

THE ETHICS OF NARRATIVE

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My project today is to examine the scope of that most central of lawyerly duties, the duty of zealous representation, and its relation to narrative. Specifically, I want to explore the tension that arises between the progressive lawyer's political commitment to anti-subordination on the one hand, and the particular demands of an individual client's case on the other. The question presented is: Do the ethical rules permit, or even require, lawyers to strategically deploy racist, sexist or homophobic narratives that will advance their clients' interests? I begin the consideration of this thorny question by examining a specific teaching tool used in our law school and a series of complexities generated by it, and then propose a modest amendment to the ethical rules that would permit lawyers to better balance their commitments to progressive values and to their clients.

In the Criminal Justice Clinic here at the *Washington College of Law*, we have used a simulation for a number of years to explore a range of issues relating to the nature of the lawyer-client relationship, and, in particular, approaches to client interviewing and counseling, fact investigation, and development of case theory.¹ The simulation requires that the students defend a thirty-two year old man named Randy Gilles, who, after a night of drinking with a friend, is accused of having forced a woman, Deborah Brand, to engage in oral sex with him and his friend in the backseat of a car. What little information the students are provided—a police report, the complaining witness's statement, the charging documents—is, by design, fraught with inconsistencies and contradictions. The students conduct an interview of their simulated client in which the client reports that he and his friend met Brand early in the morning at the hospital, where

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1. Simulation on file with author.

the friend was having his hand stitched up following a barroom brawl. Brand asked them for a ride home, they agreed, but later changed their minds and dropped her off well short of her home.

Soon after the client interview, the students are asked to theorize about what might have happened by brainstorming possible explanations for what occurred in the early morning hours of the night in question.

The ambiguity of the facts presented in the simulation lends them to a wide range of exculpatory possibilities: Brand had consensual sex but was angry because the two men dropped her off in the middle of nowhere; Brand was high and made the whole thing up; Brand had sex with the friend but not with our client; Brand was on medication that altered her memory.

This set of explanations can be crudely categorized as “crying rape.” As one student put it in the course of a simulated interview, Deborah Brand was a “stank ho.” These student-generated characterizations provide the basis for a preliminary classroom discussion of gender, and give rise to a series of feminist inquiries: Do women lie about rape? What explains our willingness to believe that they do? Why do we so quickly arrive at such a conclusion? What histories, assumptions, and stereotypes underlie such a conclusion?

The students continue to generate additional possible explanations for what happened between Randy Gilles and Deborah Brand, and inevitably, a student suggests that Brand was trading sex for drugs. Of course, the “crack whore” defense, as some students describe this theory, is susceptible to the same feminist critique as the “crying rape” narrative, but it lends itself to additional critical study on race. A careful review of the police report reveals that Deborah Brand is African American. The documents provided to the students fail to specify the race of the defendant, Randy Gilles. Why does this matter?

First—and this should be obvious—it is fundamentally different to identify a black woman as a “crack whore” than it is to so identify a white woman. Just as crack, by itself, tends to conjure an image of an African American, the “crack whore” stereotype has been plied in racial terms. The “crack whore” is in many ways the cousin of the “welfare queen”: both are, in the popular imagination, irresponsible, desperate, manipulative, female and black.² The “crack whore”

2. See generally JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* 123-25 (1994); Catherine R. Albiston & Laura Beth Nielson, *Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls*, 38 *HOW. L.J.* 473 (1995).

defense is thus both gendered and racialized.

Second, if we assume for the moment that Gilles is white, then the defense is not merely of a woman crying rape, but of a black woman crying rape against a white man. When we make a critical inquiry of this narrative, we can find, not too far under the surface, a case similar to that of Tawana Brawley;³ if we dig deeper, we uncover a long Jim Crow history of disbelief when black women accuse white men of rape;⁴ if we dig deeper still, we see a slave history of slaveowner rape of black women with complete and utter impunity.⁵ In short, the feminist objection to the defense is incomplete without an attendant critique of the racialized dimension of the problem, just as the critical race critique is wanting without a consideration of gender. A “crack whore” is not just a crack whore; there is more to it than that.

