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(Er)Race-ing an Ethic of Justice

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INTRODUCTION

For several years, I have pursued a project devoted to the study of race, lawyers, and ethics in the American criminal justice system. Building on the evolving jurisprudence of Critical Race Theory,[1] the project spans a series of case studies investigating the rhetoric of race, or *race-talk*, in the prosecution and defense of racially motivated violence. The first work of the series examines the rhetoric of race in cases of black-on-white racially motivated violence, highlighting the *self-subordinating, racialized* defense of Damian Williams and Henry Watson on charges of beating Reginald Denny and others during the 1992 South Central Los Angeles riots.[2] The next work inspects racial rhetoric in cases of white-on-black racially incited violence, extrapolating *other-subordinating, racialized* defense strategies from the criminal and civil trials of the United Klans of America and several Ku Klux Klan members in the 1981 lynching of Michael Donald in Mobile, Alabama.[3] A third work analyzes the discursive and symbolic meaning of race in *double trials* involving successive state criminal and federal civil rights prosecutions, citing the trials of Lemrick Nelson and Charles Price arising out of four days of interracial violence in the Crown Heights section of Brooklyn, New York in 1991.[4] A forthcoming work explores the federal criminal

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1. For collections of works in this area, see CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995) and CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995). *See also* CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 1997).

2. *See* Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995); Anthony V. Alfieri, *Race-ing Legal Ethics*, 96 COLUM. L. REV. 800 (1996).

3. *See* Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063 (1997).

4. *See* Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293 (1998).

prosecution of five white New York City police officers on charges of physically and sexually assaulting Abner Louima, a young Haitian immigrant, at a Brooklyn station house in 1997.[5]

The purpose of this ongoing project is to understand the meaning of racial identity, racialized narrative, and race-neutral representation in law, lawyering, and ethics. To that end, the case studies serve as a means to develop working hypotheses regarding the sociolegal experience of subordination: specifically, the subordinating discourse and imagery of race trials, the nature of client and community harm caused by such subordination, the color-coded partisanship of purportedly race-neutral ethics regimes that countenance such subordination, and the legitimacy of alternative race-conscious ethical regulation. The process of reworking these hypotheses, one hopes, will not only reveal the sociolegal structures of racial violence in American history, but also reconstruct dominant visions of racial dignity and community in American law.

The reconstructive nature of this project derives in part from the teachings of Critical Race Theory and the emerging voices of color in Asian-Pacific[6] and LatCrit scholarship.[7] Unlike traditional canons of colorblind or color-coded representation, the vision of practice underlying this growing jurisprudential movement implies an ethic of good lawyering based on a color-conscious, contextual approach to civil and criminal advocacy.[8] Still formative, the approach strives to accommodate the identity interests of client dignity and community integrity and, at the same time, to heed the injunction of effective representation.[9]

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5. *See* Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. (forthcoming May 1999).

6. *See* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1243, 1245-68 (1993) (urging the construction of an authentic, post-structuralist Asian American legal scholarship and announcing an "Asian American moment"); *cf.* Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV 1467, 1476-81 (1996) (citing the controversy over the emergence of an "Asian American legal scholarship" as an example of a backlash against the gains of historically disadvantaged groups).

7. *See generally* Symposium, *LatCrit: Latinas/os and the Law*, 85 CAL. L. REV. 1087 (1997); Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 HARV. LATINO L. REV. 1 (1997).

8. *See* Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 873-95 (1997) (arguing for the use of "critical race praxis," defined as combining "critical pragmatic socio-legal analysis with political lawyering and community organizing for justice practice by and for racialized communities").

9. *See* GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 11-82 (1992) (elucidating the rebellious idea of lawyering against subordination); Anthony V. Alfieri, *Practicing Community*, 107 HARV. L. REV. 1747, 1751 (1994) (reviewing LÓPEZ, *supra*) (seeking a new method of lawyering for disadvantaged clients that empowers rather than disables client communities).

The centrality of context to this approach lends added significance to the celebrated publication of William Simon's *The Practice of Justice: A Theory of Lawyers' Ethics*. Together with the new wave quartet of Robert Gordon,[10] David Luban,[11] Deborah Rhode,[12] and David Wilkins,[13] Simon stands among the preeminent scholars in legal ethics, singular in his deft integration of critical theory into the study of the legal profession. Simon's trenchant critique of the profession and its jurisprudential underpinnings gives direction to second wave projects like the one at hand. Indeed, *The Practice of Justice* provides a normative framework for designing race-conscious, community-regarding duties of legal representation. Instead of simply rehearsing Simon's critique and casting objections against it, this essay endeavors to put Simon's book to work in the service of fashioning an ethic of representation in race cases.

The essay is divided into four parts. Part I outlines Simon's jurisprudential critique and revision of liberal ethics regimes. Part II describes a post-liberal vision of ethics tied to race-consciousness and racial community. Part III contemplates the practicalities of institutionalizing a race-conscious, community ethic of representation. Part IV parses and responds to theoretical objections to a race-conscious regulatory regime.

I. LIBERAL VISIONS: DOMINANT AND CONTEXTUAL

Like his new wave, post-realist compatriots, Simon treats law and the animating force of legal consciousness as ideological artifacts produced by normative contest and political conflict. He explores the ideology of the profession by interrogating its prevailing habits of mind, speech, and conduct. His inquiry begins with the introduction of the Dominant View,[14] an ideological stance rooted in state bar codes, disciplinary doctrine, and professional responsibility literature.[15] Attributing both moral anxiety and ethical disappointment to this Dominant View, Simon searches for an explanation of popular and professional disenchantment with the social role and moral aspi-

10. *See, e.g.*, Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255 (1990); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988).

