95 Colum. L. Rev. 1301

Columbia Law Review
June, 1995

Essay
Anthony V. Alfieri[a]

DEFENDING RACIAL VIOLENCE

Introduction

In September 1993 Damian Monroe Williams and Henry Keith Watson stood trial in Los Angeles County Superior Court on twelve charges of aggravated mayhem, felony assault, robbery, and attempted murder arising out of the April 29, 1992 beating of Reginald Denny and seven others during the South Central Los Angeles riots.[1] Legal teams representing Williams and Watson[2] pleaded two defenses to the charges: mistaken identity, and diminished capacity under a "group contagion" theory of mob violence.[3] According to a defense witness called to provide expert testimony on mob violence, group contagion theory applies to a "crowd situation" of "impulsive thoughtless action" marked by an emotional "outpour" of frustration, anger, and violence in a given community.[4]

Pointing in her opening statement to the violent aftermath of the Rodney King verdict, Karen Ackerson, lead counsel for Watson, described South Central Los Angeles as a situation of "total and complete anarchy, an abrupt explosion of anger, utter chaos, conflict, disorder, confusion and explosion of tempers, mass hysteria, people scrambling, a spontaneous form of activity, sudden violence, screaming, turmoil, cursing, yelling"; in sum, "a totally uncontrolled situation" where "everyone was doing his own thing."[5] Ackerson argued that "any human being who suddenly ***1302** found himself feeling violated, humiliated, confused, in despair and totally hopeless in the same chaotic situation and circumstance may have found himself caught up in the civil unrest of April 29th, 1992."[6]

Edi Faal, lead counsel for Williams, echoed Ackerson's description in his opening statement. "Yes there was a riot," he acknowledged, "some people call it a rebellion. Some people call it an uprising."[7] In fact, "[w]hat happened," he clarified, "was nothing more than a mob scene."[8] The people of South Central Los Angeles were "angry" and "frustrated," Faal explained, "by what they perceived to be the injustice of the verdict in the Rodney King case and because of that, tempers flared."[9] Now, he declared, Williams and Watson "are being tried as scapegoats."[10]

By design, the group contagion defense of diminished capacity vitiated the specific criminal intent required to prove aggravated mayhem and attempted murder, the most serious charges facing Williams and Watson.[11] Indeed, Faal asserted that the "chaotic, sporadic, and disorderly" conditions in South Central Los Angeles "precluded" Williams and Watson from "developing" the specific intent to commit such crimes.[12] The "chaos, sudden conflict and total disorder" in the South Central community, Ackerson added, demonstrated "no preexisting reflection," only the "sudden heat of passion."[13]

In this Essay, I explore the form and substance of the Williams and Watson legal teams' diminished capacity defense.[14] Strictly construed, the defense neither exculpates nor excuses Williams and Watson's lawbreaking acts. Rather, the defense explains such acts in the racial context ***1303** of their commission, thereby mitigating claims of retributive punishment.[15] Taking this explanation as a starting point, the Essay begins a larger project studying the historical intersection of race, lawyers, and ethics in the context of the American criminal justice system, specifically in cases of racial violence.[16] Given the breadth of law and jurisprudence on the subject of racial violence,[17] I confine the scope of the project to cases involving private acts of criminal violence motivated by racial difference, such as black- on-white or white- on-black violence. My purpose is to investigate the rhetoric of race or "race-talk" in criminal defense advocacy and ethics dealing with racially motivated private violence. By race-talk, I mean both the colorblind and the color-coded narratives heard in courtrooms and law offices. Out of these settings emerge racialized stories, that is, stories that appear facially neutral but inflict invidious injury.[18]

In prior works, I define story as the constructed core of the lawyering process.[19] Story comprises multiple narratives of diverse origins, signaling ***1304** a wide range of social meanings, values, and images. The narratives embody the complexity and the tensions that accompany such divergent meanings. Legal storytelling enmeshes narrative tension or dissonance in the conventions of advocacy -- in this case the conventions of a state criminal trial defense strategy.