Let me note that despite the imaginative, and perhaps speculative, nature of the exercise of brainstorming case theories, the students rarely address Deborah Brand’s sexual orientation. By positing the “crying rape” defense, they implicitly theorize about Brand’s gender (i.e., what kind of woman is she?). By suggesting the “crack whore”

3. See generally PATRICIA J. WILLIAMS, *ALCHEMY OF RACE AND RIGHTS* 161-78 (1991) (discussing the case of fifteen year-old Tawana Brawley, who in 1987 told police that she was kidnapped by six white men and taken to the woods near her home in Wappinger Falls, New York, and raped). Brawley was found disoriented in a vacant lot, with cigarette burns on her body, “KKK” and “Nigger” written on her torso, and smeared with feces. A New York grand jury concluded that Brawley had fabricated the story. But as Patricia Williams notes, Brawley’s story fit into a larger narrative of disbelief. “Tawana’s terrible story has every black woman’s worst fears and experiences wrapped into it. Few will believe a black woman who has been raped by a white man.” *Id.* at 174.

4. See generally Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 722-25 (2002) (describing incidents where white men exhibited a high degree of skepticism toward reports that black women had been sexually victimized); Julie Novkov, *Racial Constructions: The Legal Regulation of Miscegenation in Alabama, 1890-1934*, 20 LAW & HIST. REV. 225, 237 (2002) (explaining that in the late nineteenth century, the legal system did not acknowledge that white men could rape black women or that black women could be raped); Marilyn Yarbrough & Crystal Bennett, *Cassandra and the “Sistahs”: The Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 J. GENDER RACE & JUST. 625, 626-28 (2000) (asserting that African American women are “particularly and peculiarly susceptible to being disbelieved, especially regarding sexual harassment and assault); Angela P. Harris, *Race & Existentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 599 (1990) (noting that even after the Civil War, black women were considered promiscuous by nature and that historically, raping black women was not considered a crime).

5. See Harris, *supra* note 4, at 598 (stating that “[d]uring slavery, the sexual abuse of black women by white men was commonplace.”); see also bell hooks, *Ain’t I a Woman: Black Women and Feminism*, in *LAW AND VIOLENCE AGAINST WOMEN: CASES AND MATERIALS ON SYSTEMS OF OPPRESSION* 358 (Beverly Balos & Mary Louise Fellows eds., 1994) (asserting that white male slaveowners wanted enslaved black women to accept sexual exploitation as the right and privilege of those in power).

defense, they implicitly theorize about Brand's gender and race (i.e., what kind of black woman is she?). But in both instances, sexual orientation is left uninterrogated, which is to say that even the students' tentative inquiries into gender, race, and gender and race, are presumptively heterosexual. This is, I think, a sign of how deeply closeted sexual orientation remains in even the most progressive of lawyering processes: our consideration of poor black women never countenances the possibility that they might not be straight. To theorize on Brand's sexuality is more than a fanciful digression. In a case where the existence of and consent to a heterosexual sexual encounter are fundamental, the sexual orientation of the putative crime victim may be of enormous relevance. While far from conclusive, Brand's sexual orientation may influence a factfinder's determination of her credibility regarding the sexual conduct alleged. For example, a jury may be less willing to believe that Brand had consensual sex with a man if they believe her to be a lesbian. I do not mean to be reductive about sexuality; sexual identity is hardly determinative of sexual conduct, but it is, within the confines of the courtroom, at the very least probative.

This blind spot reminds us of the importance of Mari Matsuda's demand that we ask the "other question."⁶ As Professor Matsuda writes: "When I see something that looks racist, I ask, 'Where is the patriarchy in this?' When I see something that looks sexist, I ask, 'Where is the heterosexism in this?' When I see something that looks homophobic, I ask, 'Where are the class interests in this?'"⁷ In so doing, we are forced "to look for both the obvious and non-obvious relationships of domination, helping us to realize that no form of subordination ever stands alone."⁸ Feminist and critical race inquiries are, then, inadequate, and leave the progressive lawyer's project incomplete. A fuller understanding of subordination, and a greater attention to it, demand the embrace and incorporation of sexual orientation into the progressive lawyer's case analysis.

After exploring these various narratives underlying the "crying rape" and "crack whore" defenses—what I term subordinating narratives—I ask my students the following questions: "So what? Is there anything wrong with advancing these defenses? More broadly, is there anything wrong with advancing arguments that, while advantageous to our clients, may reinforce subordinating racist,

6. Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991).

7. *Id.*

8. *Id.*

sexist, or homophobic stereotypes?"

The reinforcement of homophobic stereotypes is perhaps best exemplified by the "Jenny Jones case," where a guest on a talk show, Jonathan Schmitz, killed a gay man who had confessed his affection for Schmitz on air.⁹ The defendant claimed that he killed out of the embarrassment that such a confession, and the implication that Schmitz might be a homosexual, caused.¹⁰ This has been labeled the "homophobic panic" defense.¹¹

The "so what?" question demands two lines of inquiry: a doctrinal examination of the rules of ethics and a normative consideration of fairness. Professors Abbe Smith and Anthony Alfieri have engaged for some years now in a rather contentious debate on the subject, much of which has centered upon what is different or special about criminal defense as opposed to other practices of law.¹² The debate is too complicated to render in its entirety here. In typical academic form, my point is not to answer the question one way or another, as Smith and Alfieri endeavor to do, but to highlight the tensions that arise in the inquiry, and to demand that such tensions not be swept under the rug, or, apropos of this symposium, be closeted.