11. *See, e.g.*, DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988); DAVID LUBAN, LEGAL MODERNISM (1994).

12. *See, e.g.*, DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS (2d ed. 1995); DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (2d ed. 1998).

13. *See, e.g.*, David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992).

14. *See* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 7-11 (1998). Hereinafter, all references to *The Practice of Justice* will be made by citation to page numbers without additional identification.

15. *See* p. 7.

ration of lawyers.[16] He locates this explanation in the norms of professional responsibility that govern a lawyer's commitment to legality and justice. The core of that commitment, according to Simon, is loyalty to the client.[17] Pointing to the structural tension between client interests and third-party or public interests, Simon observes an anxious profession struggling with hard moral decisions.[18]

Simon's observation of moral anxiety is widely shared.[19] Yet, for Simon, the instant anxiety signals a greater deterioration in the "moral terrain of lawyering."[20] He traces this anxiety to the jurisprudential foundation of the Dominant View and its core principle of client loyalty.[21] That categorical imperative, Simon explains, carries crucial assumptions about the nature and purpose of law and the legal system that extend beyond the Dominant View. Here, the reach of jurisprudential logic extends through a common style of decisionmaking that Simon calls categorical. Ethical judgment driven by categorical injunction entails a style of decisionmaking that "severely restricts the range of considerations the decisionmaker may take into account when she confronts a particular problem."[22] Under this style, Simon notes, "a rigid rule dictates a particular response in the presence of a small number of factors."[23] Hence, he adds, the "decisionmaker has no discretion to consider factors that are not specified or to evaluate specified factors in ways other than those prescribed by the rule."[24] Both the American Bar Association's *Model Code of Professional Responsibility*[25] and its *Model Rules of Professional Conduct*,[26] Simon concludes, "legitimate the lawyer in pursuing any arguably lawful goal of the client through any arguably lawful means."[27]

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16. *See* pp. 1-7.

17. *See* p. 7 ("The core principle of the Dominant View is this: the lawyer must—or at least may—pursue any goal of the client through any arguably legal course of action and assert any nonfrivolous legal claim.").

18. *See* pp. 4-7.

19. *See, e.g.*, MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 33-39 (1994) (describing changes in the practice of law that tempt lawyers into unethical conduct); ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 1 (1993) (declaring a transformative "crisis in the American legal profession").

20. *See* p. 4.

21. Under the Dominant View, Simon comments, "the only ethical duty distinctive to the lawyer's role is loyalty to the client. Legal ethics impose no responsibilities to third parties or the public different from that of the minimal compliance with law that is required of everyone." P. 8.

22. P. 9.

23. P. 9.

24. P. 9.

25. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980).

26. MODEL RULES OF PROFESSIONAL CONDUCT (1998).

27. P. 8.

Even competing visions of practice, Simon laments, suffer from the infirmities of this categorical style of judgment.[28] The altruistic Public Interest View, for example, adheres to the basic maxim "that law should be applied in accordance with its *purposes*, and litigation should be conducted so as to promote informed resolution on the *substantive merits*."[29] More conventional perspectives on ethics and professional responsibility suffer in the same way. To Simon, for instance, a rule-focused approach emphasizing mechanical, positive law compliance quickly degenerates into the folly of moribund formalism.[30] A role-morality perspective underscoring nonlegal value commitments and personal moral autonomy, by comparison, strains the bounds of professional role and legal obligation to an untenable degree.[31] A contrasting personal-relations approach stressing the friendship-based extralegal values of loyalty, trust, and empathy unwittingly denigrates norms of legal merit and justice.[32] Last, a prudential approach heralding the "lawyer-statesman" ideal of practical reason derived from common law modes of decisionmaking badly underestimates the moral quality of practice.[33]

Overcoming the reigning preference for categorical styles of judgment, Simon advances a contextual approach to ethical decisionmaking that urges vindication of the *underlying legal merits* of a matter.[34] For Simon, this approach involves "a judgment that applies relatively abstract norms to a broad range of the particulars of the case at hand."[35] His Contextual View imagines a legal ethics regime contingent on a lawyer's discretionary judgment exercised in a manner likely to promote justice. On this view, the promotion of justice is neither inconsistent with the rational, vigorous pursuit of a client's private goals nor inconsonant with the procedural and adversarial public norms of the legal system. Both private and public values, Simon contends, may be served in the particularized circumstances of a case to uphold the aspirational tradition of legal professionalism.[36]

Jurisprudentially, then, Simon steers a delicate course. He seeks to maintain a sense of fidelity to law and to the norms of liberal legalism while he struggles to temper the radical excesses of possessive individualism through discretionary appeal to a greater ideal of public justice. Unfortunately, even a scholar of Simon's elegance and skill must fail in such an en-

28. *See* pp. 8-9.
29. P. 8 (emphasis added).
30. *See* pp. 14-15.
31. *See* pp. 15-18.
32. *See* pp. 19-21.
33. *See* pp. 21-25.
34. *See* pp. 9-11.
35. P. 10.
36. *See* pp. 9-11.

