of young black males into two universal and objective categories of essential black manhood distorts the meaning of racial identity and the image of racial community.⁷

Contemporary rules of legal ethics, I explained, condone this distortion by approving racialized or color-coded criminal defense strategies under neutral accounts of liberal contractarian and communitarian legal theory.⁸ The contractarian account treats deviance-based racialized strategies as the rational and voluntary maneuvers of an autonomous client. The communitarian account addresses the same strategies as the product of lawyer-client deliberation and dialogue.

Despite the allure of liberal theory, I assailed the presumption common to each account that a client might *freely* adopt a self-subordinating narrative of racial deviance.⁹ That presumption, I pointed out, overlooks the constraints of laws (procedural and substantive), legal institutions (courts and prisons), and legal actors (prosecutors and police) impinging upon a criminal client's decisionmaking.¹⁰ Those constraints, coupled with a client's interests in liberty and survival, give rise to a more limited conception of *voluntary* client action. This weakened conception commands less deference under contractarian and communitarian doctrine, thereby leaving room for a lawyer's discretionary moral counseling.

Moreover, I noted that the presumption of willful self-subordination omits the potential harm to the dignitary and community interests of a client.¹¹ Such harm disturbs the logic of elevating a client's liberty and survival interests over the competing values of dignity and community and, hence, diminishes the notion of *rational* client self-subordination. This notion erodes because dignity and community form the moral underpinnings of liberty. Abating dignity or community curtails liberty, lessening the rationality of self-subordination. Attenuation of this sort does

5. See Alfieri, *supra* note 2, at 1304.

6. See *id.* at 1309.

7. Cf. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *Stan. L. Rev.* 581, 585-86 (1990) (describing experience of racial essentialism in context of black women).

8. See Alfieri, *supra* note 2, at 1320.

9. See *id.* at 1324-25.

10. See *id.* at 1311, 1322.

11. See *id.* at 1323-25.

not, of course, necessarily render self-subordination irrational. A client may view it as a means to achieve a short-term interest, namely acquittal. It remains to be seen whether a lawyer and client can reach such a judgment in a consensual and fully-informed manner.

To engage the issues of racial essentialism and self-subordination, dignity and community harm, and color-blind deliberation in criminal defense advocacy and ethics, I proposed an alternative ethic of professional responsibility based on principles of race consciousness, contingency, and collectivity.¹² The principle of race consciousness posits race and racial difference as central to a client's identity and decisionmaking process. The principle of contingency holds that a client's moral character and life choices derive, in part, from sources outside the self, including law and community. The principle of collectivity enjoins lawyers and clients to accept joint responsibility for harm to third party or community interests.

Two rule-based approaches accommodate this cluster of alternative principles. A strong version urges criminal defense lawyers to forego unilaterally the use of deviance-based racialized strategies, except to encourage the ad hoc jury nullification of a racially discriminatory prosecution.¹³ A weak version prescribes lawyer-client deliberations of racial identity and injury within a counseling dialogue devoted to considerations of moral character and community integrity. Character dialogue assesses the incompatibility of deviance narratives with client authenticity and dignity. Community dialogue considers the client obligation to uphold the integrity and to promote the respect of racial communities.

Barnes claims that the alternative ethic of race-conscious responsibility fails to recognize that race-based narratives of "white defiance" provide the most significant source of harm to individual and collective black identity.¹⁴ The harm flows from public attempts to exculpate racially motivated acts of white-on-black violence, especially in "high-profile" criminal trials.¹⁵ For Barnes, the failure to appreciate this harm signals a misapprehension of the social construction and discourse of race.¹⁶ In her view, deviance-based racialized criminal defense strategies merely "reflect" the dominant racial discourse in American society.¹⁷ According to

12. See *id.* at 1340.

13. The nullification proviso follows established mechanisms governing the allocation of burdens and the order of proof in cases of discriminatory employment and jury selection. The mechanisms require evidence of discrimination to be refuted by a neutral explanation of legitimate, nondiscriminatory reasons. Under this framework, it is the criminal defense counsel's burden to produce evidence of prosecutorial racial discrimination. Once this burden is met, the burden of production shifts to the prosecution to establish a neutral explanation for the indictment. Establishing a neutral predicate shifts the burden back to the defense for rebuttal evidence of pretext.