We can begin to understand the tensions this way: the progressive lawyer has an age-old duty of zealous representation on the one hand and a chosen commitment to anti-subordination on the other. The duty of zealous representation provides, as Lord Brougham famously said in 1821, that "to save [a] client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is [the lawyer's] first and only duty."¹³ That is to say, in the

9. See *People v. Schmitz*, 586 N.W.2d 766, 768 (Mich. Ct. App. 1998) (stating that the defendant shot the victim three days after appearing on the *Jenny Jones* talk show).

10. See *id.* (noting that the defendant claimed he was humiliated and betrayed by the experience on the talk show).

11. See generally Kara S. Suffredini, *Pride and Prejudice: The Homosexual Panic Defense*, 21 B.C. THIRD WORLD L.J. 279, 279 (arguing that homosexual panic defense is based on social and institutional prejudice toward gays and lesbians despite its pretensions to psychiatric disorder); see also *Schmitz*, 586 N.W.2d at 768 (describing the defense as one of diminished capacity).

12. Compare Abbe Smith, *Burdening the Least of Us: "Race-Conscious" Ethics in Criminal Defense*, 77 TEX. L. REV. 1585, 1595 (1999) (arguing that a criminal defense attorney's primary concern should be for his or her client's rights, not justice for the larger racial community the client associates themselves with), with Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293, 1357-63 (1998) (promoting race-conscious ethical rules for advocacy), and Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301, 1306, 1339-42 (1995) (deploring the use of racial narratives by criminal defense lawyers because of the harm such stories inflict upon the community).

13. MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 65-66 (1990) (quoting Lord Brougham in his representation of the Queen in *Queen Caroline's*

course of representation, a lawyer should do everything that a lawyer is allowed to do so long as it is advantageous to the client. Although articulated by Lord Brougham in the context of criminal defense (the defense of Queen Caroline), as embodied in the rules of ethics—Canon 7 of the Model Code¹⁴ and in the Model Rules, the preamble and the comment to Rule 1.3¹⁵—the duty of zealous representation applies to lawyers in all types of representation. The commitment to anti-subordination is something I presume on the part of the progressive lawyer, my only concern today.

The tension arises when we consider modes of persuasion and the centrality of narrative. Narrative, or storytelling, is the primary means by which we as lawyers advance our clients' causes. Alfieri suggests that narrative is the "constructed core of the lawyering process."¹⁶ By describing it as "constructed," Alfieri highlights the fact that narratives are flexible and contingent, subject to the choices that lawyers and clients make as to what to include and what to exclude, what to foreground and what to background. Because narratives are constructed and do not merely exist in the ether, there for us to discover, the choices we make as to what narratives to construct are subject to moral and ethical scrutiny.

One obvious reason to use storytelling in our lawyering is that it is persuasive. In order for a story to be persuasive, it must resonate with the values, beliefs and assumptions of our audience. Our story ought to resonate with stories our audience is already familiar with and to which it already subscribes: the heroic firefighter, the Good Samaritan. Of course, our audience of judges and jurors may well subscribe to far more pernicious stories: the helpless woman victim, the crack whore, the lascivious fag. There is, of course, a strategic call to make as to which narratives our audiences actually believe and those they do not. At the end of the day, though, in order for our narratives to be effective, they must draw upon prevailing norms and beliefs, no matter how problematic they may be. As Abbe Smith writes, "Prejudice exists in the community and in the courthouse, and criminal defense lawyers would be foolhardy not to recognize

Case).

14. See MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (1981) ("The duty of a lawyer, both to the client and to the legal system, is to represent the client zealously within the bounds of the law . . .").

15. See MODEL RULES OF PROF'L CONDUCT pmbi. (2002) (maintaining that "[a]s advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); see also MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2002) (providing that "[a] lawyer must act . . . with zeal in advocacy upon the client's behalf.").