terprise. The weight of liberal foundational norms—moral agency, radical individualism, contractarian commodity exchange, and public-private separation—condemns the project of ideological reparation. Consider, for example, Simon's overbroad concept of client agency. Construed either as an isolated individual or as a corporate entity, Simon's client often seems to possess an unchecked free will, a power of agency unfettered by material constraints in counseling or in the political economy.[37] Consider as well his crabbed notion of the "public dimension" of client-group loyalty and client-community nexus outside the legal system.[38] Narrowly defined, client loyalty operates to exclude the competing values of family, group, and community. Simon confesses as much but offers little guidance in the effort to reintegrate those values into a richer conception of *other-regarding* loyalty relevant to the support of "third-party and public interests."[39] More troubling, his underdeveloped notion of a larger, public community reinstates the private alienation of liberal individualism. Equally frustrating, the vitality of liberal legalism enjoys reinvigoration under his prescription of discretionary judgment. Because the prescribed act of discretion is itself ungrounded in community or some other public-regarding principle, Simon's lawyer may simply reenact his own private moral preference at the expense of a client-community participatory resolution. The next Part ponders whether a race-informed, post-liberal vision of ethical lawyering might fare any better.

II. POST-LIBERAL VISIONS: RACE-CONSCIOUSNESS AND RACIAL COMMUNITY

Critical Race Theory offers a battery of post-liberal visions embracing race-consciousness and racial community. Both liberal and postmodern in nature, the visions offer conflicting interpretations of racial identity, racialized narrative, and race-neutral representation. Several contemporary trials illustrate this conflict and the interpretive violence that binds racial discourse and symbol together in the harmful experience of client and community subordination. Consider, for example, the recent trials of Damian Williams and Henry Watson, the Alabama-based United Klans of America, and Lemrick Nelson and Charles Price. Careful scrutiny of these trials shows racial identity to be mutable in character, racialized narrative to be unstable in form, and race-neutral advocacy to be color-coded in content. The shifting circumstances of procedural and substantive laws, judges and juries, parties, victims, attor-

37. *See* pp. 5-7 (describing representation of Charles Keating and Lincoln Savings & Loan); pp. 166-69 (same); pp. 151-56 (discussing representation of a private university in a collective bargaining union dispute).

38. *See* pp. 11, 149-56.

39. P. 225 n.32; *see also* p. 211.

neys, and sociolegal culture add to this variability, creating cross-cutting lines of *racial* demarcation within law and the legal system. Surprisingly, what emerges out of this racial vortex is a relatively fixed set of status boundaries implying a system of moral hierarchy. The upshot is seen in the spectacle of the American *race trial* where identity, narrative, and representation shift in an ongoing contest of accommodation and resistance to well-entrenched racial hierarchy.

Racial identity is deeply embroiled in the moral hierarchy of the American race trial. It is expressed in lawyer speech and conduct, in the discourses of constitutionalism, in legislation, and in the common law.[40] The colors of black and white, in fact the categories of blackness and whiteness, dominate those discourses, naturalizing color-coded inferences and color-conscious stereotypes about racial identity. The heart of both inference and stereotype is race-infected moral inferiority.

The precept of inferiority is rhetorically encoded in the racialized defense. Color-coded claims that overtly or covertly appeal to demeaning racial stereotypes shape the form and substance of the racialized defense. Pervasive in American law, culture, and society, the claims disclose the historical linkage connecting the past defense of antebellum slave rebellion[41] and the contemporary defense of deprivation-fueled insurrectionist violence.[42] The strength of that link hinges on moral character.

The prevalence of racial identity judgments of moral inferiority in criminal lawyer narrative and storytelling follows in part from the basic presuppositions of traditional criminal defense advocacy (partisanship and moral nonaccountability)[43] and in part from the liberal premise of freely exerted client

40. On racial identity and lawyer conduct, see Robin Charlow, *Tolerating Deception and Discrimination After* Batson, 50 STAN. L. REV. 9 (1997). On racial identity and the discourses of constitutionalism, see Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998). On racial identity and legislation, see Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111 (1998). On racial identity and post-common law codes, see Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998).

41. *See* Ariela Gross, *Pandora's Box: Slave Character on Trial in the Antebellum Deep South*, 7 YALE J.L. & HUMAN. 267, 288-91 (1995) (describing how antebellum southern courts accepted characterizations of slave runaways not as people who had chosen to flee, but as property with an inherent defective quality).

42. *See* Patricia J. Falk, *Novel Theories of Criminal Defense Based Upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 N.C. L. REV. 731, 738-41, 748-57 (1996) (describing cases where defendants attempted to use the ills of their inner-city environment or the effects of racism as excuses for criminal behavior).

43. *See* Eva S. Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 GEO. J. LEGAL ETHICS 1, 17-21 (1994) (finding that principles of partisanship and nonaccountability free advocates from legal, professional, and moral responsibility for the means and ends of representation when pursued within legal constraints).

subjectivity. On these bases, racialized narratives appear contingent on instrumental lawyer strategy and voluntary client self-construction. Although contingent, advocacy narratives in race cases sound determinate themes of a natural or a necessary racial order. These themes resonate in historical proclamations of a *naturally* defective black moral character and courtroom declarations of the *necessary* portrayal of a deprivation-induced black moral deficiency. Clothing strategic argument in the natural and necessitarian rhetoric of racial inferiority legitimates subordinating constructions of moral character and conduct under a claim of race-neutral representation. The stance of race-neutrality cloaks the color-coded practice of advocacy.