14. See Barnes, *supra* note 4, at 791-92.

15. See *id.*

16. See *id.* at 789-90.

17. See *id.*

this view, defiance-based racialized narratives must similarly "reflect" the reigning racial discourse. This inference is mistaken. Defiance narratives deviate from dominant racial discourse. Barnes overlooks this deviation, misconceiving the tensions in the sociolegal discourse of race and misstating the individual and community harm arising out of those tensions.

Barnes's explication of racialized defense strategies mistakes the whole purpose of the alternative ethic of race-conscious responsibility. The goal of the ethic is to establish the principle of lawyer moral accountability for *racial* harm done to the character of individual clients and to the integrity of third parties or communities. At present, codes of ethics permit lawyers to maintain a color-blind stance of nonaccountability in appraising the moral consequences of their advocacy for law, legal institutions, clients, and third parties. This stance not only trivializes, but silences, racial injury.

Barnes departs from this stance, conceding the harm of black deviance narratives, only to override it with purported evidence of the greater harm of white defiance narratives.¹⁸ This override implies that racial harm is susceptible to empirical measurement and ordering. Barnes in fact differentiates between discrete categories of harm and arranges them in white/black and social/legal hierarchies. According to this hierarchical logic, white narratives dominate black voices and social discourse governs legal rhetoric. Although Barnes finds this logic compelling, she denies that it is natural or necessary, citing political and economic means of change.¹⁹ Yet, she detects no room for change in the settled principle of lawyer moral nonaccountability, proclaiming it *necessary*.²⁰

The admission of client racial injury, however, demands lawyer moral accountability. The historical legitimacy of the principle of nonaccountability hinges on the pretext of race-neutrality. Evidence that racialized strategies mar the dignity of "individual personalities" and deform the integrity of "collective" racial histories shatters this pretext.²¹ Likewise, evidence of historically intertwined racial narratives and sociolegal discourses explodes the hierarchies of white/black narrative and social/legal discourse. Barnes overcomes these evidentiary showings on the strength of the duty of client loyalty. That duty, she insists, tolerates lawyer-inflicted moral injury to client racial identity and community, regardless of narrative source and content.²²

Contrary to Barnes's view, the convergence of race, law, and language in criminal defense advocacy warrants a *political* defense of racial-

18. See *id.* at 791–93.

19. See *id.* at 792.

20. See *id.* at 793.

21. On the interpretive collapse of "individual personalities" into "collective subjects" under the rubric of race, see Angela P. Harris, Foreword: The Jurisprudence of Reconstruction, 82 Cal. L. Rev. 741, 762 (1994) ("The study of racism is in part a study of how individual personalities are melted down into collective subjects.").

22. See Barnes, *supra* note 4, at 794.

ized strategies within the ambit of zealous advocacy. Consider, for example, an anti-subordination theory or politics of legal advocacy. Criminal defense advocates might argue that certain racially motivated acts of black-on-white violence constitute *legitimate* political acts deserving of protection. Alternatively, they might contend that racially motivated violence comprises a form of self-defense or that race-infected rage furnishes a legal excuse for such violence. But Barnes eschews an explicit politics of racial representation in favor of the adversarial system excuse of the best available criminal defense.²³ The best defense claim is bound up in the ethical charge of zealous advocacy. Adhering to this color-blind decree, Barnes contends that the ethic of race-conscious responsibility presumes too much about the detrimental nature and sociolegal origins of racial injury. The ethic, she remarks, overstates assessments of the damaging effects of lawyers' use of racialized narratives.²⁴