16. Alfieri, *Defending Racial Violence*, *supra* note 12, at 1303.

this as a fact of life.”¹⁷

But this is where the tension lies: some thirty years after the end of *de jure* racial and gender discrimination, our ability to discern discrimination, and structural forms of discrimination in particular, depends largely upon critical insights, such as the recognition that the characterization of Deborah Brand as a crack whore plays upon subtle, deep-seated stereotypes centered around race and gender. The same is true, I would argue, with regard to sexual orientation, for although much of the homophobia expressed today is obvious on its face, so much more exists in more subterranean forms. Moreover, we can learn from the inability of formal racial and gender equality to root out structural forms of race and gender discrimination that the same is likely to be true of sexual orientation, which is to say that even if we were to achieve anti-discrimination laws on the basis of sexual orientation throughout the country, even if we were to achieve heightened scrutiny of discrimination against lesbians and gays, the discrimination would find ways to persist. We rely, then, upon our critical faculties to unearth subterranean subordination.

Critical study is committed to the project of destabilizing prevailing norms, interrogating assumptions, and otherwise muddying what appear to be clear waters. It is in large part through this methodology that our political awareness of, and political opposition to racism, sexism and homophobia emerge. But our legal institutions, and the courtroom in particular, require that we construct narratives that resonate with well-settled norms, values and attitudes. Arguably, the duty of zealous representation requires that we conform our narratives to these prevailing norms as well. Our commitment to anti-subordination is therefore difficult to square with our duty of zeal, given that as lawyers we operate not only in the defined universe of a particular client representation, but in the indeterminate universe of broader society as well. This is the problem of generalized political commitments meeting individual demands.

The tension here is significant. What if we conclude that the “crack whore” defense, or the homophobic panic defense, is the most effective for our clients? What if we believe, as I do, that criminal defense lawyers are, by virtue of their structural position in the criminal justice system, daily engaged in a battle against the subordination of the state against poor people and against people of color? Does that change our analysis about whether subordinating

17. Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People who do Terrible Things*, 28 HOFSTRA L. REV. 925, 954 (2000).

narratives are okay? Does the duty of zealous representation even allow us *not* to employ such a narrative?

The ethical rules allow us to engage our clients in a discussion of the broader implications of the narratives we construct. Model Rule 2.1 provides: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."¹⁸ Model Code EC 7-9 allows a lawyer to ask his or her client for permission to forego an action that the lawyer views as unjust, even if the action is in the best interest of the client.¹⁹ However, "the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for the lawyer."²⁰ And Model Rule 1.16(b)(4) states that a lawyer has discretion to withdraw from representation if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."²¹

The ethical rules just discussed concern the potential conflict between a lawyer's duty to his or her client and the lawyer's fidelity to his or her own moral code. But the ethical rules also recognize a tension between a lawyer's duty to his or her client and an obligation owed to third parties. Ethical Consideration 7-10 states: "The duty of a lawyer to represent the client with zeal does not militate against the concurrent obligations to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm."²² Thus, the progressive lawyer's commitment to anti-subordination may find recognition in two qualifications on Lord Brougham's absolutist view of the duty of zealous representation: the lawyer's independent moral judgment, and the lawyer's professional duty to third parties and to the public.²³ This is necessarily the case, as the lawyer's moral judgments mediate her determination of what

18. MODEL RULES OF PROF'L CONDUCT R. 2.1 (1983).

19. See MODEL CODE OF PROF'L RESPONSIBILITY EC 7-9 (1981) ("[W]hen an action in the best interest of the client seems to the lawyer to be unjust, the lawyer may ask the client for permission to forego such action.").

20. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1981).

21. MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(4) (2002).

22. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-10 (1981).

23. See Gerald F. Uelman, *Lord Brougham's Bromide: Good Lawyers as Bad Citizens*, 30 LOY. L.A. L. REV. 119, 120 (quoting Lord Brougham in stating that the role of the defense lawyer is that of an advocate, who, "in the discharge of his [the lawyer's] duty, knows but one person in all the world, and that person is [the lawyer's] client.").

duty she owes to third parties.

As Bill Ong Hing notes, "The language encouraging the lawyer to take responsibility is couched in terms of aspiration, rather than professional duty."²⁴ The prospect of augmenting professional duty to third parties or to the public good, at the expense of the lawyer's commitment to the wishes of the client, is fraught with difficulty and subject to immediate and predictable challenge. There is, for example, an inherent subjectivity to the question of what constitutes the public good, as any such determination requires the exercise of individual judgment. Objections such as this are not easily overcome. And yet, as lawyers we are called upon to exercise our judgment all the time. Daily practice of law offers the best evidence of the ethical rules' failure to provide bright line rules. This is to say that conformity with the ethical rules demands the exercise of individual judgment.

William Simon has argued that lawyers have ethical discretion to refuse to "assist in the pursuit of legally permissible course of action" if such assistance would run counter to justice.²⁵ I wish to make a more modest proposal: namely, that lawyers should engage their clients in a meaningful discussion of the potential negative consequences to others of their specific narrative choices.