Consider the rhetoric of race in cases of black-on-white racially motivated private violence, specifically in the assault and attempted murder trial of Damian Williams and Henry Watson.[44] To win acquittals, the Williams-Watson defense attorneys challenged and ultimately refuted substantial evidence of intent and voluntary conduct available to prove criminal liability for attempted murder and aggravated mayhem in the beating of Reginald Denny and others. Their main defense rested on a "group contagion" theory of mob-incited diminished capacity. Marshaled as a partially exculpatory defense, the theory holds that young black males as a group, and the black community as a whole, share a pathological tendency to commit acts of violence in collective situations. Both Williams and Watson are young, male, and black. Among the victims, Denny is white, and the others are of mixed ethnic and racial backgrounds.

The rhetorical structure of criminal defense stories of black-on-white racial violence embedded in the Williams-Watson trial record reflects the sometimes dissonant incorporation of competing narratives of deviance and defiance. The narratives construct the identity of young black males in terms of *both* bestial pathology and insurrectionist rage. That dissonance produces racialized narratives of "good" and "bad" young black men, thus reducing racial identity to a dichotomy of virtue and sin. Under this dichotomy, blackness itself resembles an act of original sin fatal to moral character. Distilling male racial identity into objective, universal categories of unalterable human nature distorts the meaning of racial identity and the image of racial community. The tendency of white *and* black criminal defense lawyers to privilege deviance narratives and to subordinate defiance narratives in storytelling magnifies that distortion, inscribing the mark of bestial pathology into the sociolegal texture of racial identity and community.

Next consider racial rhetoric in the context of white-on-black private violence, particularly in the 1981 lynching of Michael Donald by the Ku

44. *See* Alfieri, *Defending Racial Violence*, *supra* note 2, at 1308-20.

Klux Klan.[45] The legal defense of lynching displayed in the Alabama Klan trials[46] demonstrates the identity-making function of legal narrative in the context of race and community bias.[47] Specifically, the defense captured a white community-minded imagination infusing the most ordinary individuals with racial invective and hatred. Several lynching defenses—jury nullification, victim denigration, and diminished capacity—embody a distinct narrative form of the racialized defense. Both the defense of jury nullification and that of victim denigration erect moral hierarchy by overt use of racialized narrative. Nullification rhetoric trumpets white racial supremacy. Denigration rhetoric intones black racial inferiority. The defense of diminished capacity, by contrast, reproduces hierarchy by covert reference to the normative value of segregated community.

The moral hierarchies implanted in the racialized narratives accompanying the lynching defenses of nullification, denigration, and diminished capacity denote *difference* in sociolegal status. The defense of jury nullification, for example, invokes community commitment to racial difference and subordination. Propounded as an expression of community moral sentiment, nullification seeks to rectify or to reinforce perceived inequalities of racial status. For the white defender of black lynching, the criminal jury trial provides a forum for citizen political participation aimed at curing the problem of white disenfranchisement.

The racialized defense of victim denigration rests on the obfuscation of racial identity behind the image of deviance. Criminal defense lawyers employ deviant imagery in elevating the status of the white lawbreaker and degrading the worth of the black victim. The denigration defense centers on the racially subordinate status of black victims. Renewing this status bolsters claims of black moral, physical, and mental inferiority, thereby providing the moral rationale for lynching and segregation.

The racialized defense of diminished capacity combines commitment, community, and delusion to free white lawbreakers of moral and criminal culpability. Proponents of the defense contend that the extreme nature of white commitment to broad racial supremacy induces a delusional state of mind. Caught up in the emotion of populist resistance to arguably unlawful state mandates (desegregation and affirmative action), white lawbreakers engage in acts of racial violence without individual or collective remorse.

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45. *See* Alfieri, *supra* note 3, at 1063-65.

46. Both federal and state criminal trials ended in convictions with sentences ranging from life imprisonment to death. A subsequent federal civil rights trial concluded in a $7 million award of damages against the Alabama Klan. *See id.*

47. *See generally* LOU FALKNER WILLIAMS, THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS, 1871-1872 (1996).

Overcoming the image of white savagery, the defense offers the sympathetic impression of white innocence and empowerment.

Consider as well the racialized defense of Lemrick Nelson and Charles Price in the 1991 murder of Yankel Rosenbaum.[48] A bundle of racialized narratives attend the Nelson-Price state and federal trials, infecting both prosecutorial and defense tactics. The dueling narratives generate race-contaminated opening statements, witness examinations, and closing arguments replete with claims of *white* hierarchical bias allegedly manifested in the acts of police officers and prosecutors, and widespread assertions of *black* deviant pathology demonstrated in family disfunction, juvenile delinquency, and drug abuse. Moreover, the narratives spawn pretrial motion strategies, such as recusal and adult transfer, that hinge on the contention of the defective, indeed irredeemable, state of white and black moral character. Apparently, for blacks at least, this original defect seals the criminal fate of both adults and children.

Dominant ethics rules tolerate the above color-coded criminal defense strategies under neutral accounts of liberal theory. Two principal accounts stand out in this respect, circulating through the great bulk of ethics rules. The first, loosely based on the contractarian strand of liberalism, draws on the familiar presuppositions of moral agency, radical individualism, commodity exchange, and public-private separation. In this code-ratified account, the client reaches independent moral decisions concerning the private objectives, and even the means, of representation.[49] Formulated under market conditions, the decision seeks to maximize client commodity value in economic exchange relationships, including welfare state interchanges. In this way, the contractarian account treats deviance-specific racialized strategies as the rational and voluntary decision of an autonomous client.