To be sure, the alternative ethic of race-conscious responsibility opposes the accepted obligations of criminal defense practice, including the race-neutral pretense of zealous advocacy. The ethic meets this challenge by seeking to enlarge the notions of lawyer duty, client or third party injury, and causal responsibility integral to advocacy. Efforts to stabilize these categories merely produce discontinuity and fracture. Ethics scholars reveal this discontinuity in the lawyer's duty to offer nonlegal advice on issues of moral character²⁵ and community interest.²⁶ CRT scholars demonstrate the malleability of racial identity²⁷ and the multiple physical and psychosocial aspects of racial injury.²⁸ Feminist scholars point to the ambiguity of causal attribution in fact finding.²⁹ The mutability of these

23. See *id.* at 794-95.

24. See *id.* at 789-90.

25. See Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 *Yale L.J.* 1545, 1549, 1607, 1609 (1995) (proposing a "counselor-lawyer" ethics of dialogue, character, and virtue guided by a "presumptive moral obligation to engage in a counseling conversation if there is reason to foresee that the client may violate the law or a significant legal or moral norm").

26. See Bill O. Hing, *In the Interest of Racial Harmony: Revisiting the Lawyer's Duty To Work for the Common Good*, 47 *Stan. L. Rev.* 901, 930 (1995) (recommending community-lawyer ethic of "racial harmony" to resolve conflicts involving different racial and ethnic groups).

27. See Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 *Stan. L. Rev.* 781, 783 (1994) (discussing criminal defense attorneys' construction of race in deploying race-based claims of reasonableness in self-defense cases).

28. Cf. Peggy C. Davis, *Law as Microaggression*, 98 *Yale L.J.* 1559, 1570 (1989) (describing cognitive, microaggressive acts conveying the "social message of inferiority and subordination") and John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope from a Mountain of Despair,"* 143 *U. Pa. L. Rev.* 1233, 1235-36 (1995) (employing the concept of "racialized space" to link the dynamics of residential location, community, and racial identity).

29. See Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 *N.Y.U. L. Rev.* 36,

concepts makes clear that a lawyer's duty is not fixed and may be expanded to meet the demands of a particular context.

Notwithstanding the instability of the core categories of criminal defense ethics, Barnes protests that the ethic of race-conscious responsibility runs counter to "the lawyer's duty to act solely in the interests of individual clients."³⁰ Acknowledging that this duty may sometimes require the use of "racialized narratives," Barnes persists that race-based narratives are "clearly permit[ted]" by ethical rules.³¹ Regulatory encroachment on these boundaries, Barnes comments, is likely to "wind up on a collision course with principles underlying the First Amendment to the U.S. Constitution."³²

Barnes's remonstrations overlook the basic incoherence of the "best interest" standard. Coherent exercise of a lawyer's best interest discretion requires a fixed account of client identity, an ability to discern client values and interests, and a willingness to justify normative judgments independent of client preference. Barnes's proffered analysis meets none of these requirements. The analysis lacks a meaningful account of client identity outside the assertion of a narrow liberty interest. It also neglects scrutiny of lawyer epistemology, interpretation, and morality, leaving discretionary normative judgments unguided.

Barnes's suggestion that client social identity lies stuck³³ in media-driven racial artifice provides little principled justification for discretionary appeals to race-based prejudice through the exploitation of racialized narratives beyond the practical exigencies of circumstance.³⁴ Although attractive, the claim of exigent circumstance amounts to a basic restatement of her prior liberty interest argument. Absent a reasoned justification for the privileging of this interest over *all* other competing interests, including the demonstration that liberty survives unharmed by injuries to dignity and community, Barnes's analysis founders. It invokes lawyer duty but hastily cabins the scope of that duty. It acknowledges client injury but discounts the significance of that injury. And it denies a law-related narrative cause of harm but traces the line of causation to mixed sociological narrative.

Barnes's analysis falters as well in broaching the contention that ethical regulation of race-based narratives casts an impermissible restriction on the First Amendment liberties of lawyers and clients. That contention ignores the broad history of speech regulation in civil and criminal advocacy. This regulatory history encompasses restrictions on claims deemed

98 (1995) (pointing out that cultural defense arguments muddy issues of causation and responsibility).

30. Barnes, *supra* note 4, at 793.

31. *Id.* at 793-94.

32. *Id.* at 790.