Returning to the clinic's fictional client Randy Gilles, let us imagine that he is African American. We might consider, first by ourselves as his lawyers and then in conversation with him, how he might feel about advancing a narrative that relies upon negative stereotypes of African American women. The presumption is that he wouldn't care. The presumption is that he will act purely out of self-interest. But even if that is the case, how does he define self-interest? Is it not within the realm of possibility that Randy Gilles would view the lending of support to a racial stereotype about African Americans as against self-interest? Even if, as the rules of ethics currently provide, the ultimate decision rests solely with the client, it is, I would argue, the *duty* of the lawyer to consider the broader implications of the constructed narrative, and to engage the client in a conversation about them. The language of the ethical rules discussed earlier is permissive, and at best hortatory, of the kind of client counseling I envision. I suggest that the rules should make such counseling

24. Bill Ong Hing, *In the Interest of Racial Harmony: Revisiting the Lawyer's Duty to Work for the Common Good*, 47 STAN. L. REV. 901, 922 (1995).

25. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1083-84 (1988) (arguing that ethical discretion would "vindicate our legal ideals and contribute to a more effective functioning of the lawyer role").

mandatory.

It is important that we acknowledge and appreciate that as individual, as particularized, and as client-centered as a representation may be, it does not occur in a vacuum. It is true, as my students have said in reaction to the Randy Gilles simulation, that they are not going to be able to wipe away deeply entrenched sexism or racism or homophobia through the choices they make about the narrative to deploy in an individual case. But that truth cannot be determinative of the question at hand, for just as the students' efforts in an individual representation will not eradicate racism, sexism, or homophobia, nor will a client's individual case, by itself, resolve the systemic oppression of poor people by the criminal justice system. Both efforts depend upon our aggregate efforts, and rely upon the notion that our individual actions, no matter how small, are of consequence. They matter. They are subject to moral scrutiny. Even in the smallest of cases, we are as lawyers creatures in an ecosystem that shifts and responds as we do.

Let me end with one final example which may help to clarify the spillover effect that individualized narratives may have on the broader society. I raise this example in part to illustrate how the ethics of narrative apply in non-criminal as well as criminal cases. One of the cases handled in the *Washington College of Law's* International Human Rights Law Clinic last year involved a Christian individual in a predominantly Muslim country who was seeking political asylum on the grounds of religious persecution. In an early draft of their brief to the immigration court, the students representing this client employed the term "Muslim fundamentalist" in order to describe their client's persecutors. The term "Muslim fundamentalist" has a social and political currency in the popular imagination of the United States, and undoubtedly in the minds of immigration judges. It is, for example, used routinely in the media, and not just since September 11th. Indeed, its use is so prevalent that even when only the word "Muslim" is used, the term "fundamentalist" is almost implied, suggesting that all Muslims are extremists. Edward Said began making this argument in the 1970s.²⁶ Certainly within the Muslim community in the United States, the term "Muslim fundamentalist" has risen (or sunk) to the level of epithet.

Assume that use of the term "Muslim fundamentalist" will find favor with the judge and that it will be to the client's advantage.

26. See, e.g., EDWARD W. SAID, *COVERING ISLAM* 64 (1981) (arguing that Western views, as shaped by media representation, associate "Islam" with punishment, autocracy and medieval modes of logic).

What does it matter if these clinic students employ the term “Muslim fundamentalist”? They are just two students, in one client’s case, in one asylum case among a docket of thousands, in one immigration court among hundreds. But it is not difficult to imagine that the immigration judge who reads the brief and hears the case today might next week or next month be considering the detention of an Arab or Muslim immigrant under the latest anti-terrorism efforts of the government. Imagine that the government can demonstrate no affiliation of that immigrant to a known or suspected terrorist organization. Imagine—and this is not difficult to do, given the state of our anti-terrorism laws—the use of secret evidence that the immigrant is allowed neither to see nor to challenge. It is, in my mind, not a stretch at all to think that an immigration judge’s subscription to the broad application of the term “Muslim fundamentalist” might affect her judgment on whether to permit the immigrant’s detention. We must be honest in our recognition of the lawyer’s role and responsibility in shaping this judge’s judgment, and how it might affect others in the future.

The lawyer-client relationship may be a confidential one, but it is not wholly a private one. We can learn from queer theory the value of transparency, of understanding that the acts of individuals are of consequence to the collective. Is there a tension between zeal to the individual client and commitment to anti-subordination? Of course there is. But our fidelity to ourselves as lawyers depends upon the honest embrace of such tension as a threshold step to its resolution.

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