A second account, founded on an enlarged communitarian strand of liberalism, relies on the understated deliberative and third-party elements woven into the often overlooked texture of liberal theory. In this similarly rule-sanctioned account, the client approves deviance-enhanced strategies that result from lawyer-client colorblind deliberative counseling.[50] Deliberation, of course, may be inclusive or exclusive of the public at large. Public-inclusive deliberation ensures some recognition and accommodation of third-party individuals or groups. Conversely, public-exclusive deliberation affords little cognizance of or solicitude toward third-party interests. In this

48. *See* Alfieri, *supra* note 4, at 1323-25, 1335-39.

49. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1998) (requiring lawyer to abide by client's decisions on certain topics).

50. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1998) (directing lawyer to render advice to client based on professional judgment).

sense, advisory-directed forms of lawyer-client deliberation in no way guarantee an outcome favorable to third-party or public interests. Code-encouraged dialogue may be confined simply to economic and political deliberative factors without mention of higher moral or wider social considerations.

The *Model Rules* and the *Model Code* countenance the deformity of client and community racial identity constructions by allowing color-coded, racial deviance-based criminal defense strategies to survive unregulated on the presumption that a client may *freely* adopt a self-subordinating narrative as a function of either independent moral decisionmaking or lawyer counseling. Ethical legitimacy in this context rests in part on the rhetoric of colorblindness and in part on the belief that the discourse of the public sphere of law and society is somehow separate from the self-conscious identity-making imaginings of the private sphere of family and community. To the extent that ethics rules reinforce racial status boundaries in law and society, reformers must treat advocacy narratives as a kind of status-preserving discourse fostered by laws, legal agents, and legal institutions. Effective code reform, therefore, must be undertaken against the practical backdrop of laws, legal institutions, and the sociolegal relations of lawyers, clients, and legal administrators and adjudicators. The next Part reviews the practical considerations that Simon encounters in mounting institutional reform strategies and that, moreover, are likely to be encountered in the reformist effort to institutionalize a race-conscious, community ethic of representation.

III. INSTITUTIONALIZING RACIAL ETHICS

Fulfilling the task of institutionalizing a race-conscious, community ethic of representation depends on twin stances toward the descriptive structure and prescriptive resolution of legal ethics problems. Descriptively, Simon points out, the structure of legal ethics problems is permeated by recurring analytic tensions distinguishing substance from procedure, purpose from form, and broad from narrow framing.[51] Prescriptively, he adds, the resolution of ethics problems demands contextual judgment. Without a normative compass, he admits, this style of discretionary judgment falters. To steer lawyer judgment, Simon engrafts the normative maxims of *justice* and *legal merit* onto traditional codes of legal ethics.[52] Summoned to promote justice, the maxims purportedly guide resolution of the key tension in lawyer obligation

51. *See* pp. 139-56.

52. *See* pp. 21, 50-51, 138-39, 158-60, 195. Simon asserts that the lawyer enjoys "access to principles of legal merit and justice through both his membership in the society and his training as a lawyer." P. 51.

confronted when "the interests of clients conflict with those of third parties or the public."[53]

For Simon, the intractable problems of competing obligation in legal ethics translate into heavy burdens of contextual judgment. The basic structure of legal ethics problems, however, militates against the particularized application of such discretionary judgment. Dominant ethics rules, according to Simon, afford neither a substantive yardstick for evaluating legal merit nor an established set of procedures for conducting that evaluation.[54] The absence of a merit-based substantive benchmark and a procedural matrix thwarts discretionary judgment. The schism dividing purposive and formal methodologies additionally confounds lawyer judgment.[55] The tendency to rely on alternately broad and narrow issue-framing methods further undermines the exercise of lawyer discretionary judgment.[56]

To escape the rigid confines of substantivist and positivist categories and, thus, to avert quarrels over substance/procedure, purpose/form, and broad/narrow framing in ethical problem-solving, Simon forgoes categorical analysis and the corresponding facile resolution of jurisprudential tensions in favor of renewed contextual discretion in the framing of ethics problems.[57] For Simon, the contextual development of a legal method combining substantive purpose, pragmatism, particularized fact, lawyer skill, and institutional expertise relegitimates the exercise of lawyer discretionary judgment. Under Simon's Contextual View, discretion of this sort employs general standards of relevance that identify considerations tending to give interpretive logic to applicable substantive law, to lend substantial practical weight to a particular outcome, and to harness lawyer knowledge and institutional competence appropriately.[58]

Initial resistance to the institutionalization of the Contextual View of reform comes from many *practical* fronts.[59] Surveying the field of protest, Simon starts with the claim of contextual inefficiency concerning both the time and effort devoted to ethical decisionmaking. When situated within conventional practice settings, this claim gives rise to the related charge of ineffectuality and, more disturbing, to the assertion of the threatened unrepresentation of "unpopular clients" due to discretionary judgments of substan-

53. P. 138.
54. *See* pp. 138-42.
55. *See* pp. 144-46.
56. *See* pp. 149-51.
57. *See* pp. 7-11.
58. *See* pp. 150-51.
59. *See* pp. 156-57.

tive merit and to the independent freedoms obtained by principled commitment to legal values.[60]

Simon denies the practical and moral costs of the Contextual View. Situating that posture within the "aspirational tradition of professional rhetoric," he insists that "the Contextual View can serve as a basis for guiding and appraising lawyers' exercise of their discretion," even without serious institutional change.[61] Steadfast in this contention, he finds the Contextual View easily susceptible to institutionalization, relying on an enforcement structure of contextual norms and voluntary rule commitments supervised by bar associations or, alternatively, by courts, legislatures, and public regulatory agencies.[62] To demonstrate the viability of a conventional disciplinary regime governed by contextual norms, Simon analogizes to the common law tort liability system. The tort system, he argues, illustrates the workings of a disciplinary system of professional responsibility capable of enunciating standards of professional conduct and enforcing substantive norms.[63]