This Essay argues that the rhetorical structure of criminal defense stories of black- on-white racial violence, manifested here in the group contagion claim of diminished capacity, reflects the dissonance of competing narratives of deviance and defiance.[20] The deviance narrative constructs racial identity in terms of bestiality or pathology.[21] This construction portrays young black males as deviant objects controlled by bestial instincts or pathological impulses. The defiance narrative, in comparison, constructs racial identity in the language of rage and rebellion. This account depicts young black males as rational, voluntary subjects guided by the imperatives of resistance and solidarity in opposition to racial sub - ordination. Applied to the April 1992 events in South Central Los Angeles, the account relays the image of an insurrection, rather than a riot. Explicating this distinction, Kimberle Crenshaw and Gary Peller contend that the image of a riot suggests an emotional, individual reaction to the Rodney King jury verdict, while the image of an insurrection conveys a more rational, community-wide response to "a systematic set of social dynamics" involving the "day-to - day subordination of the Los Angeles African American community."[22]

***1305** In the Williams-Watson case, narratives of racial deviance and defiance proliferate in a kind of parallel tension.[23] The notion of proliferation implies competition, not contradiction.[24] At trial, the narratives contend for a position of privilege.[25] Neither reason nor truth confers the privilege of narrative dominance. Only power -- circulating through the thickness of laws, institutional practices, and legal relations[26] -- bestows privilege, and then only partially.[27] Power functions by constraining the space open to rival narratives in legal storytelling. Narrative privilege is thus contingent on the contest of power over story. The winner of that contest controls, at least in an ephemeral sense, the signification of meanings and values in the juridical world of courts, public institutions, and street-level legal agents.

The context of criminal defense advocacy and ethics limits the space available for narrative contest. Within the narrow constraints of the criminal justice system, defense lawyers find scarce opportunity to contest the dominant narratives embedded in laws, institutional practices, and legal relations, even when those narratives inscribe negative racial stereotypes, such as the image of the black male as a social deviant. The risks of state violence are too high and the burdens of advocacy too great to press for such opportunities, particularly when the image to be contested seems bounded and short-lived. For criminal defense lawyers, the image of black male deviance takes passing shape in a private domain of attorney-client negotiation, adversarial bargaining, and institutional adjudication. The geography of this domain is legal, not social; moreover, the temporal quality of its imagery is transitory, not fixed. Accordingly, lawyers believe ***1306** there is no permanent spillover of racial identity or imagery from the private domain of law to the public domain of society. The apparent absence of spillover frees criminal lawyers to use narratives of racial deviance in telling private defense stories without consideration of the potential public injury to group or community racial identity.

This Essay challenges criminal defense lawyers' freedom in storytelling. The Essay is divided into three parts. Part I

examines the Williams-Watson legal defense teams' use of racialized narratives to tell the individual stories of Damian Williams and Henry Watson. Part II analyzes the propriety of the defense teams' deployment of racialized narratives under conventional and alternative ethical regimes. Part III proposes an ethic of race- conscious responsibility accomplished through middle-level rules of criminal defense practice. The Essay concludes that criminal defense lawyers representing black males in cases of racially-motivated private violence bear a race-conscious responsibility to forego narratives or stories that construct racial identity in terms of individual, group, or community deviance.

I. Racialized Story

The ethic of race- conscious responsibility in criminal defense advocacy that I develop in this Essay derives from the principle of interpretive responsibility in storytelling.[28] In both advocacy and counseling, lawyers construct stories.[29] Although laws, legal institutions, and other legal agents frame that construction, lawyers play a central role. Accounts of this role and its attendant obligations differ. Dominant accounts ***1307** pro pound client,[30] court,[31] and law- centered obligations.[32] Discretionary approaches proffer justice,[33] public,[34] and third party- centered[35] obligations.

The proposed ethic of race- conscious responsibility presents an alternative community-centered obligation. The inclusion of a community dimension stems from the premise that legal storytelling constructs both public and private identity.[36] Dominant accounts of criminal defense ethics deny this public/private overlap. That denial rests on the distinction between a client's legal and social identity. According to this distinction, legal identity issues from the institutions of the juridical state charged with the adjudication and enforcement of law. Lawyers help to frame a client's legal identity in court pleadings and motions, at trial, and on appeal. Social identity evolves from the institutions of the political state, the family, and the market. Lawyers make little contribution to the shape of a client's social identity. It follows, therefore, that law and legality stand separate from politics and society.

The separation of law, politics, and society in dominant accounts of criminal defense ethics does not fully correspond to the public/private dichotomy in modern liberal theory. Although liberal theory adheres to the separation of law and politics, it defines the public realm in terms of state action, both juridical and political, and the private realm primarily in terms of the family and the market. Dominant ethical accounts, in contrast, shift juridical forms of state action from the public to the private sphere. This shift reconceives the private sphere as the site of legal identity. ***1308** At the same time, the accounts combine the remainder of public and private spheres -- the institutions of the political state, the family, and the market -- to establish the site of social identity. In this way, the accounts invert the public/private dichotomy of liberal theory to conform to a revised categorical division of law and society.