33. See *id.* at 792.

34. See *id.* at 792-94, 796.

frivolous,³⁵ prejudicial,³⁶ and false,³⁷ as well as claims presented in bad faith.³⁸ Further restrictions flow from judge-made doctrinal bars to proffered defenses in cases of avowed political protest.³⁹ In addition to this regulatory and prudential history of speech restriction, the CRT-forged doctrine of hate speech presents a potential substantive basis for regulation, provided courts construe racialized narratives as a form of hate speech.⁴⁰

Barnes's rejection of alternative speech regulation and her tolerance of essentialist narratives contravenes the recent effort of CRT scholars to define racial identity as subjective and pluralist, and, further, to decenter the universal racial subject as a moral agent isolated from her community. Applied to the context of criminal defense advocacy, this effort harbors both theoretical and practical import. Indeed, unless criminal defense advocates construe racial identity in multi-faceted terms and link clients to community contexts, they risk reenacting racial essentialism and collective stigma. They also risk a revival of the metaphysics of neutrality.

Barnes's critique promotes a liberal metaphysics of race-neutral ethics and lawyering, hindering the development of a theory of the racialized subject situated at the intersection of competing narratives, and limiting the possibility of transformative self-construction based on a concept of

35. See 28 U.S.C. § 1915(d) (1995) (permitting court dismissal of frivolous in forma pauperis actions); Fed. R. Civ. P. 11(b)(2) (requiring attorney certification that contentions are warranted by nonfrivolous argument); Model Rules of Professional Conduct Rule 3.1 (1994) (barring claims or contentions where basis is frivolous); Model Code of Professional Responsibility EC 7-4 (1980) (a lawyer may not bring a claim unless there is a basis that is not "frivolous").

36. See Fed. R. Evid. 403 (allowing exclusion of relevant evidence on grounds of "unfair prejudice, confusion of the issues, or misleading the jury"); Fed. R. Evid. 404 (generally "[e]xcluding evidence of a person's character or a trait of character for the purpose of proving action in conformity therewith on a particular occasion"); ABA Standards for Criminal Justice Standard 4-7.7(c) (1992) (prohibiting "arguments calculated to appeal to the prejudices of the jury"); see also Fed. R. Evid. 412 (excluding evidence of alleged predisposition of rape victim).

37. See Model Rules of Professional Conduct Rule 3.3(a)(1), (4) (1994) (false statements of material fact or offers of evidence); Model Code of Professional Responsibility DR 7-102(A)(4)-(5) (1980) (false evidence or statements of fact).

38. See Model Rules of Professional Conduct Rule 3.1 (1994) (requiring good faith argument); Model Code of Professional Responsibility EC 7-4 (1980) (same).

39. See James L. Cavallaro, Jr., Casenote, *The Demise of the Political Necessity Defense: Indirect Civil Disobedience and United States v. Schoon*, 81 Cal. L. Rev. 351, 354-56 (1993) (explaining judge-made doctrinal obstacles to the assertion of necessity defense in cases of civil disobedience); Douglas L. Colbert, *The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial*, 39 Stan. L. Rev. 1271, 1272 (1987) (discussing the prosecutorial use of in limine motions to preclude defenses in both criminal and politically sensitive trials).

40. For an exposition of the substantive basis and regulatory function of hate speech, see Mari J. Matsuda et al., *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (1993).

dual or multiple consciousness.⁴¹ Equally important, her disavowal of interpretive possibilities to promote justice⁴² treats the repression of hierarchical dualities—deviance and defiance—as a matter of rhetorical form rather than substance and, thereby, trivializes the *legal* experience of racial subordination. A call for an end to race-talk—even the color-coded rhetoric of well-intentioned criminal defense advocates—is neither a call for neutrality, truth, nor injustice. Instead, it is a call for racial responsibility.

41. See Ian F.H. Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 *Harv. C.R.-C.L. L. Rev.* 1, 61 (1994) (noting that race and identity “are relationally tied to one another across the unstable medium of communities”).

42. See Barnes, *supra* note 4, at 792–93.