To his credit, Simon admits that the tort model analogy fails to exhaust the practical considerations of institutional ethics reform. Stymied in the effort to restructure the market for legal services concordant with the promotion of a "high commitment lawyering" ethic,[64] Simon concedes the importance of addressing the practical considerations of psychological bias, transaction and education costs, enforcement and information costs, and rule-making procedures.[65] Yet, even with such practical engagement, Simon's Contextual View struggles to overcome the emotional and cognitive bias constraining ethical commitment and the scarcity of voluntary enforcement activity or commitment-forcing rules sufficient to sanction noncomplying behavior such as strategic nondisclosure.[66] Frustrated, Simon advances the notion of publicly subsidized optional codes operating to underwrite the "production of alternative high-commitment bodies of norms that parties could adopt by incorporation."[67]

In this light, consider the remedial regulation of criminal defense advocacy under an alternative, perhaps optional, race-conscious, community ethic of professional responsibility. Contemporary ethics codes dictating the conventions of racialized defense practices that have come to mark race trials permit lawyers to maintain a colorblind stance of nonaccountability in appraising the moral

60. *See* pp. 156-62.
61. P. 195.
62. *See* pp. 195-97.
63. *See* pp. 197-203.
64. *See* pp. 203-06.
65. *See* pp. 206-10.
66. *See* pp. 203-14.
67. P. 212.

consequences of self-subordinating racial essentialism and in assaying the harm done to the client-self as well as to third-party and public interests. By contrast, a race-conscious community ethic establishes the principle of lawyer moral accountability for *racial* harm that disfigures the character of individual clients and tarnishes the integrity of third parties or communities. Like Simon's Contextual View, the instant ethic merges precepts controverted by, but well known to, liberal regimes. The opening precept, race-consciousness, posits race and racial difference as fundamental to a client's identity and to her moral decisionmaking process. An additional precept, contingency, asserts that a client's moral character and identity originate and unfold in contexts linked to but located outside the self, such as the places of family, school, or community. A final precept, collectivity, postulates lawyers and clients as full, collaborative partners in devising strategies of representation that work to prevent harm to the dignitary and community interests of the client-self as well as those of third parties.

In prior studies, two rule-based approaches offered the promise of integrating this bundle of alternative precepts into a feasible ethic.[68] A strong version of the ethic requires criminal defense lawyers, acting unilaterally, to abandon the use of deviance-based racialized strategies, except to nullify a racially discriminatory prosecution.[69] Not unlike Simon's Contextual View, this lawyer-driven approach borrows from long-standing traditions of lawyer independence and moral activism. A weak version directs lawyer-client counseling dialogue about the composition of racial identity and its connection to race-influenced community. This bilateral approach reignites the Brandeisian vision of social responsibility echoed, albeit weakly, in Simon's Public Interest View.[70] In addition to rendering joint assessments of moral character and community integrity, this type of dialogue tests deviance narratives against the norms of client authenticity, dignity, and self-respect, weighing the risk of harm to personhood and to community.

Doubtless, some may denounce these remedial prescriptions, finding both unilateral and bilateral approaches to pass gravely wide of constitutional and ethical markers.[71] Like the self-regulating legislation recently promul-

68. *See* Alfieri, *Defending Racial Violence*, *supra* note 2, at 1340-42.

69. Reasons of efficacy recommend that the nullification proviso follow well-established procedures governing the allocation of evidentiary burdens common to cases of discriminatory employment and jury selection.

70. *See* Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445, 1471 (1996) (discussing Brandeis' role in shaping the concept of the public interest lawyer).

71. *See* Robin D. Barnes, *Interracial Violence and Racialized Narratives: Discovering the Road Less Traveled*, 96 COLUM. L. REV. 788, 789-93 (1996) (arguing that Professor Alfieri's two approaches are "disconnected from any concrete goal or objective that a rulemaking body could effectively monitor or control" and are "on a collision course with principles underlying the First

gated by the judiciary,[72] the instant approaches make serious commitments to norms and methods incompatible with dominant ethics rules. Both approaches, for example, interweave social and legal strands of race-talk, pronounce harm to identity-based dignitary and community interests, and significantly curtail the criminal defense lawyer's duty to advocate on behalf of individual client interests. At bottom, these commitments flow from an anti-subordination politics of law dedicated to overturning racial hierarchies of white/black narrative and social/legal discourse. On this theory of politics, the well-settled duty of client loyalty that survives under the aegis of race-neutral partisanship and moral nonaccountability gives way to moral claims of identity and community. To be sure, normative deference nowhere indicates the abdication of professional role or the wholesale repudiation of ethical duty. Moreover, nothing here compels the unalloyed *political* defense of racially motivated acts of violence on the grounds of self-defense, symbolic speech, or revolutionary fervor. The proposed ethic of race-conscious community representation merely seeks to reopen the traditionally suppressed lawyering premises of liberal legalism incorporated in the enlarged notions of lawyer duty and client or third-party injury.

Progress in reopening these foundational notions is already at hand. This progress is evidenced by categorical instability affecting the lawyer's duty to furnish nonlegal advice on matters germane to moral character[73] and community interest.[74] Despite this core instability, the Dominant View prevails, conflating the duty of racialized defense and the best interest of the client. Yet coherent application of the best interest axiom requires a steady account of client identity, the discernment of client values and interests, and a normative predicate to override client preference. The Dominant View meets none of these requirements. It lacks a meaningful account of client identity. It provides no strategy of discernment. And it leaves normative preferences unstated.