Inevitably, however, spillover occurs between the legal and social spheres of identity.[37] Indeed, once established, the legal identity of lawbreakers -- whether deviant or defiant -- spreads beyond law to society. Spillover demonstrates the pernicious effect of racialized law stories. Race-infected storytelling imports historical practices of subordination[38] into the legal identity-making process under the rubric of colorblind treatment. These practices mediate the interpretation of laws and the conduct of legal relations, acquiring the form of race-talk. The repetition of race-talk pushes racially subordinate images outside the criminal courthouse into the mainstream of popular culture and society. Regina Austin finds evidence of spillover in the "almost hysterical suspicion" that black men encounter "as they negotiate public spaces in urban environments and attempt to engage in simple commercial exchanges."[39] Public/private and social/legal dichotomies fail to cabin the images of black male deviance that arouse such suspicion.[40]

A. Race-Talk and Narrative Intersection

The Williams and Watson defense teams employed race-talk in an effort to place race and justice in the context of the "real world."[41] Faal declared: "[J]ustice does not exist in a vacuum. It's not a concept that you . . . put . . . in isolation. Justice exists in the real world."[42] People acting in that world, he observed, "commit the most heinous crimes out ***1309** of anger" and frustration over injustice.[43] For Williams and Watson, injustice occurred "in connection with the [Rodney] King case."[44]

Coupled with anger, Faal noted, "frustration brings about agitation and, of course, agitation could bring about a situation where people gather together in a mob situation and start acting out in a thoughtless and impulsive manner."[45] In this sense, defiance and deviance intersect in explosions of racial violence.

The intersection of defiance and deviance narratives in race-talk spawns double narratives[46] of "good" and "bad" young black men.[47] For "bad" -- predatory -- black men like Damian Williams, deviance spurs violence. On direct examination, Timothy McRath, a police officer and a prosecution witness, testified that Williams confronted him prior to the outbreak of violence in South Central Los Angeles, stating: "Fuck you. You ain't shit. If you was any kind of nigger, you would be out here with us."[48] For "good" -- law-abiding -- black men like Henry Watson, defiance degenerates into deviant acts of violence. Ackerson, in her opening statement, described Watson as a married, gainfully employed "ex marine" with two children.[49] Upon direct examination, Chester Clary, a former colleague of Watson's and a defense witness, testified: "He is not -- was not the person who I had worked with. When I say not the same person who I knew, I just couldn't, you know, this is a Keith who I knew? What happened? I don't know."[50] During her closing statement, while summarizing Clary's testimony, Ackerson recounted that Watson "is not that kind of person," that is, not a person capable of committing acts of criminal lawbreaking.[51]

Faal traced the violent intersection of defiance and deviance in South Central Los Angeles to "sociological factors."[52] Citing the expert witness testimony of three sociologists on the nature of "crowd" and "mob activity," he pointed to "situations where moods and behavior are rapidly communicated in an impulsive and thoughtless manner" through fear, panic, and frustration.[53] An individual placed in such situations, he ***1310** claimed, "loses his free will and just flows with the temper of the mob" even when he ordinarily "do[es]n't think like that or act like that."[54]

To appreciate the frustration inciting Williams and Watson, Faal urged the trial court to consider the thirty month jail sentences "handed down" against police officers Koon and Powell in the Rodney King case.[55] Their conduct, he argued, "precipitated the actions that led to the riots"; their brutality "brought about this whole mess."[56] They induced "the feeling of despair among people who feel that justice is not being done especially when it comes to their kind," Faal insisted.[57] They, he persisted, fueled "the perceived injustice and the helplessness that people felt in South Central Los Angeles."[58] Because "violence grows out of specific social conditions," Faal reiterated, Williams and Watson "cannot be seen and should not be seen in a vacuum."[59] Race-talk of this sort encodes double images of black defiance and deviance into the discourse of criminal advocacy.

B. Deviance Narratives

The presence of deviant racial imagery in criminal defense narratives is not simply a function of overzealous advocacy; it is a basic, essentializing tendency of racialized storytelling. Because that tendency is naturalized by the content of legal discourse and the conduct of legal relations, lawyers overlook the spillover effects of deviant imagery. Yet, as Regina Austin points out, blacks experience these effects, often in moments of public humiliation.[60] The destructive spillover effects of race-talk are bound up in the experience of public humiliation and indignity.

Lawyers' neglect of the destructive spillover effects of race-talk discloses unreflective deliberative judgment. Criminal defense lawyers display unreflective judgment when they participate in rigid modes of formalist and instrumentalist deliberation.[61] Formalist deliberation treats racial deviance as a neutral and objective category of description. To a formalist, young black males are deviant. Instrumentalist deliberation asserts ***1311** racial deviance for strategic reasons:[62] to win an acquittal or to gain a favorable plea bargain. To an instrumentalist, young black males are made to appear deviant, whether or not they are in fact deviant.[63] Lawyers often engage in formalist and instrumentalist deliberation simultaneously. Consideration of the integrity of a person or community of color, and the harm posed by race-talk, falls outside both modes of deliberation.

The Williams and Watson defense teams displayed formalist and instrumentalist deliberative tendencies in mustering evidentiary support for their claim of diminished capacity. Relying on the expert opinion of Dr. Armando Morales, a clinical

social worker,[64] they suggested that young black males as a group, and the black community as a whole, share a pathological tendency to commit acts of violence.[65] In laying the foundation for the expert testimony of Dr. Morales, Faal stated that "there was some type of a contagious behavior or contagion that was taking place" in South Central Los Angeles.[66] People, he continued, were "seeing" and "copying" other people "doing" violence "without thinking it out."[67] In a "riotic situation," Faal elaborated, "things get so sporadic, so random, so indiscriminate, so thoughtless that" people "do not reflect on their individual action[s]."[68] The "frenzy" of a riot thus "precludes" people from individually "forming" the "specific intent to kill or to commit mayhem."[69]

***1312** Morales subsequently testified that group contagion behavior, though "highly unpredictable," is "triggered" by a "powerful feeling of frustration."[70] Frustration, he stated, "can come about simply by living in a state of poverty, not being able to have employment, . . . feeling locked out from full participation in society."[71] Acting out "violent frustration," he attested, can result in "a lot of destruction" very often committed by "young people, most often males."[72] At "the height of the contagious feeling," Morales closed, "especially in those situations where there is frenzy or a lot of anger . . . one is governed by in large [sic] by a lot of impulsive behavior, a lot of impulsive action where there isn't much thinking prior to acting . . . ."[73]

The defense teams' decision to adopt a deviance theory of diminished capacity illustrates the tendency in criminal defense advocacy to pathologize racial difference. Deviance case theory alternately combines claims of mental disorder[74] or incompetence[75] with claims of cultural[76] ***1313** or environmental[77] deprivation. Faal remarked: "What we have here is impulsive action[s] of violence that are thoughtless, that must be condemned but do not go to the criminal state of mind or the depraved state of mind . . . ."[78] Like Williams, Faal pointed out, "[w]e are all the product of our circumstances in our environment."[79] Crudely distilled, the instant claim of racial deviance gives rise to the argument that young black male criminal defendants are often "nonculpably out of control."[80] This dispositional excuse frustrates the intent and voluntary act requirements of criminal liability.[81] Faal explained:

[M]y point here is the lack of ability to even form specific intent in such situations and Dr. Morales says that some of these participants described it in the following way; they said it was a feeling of unreal [sic], it was wild, it was crazy, it was strange. These are the feelings of people that get caught up in this type of situation. To them everything is unreal, reality is no longer what they are dealing with, it was wild, it was crazy.

And Dr. Morales said that these people participated in these group activities through violence without any pre-thought or plan, they come into it with no pre-thought, with no plan. . . . When you are caught up in those situations [[[, y]ou cannot have the specific intent required.[82]

Implicit in Faal's explanation of group lawbreaking violence lies a notion of deviant character. Under legal excuse doctrine, character ***1314** "rarely" furnishes the basis for a defense.[83] Instead, the standard control excuse of "irresistible impulse" predominates.[84] Applied here, however, deviance theory suggests a deeper "nonculpable developmental cause"[85] of criminal violence: racial character. The racialized assignment of deviant pathology to the character of black lawbreakers in criminal defense narratives depersonalizes individual responsibility for violent behavior under a race-neutral pretext of universality. At oral argument, Faal highlighted the "mass hysteria" surrounding the Rodney King verdict, accentuating the "impulsive" mob behavior of individuals operating free of the "social controls" provided by "police officers."[86] It was, he stressed, "more emotional than thoughtful."[87] Ascribing the mob attack to "anger, frustration, injustice and other social reasons," Faal announced: "You know people get caught up in things."[88]