Nevertheless, the alternative ethic of race-conscious responsibility will not soon unseat the Dominant View. This is unfortunate, given that the alternative

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Amendment" and the Sixth Amendment); David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030, 1069 n.183 (1995) (asserting that Professor Alfieri's approaches, if codified, would be "exceedingly vague").

72. Judicial legislation expressly regulates certain practices of racial advocacy. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(5)-(6) (1997).

73. *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, 1563-64 & n.38 (1995) (noting ambiguity in form, content, and direction of "moral dialogue").

74. *See* 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, 922-54 (1995) (revising adversary ethic to integrate duty of racial harmony especially in the context of community lawyers).

ethic will neither unfairly divest clients and communities of color of participatory control or influence over their racial identity, nor reinscribe elements of universalism and objectivity in demeaning advocacy narratives of race. Instead, the ethic pursues the postmodern campaign inaugurated by Critical Race Theory, a *political* campaign struggling paradoxically to define racial identity as subjective and pluralist while, at the same time, to decenter the racial subject as a free-wheeling moral agent unencumbered by attachments to family or community. Criminal defense advocates who continue to construe racial identity in monolithic, rather than multifaceted, terms and to strip clients from, rather than link clients to, community contexts, run the risk of reenacting a grotesque history of essentialism and stigma in American law.[75] In addition, they risk instigating a revival of the metaphysics of liberal individualism in law and lawyering: moral agency, radical individualism, contractarian commodity exchange, and public-private separation.

The liberal metaphysics undermining Simon's jurisprudential venture in ethical revision likewise hinder the development of a theory of the racialized subject and racial pluralism in advocacy. Moreover, they impede the complementary formulation of a theory of the community-enmeshed racial subject. For this subject, the experience of harm may cross from the singular to the plural, overlapping the planes of self and community.[76] The metaphysics of moral agency, radical individualism, contractarian commodity exchange, and public-private separation inhibit the reimagination of the racialized subject beyond the categorical myopia of deviance and defiance. Furthermore, they limit the possibility of transformative self-construction shaped by a sense of multiple or community consciousness. Thus limited, the proposed ethic of race-conscious, community representation may run afoul of its own goal: to expose the sociolegal structures of racial violence in American history and to reconstruct dominant visions of racial dignity and community in American law. Standing alone, that goal may not withstand theoretical onslaught. The next Part parses theoretical objections to a race-conscious regulatory regime.

IV. OBJECTIONS: LIBERAL AND POST-LIBERAL

Liberal and post-liberal objections to a race-conscious, community ethic of representation take numerous forms. Consider six such objections pressed from a theoretical standpoint. Culled mainly from Simon's own mounted

75. *See* Andrew E. Taslitz & Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment Is No Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781, 789-90, 821-23 (1996) (tracking injuries spawned by racial and ethnic bias and discrimination against lawyer and litigant communities).

76. *See* pp. 195-215.

defense, these include the claim of alienation and self-betrayal,[77] the asserted right to racial injustice,[78] the contention of long-run racial justice,[79] the attenuated obligation of obedience to law,[80] the averred duty of aggressive criminal defense,[81] and the reformist distrust gleaned from Critical Race Theory.

The first objection goes to the claim of professional alienation and self-betrayal. For those wedded to the Dominant View, the introduction of a race-conscious ethic may be dispiriting, alienating the lawyer from her traditional understanding of colorblind professionalism. Estrangement may also stem from a sense of ineffectuality and the loss of role morality. When coupled with the fear of declining self-governance and deteriorating legal judgment, the notion of professional redemption through meaningful work becomes lost, replaced by ambivalence and moral anxiety.[82] Yet the Dominant View itself manufactures the same kind of ambivalence and moral anxiety in the ratification of colorblind professionalism and race-neutral ethics. Approval of this sort may prove similarly dispiriting, resulting in alienation from the law, the client, the courts, and the professional guild. Estrangement of this order may in turn fatally undermine the search for grace and redemption in the work of representation on behalf of the other and in pursuit of civic community.

A second objection rests on the asserted right to racial injustice. The Dominant View establishes a client's entitlement to racial injustice. Basic to Libertarianism and Positivism, this right derives from principles of client liberty and bounded legal norms. Announced in the maxim of "zealous advocacy within the bounds of the law,"[83] the right counts injustice as vital to client liberty and, therefore, as autonomy enhancing. Similarly, the right construes injustice as equality enhancing, at least when legal rules otherwise secure equal protection and evenhanded application within the adversarial system.[84]

Abundant flaws diminish the injustice entitlement argument. Simon mentions, for example, the overlooked presence of nonlegal norms and the corresponding problems of legal and nonlegal norm interpretation and enforcement.[85] He also points to the unduly narrow sense of lawyer obligation

77. *See* pp. 109-37.
78. *See* pp. 26-52.
79. *See* pp. 53-76.
80. *See* pp. 77-108.
81. *See* pp. 170-94.
82. *See* pp. 109-37.
83. P. 28.
84. *See* pp. 26-52.
85. *See* pp. 30-43.

and the barren notion of client autonomy undergirding the right to racial injustice.[86] Discovering a moral and political basis for stopping short of the "bounds of the law" in cardinal democratic values, Simon urges a revived commitment to the norms of legal merit and justice chiefly accessible through lawyer citizenship and training.[87]

A third objection pertains to the contention of long-run racial justice. Simon elicits this contention from defenders of the Dominant View style of advocacy. Maintaining that short-run incidents of racial injustice in fact "avoid greater injustices" and promote a "higher level of justice in the aggregate and [in] the long run,"[88] these advocates tolerate substantial levels of injustice. In search of cogent rationales, they rely upon powerful psychological commitments to client adversarial claims, notwithstanding the system-wide costs of overweening client identification and partisanship exemplified in the strong version of confidentiality championed by the Dominant View.[89] Still, the implication of the lawyer in racial injustice, even in the short run, proves disconcerting here. For Simon, such events of adversarial corruption "underestimate the possibilities of decentralized judgments about justice and overestimate the possibilities of technocratic social engineering."[90]

A fourth objection concerns the attenuated duty of obedience to law condoned by the Dominant View. Simple espousal of a categorical duty of obedience to law fails to cure the error of underinclusive definition. Under the Dominant View, law and legal obligation receive inadequate substantive treatment. This insufficiency, Simon observes, curbs the potentially broad ambit of respect for law, allowing advocates directly and indirectly to encourage or to facilitate illegality.[91] The racialized defenses of lynching—jury nullification, victim denigration, and diminished capacity—provide a case in point. Sprouting from a weak substantive commitment to law-induced obedience, lynching defenses privilege legal norms of client loyalty, confidentiality, and zealous advocacy, as well as nonlegal norms of a white supremacist social order. In the same way, the defenses subordinate legal and nonlegal norms of racial fairness and democratic citizenship. The hierarchical ordering of legal and nonlegal norms in accordance with some perverse historical measure of racial superiority or inferiority documents the profound danger of

86. *See* pp. 43-44.

87. *See* pp. 26-52. Simon states: "[T]here is surely a substantial class of situations within which lawyers are relatively well positioned to make decisions that contribute to the vindication of merit." P. 52.

88. P. 53.

89. *See* pp. 53-76.

90. P. 76.

91. *See* p. 77.

legal/nonlegal normative dichotomy. Realizing this danger, Simon rejects a rigid, positivist notion of legality that denies authority to nonlegal norms as an inadequate basis for a general lawyer's ethic.[92] That notion is similarly incompatible with an ethic of race-conscious responsibility.

A fifth objection arises from the averred duty of aggressive criminal defense. Like many,[93] Simon admits that the practice of criminal defense entails different institutional considerations and impinges on different client interests.[94] In spite of this customary admission, Simon seems reluctant to endorse a categorically aggressive style of criminal defense.[95] His reluctance springs from an abiding suspicion of the unruly tactics of delay and deception common to criminal defense advocacy. Concessions to state-focused arguments of oppression and corruption, individual dignitary claims, and equal protection demands fail to erase this suspicion. Skepticism persists because criminal defense advocates too often engage strategies, manifested here in the guise of lynching defenses, that neither vindicate intrinsic client rights nor contribute to a substantive adjudication on the merits of client-state claims.[96] For Simon, engagement in these practices, especially when tainted by the gloss of racial hierarchy, weakens a lawyer's capacity to express moral commitments in work.[97]

A sixth objection emerges from Critical Race Theory. The postmodern prong of Critical Race Theory embraces the socially constructed nature of identity categories, alluding to the self and to community. To extract meaning from contingent and sometimes indeterminate constructions, Critical Race theorists turn to social context, focusing on the divergent themes of cultural pluralism and the multiple but neglected histories of community struggle against racial injustice. Uncovering insurgent, participatory examples of community resistance divulges no clear bond between client and community. For decades, political lawyers have tried to forge this bond.[98] Their collective failure suggests that a transformative strategy of community-based legal and political advocacy may require alternative race-conscious practices fashioned from postmodern concepts of identity and community. These enigmatic conceptions offer no chance of quick resolution; they instead afford only high-risk experi-

92. *See* pp. 77-108.

93. *See, e.g.*, David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993) (summarizing differences between defending against a civil plaintiff and defending against the state).

94. *See* p. 170.

95. *See* p. 173.

96. *See* pp. 170-94.

97. *See* pp. 170-94.

98. *See generally* Symposium, *Political Lawyering: Conversations on Progressive Social Change*, 31 HARV. C.R.-C.L. L. REV. 285 (1996); Symposium, *Poverty Law Scholarship*, 48 U. MIAMI L. REV. 983 (1994).

mentation. Whether clients or communities stand willing to assume that risk in the hurly-burly of advocacy remains to be seen.

CONCLUSION

This essay began with the attempt to deploy Simon's adroit jurisprudential analysis of dominant ethics traditions against the field of criminal defense advocacy in order to understand better the meaning of racial identity, racialized narrative, and race-neutral representation in American law, lawyering, and ethics. Although Simon's descriptive analysis is often persuasive and his prescriptive remedy is attractive, each is largely silent on the aspirational tradition of racial justice in the legal profession. Indeed, what of racial dignity and community in client representation? Where is the evidence of moral anxiety over racialized representation? Where is the jurisprudential foundation for racialized advocacy or adjudication when formalist, mechanical, and categorical modes of reasoning fail? Simon displays no sure answer to these overarching questions. However, he successfully outlines a framework from which to critique and to rebuild a liberal vision of advocacy that may one day end the subordinating discourse and imagery of race trials and thereby help rescue clients and communities of color from the harmful sociolegal experience of subordination. If there is a race-conscious destiny for the ethics of American lawyering traditions under the watch of liberal theory, it will begin in the pages of Simon's critical devotion.