For criminal defense lawyers, the racial character of a defendant offers the opportunity for formalist and instrumentalist attributions of a nonculpable mental state.[89] The practice of attribution follows from two related sets of racially- derived cognitive assumptions.[90] Under the first set, lawyers infer that people of color lack the mind and moral character to engage in willful, voluntary acts. Faal contended, for instance, that "but for his ignorance[, Damian Williams] would not have attacked . . . ***1315** Reginald Denny."[91] Ignorance, according to Faal, "is what brought Damian Williams before the court. It is his ignorance that has led him to the situation where he is in."[92]

Under a second set of cognitive assumptions, lawyers reason that people of color suffer no harm, either individually or as members of communities, when made to appear lacking in the properties of mind and character necessary for moral agency. Faal's oral argument in the Williams-Watson case provides an example of this reasoning. He stated:

This was the most unsophisticated crime. Here are people committing crimes with a helicopter up there, cameramen, there were cameras, there are hundreds if not thousands of witnesses. Any sophisticated criminal will be aware of the fact that the likelihood of being arrested was very high because of the presence of the helicopter, the camera and other news people, yet individuals continued and engaged in the conduct oblivious to the fact that their conduct or acts are being recorded. I think that shows lack of sophistication.

Clearly, the crime on Mr. Denny, as regrettable as it is, it was not a planned crime. It was not a thought out crime.[93]

The cognitive assumptions underlying Faal's implied attributions of individual and group deviance tie racial character to criminal violence. Defense lawyers may put forward various factors to link race and crime, for example, drug abuse[94] and poverty.[95] To a lesser extent, educational inequality[96] and community segregation[97] likely contribute to this link. What forges that link, however, is the strategic use of racial identification[98] ***1316** and imagery.[99] But none of these factors or strategies effectively naturalizes the character of black male deviance or normalizes the racial category of deviance.[100]

C. Defiance Narratives

Claims of natural or normal racially deviant identity compete daily with community-based narratives of defiance. These narratives denaturalize the racial character attributions of deviance theory that bolster stereo - types of, and discrimination against, black men.[101] Faal's direct examination of Danny Bakewell, a community activist and a defense witness, at the Williams-Watson sentencing hearing, elicited an illustrative form of community-based narrative. Employing the term "rebellion," Faal asked whether Bakewell realized that the violence in South Central Los Angeles "came on the heels" of a "not guilty verdict" in the beating of Rodney King.[102] Bakewell answered:

There is a tremendous feeling of rejection on the part of the community. There is a tremendous feeling of injustice that is consistently perpetrated on the community. There is a tremendous feeling that no matter what the circumstances are and what exists we will always -- and the system will always find a way to persecute us even in circumstances where we have been vindicated. I think that adds to a very demoralized community.[103]

Deputy District Attorney Janet Moore objected to this line of questioning, complaining about the "political" nature of such testimony.[104] Faal replied that the alleged crimes occurred under circumstances sufficiently "unusual" to constitute evidence of mitigation admissible at sentencing.[105] The court sustained the objection, finding "no relevance" in Bakewell's testimony about "some general feeling" of community "injustice."[106]

The court's ruling shows the difficulty of translating community-based defiance narratives into the discourse of liberal legalism, here reflected in substantive standards of criminal law and evidence. By sustaining Moore's objection, the court serves to "personalize[ ] causal responsibility" ***1317** for criminal or otherwise self-destructive behavior associated with the black "underclass."[107] Personalizing responsibility permits the criminal justice system to punish individual acts of lawbreaking in a manner compatible with liberal theory.

Accordingly, when Faal again attempted to introduce evidence explicating Williams's conduct in light of the "factors that caused the riots," Moore protested, doubting how "exploration of the cause of the riot pertains to why Mr. Williams picked up a brick and threw [it] into the side of Reginald Denny's head" and redirecting "focus on Mr. Williams, Mr. Williams'[s] choices, Mr. Williams'[s] conduct."[108] As before, the court permitted this protest; it demanded "to hear about Mr. Williams'[s] participation and what's unusual about the circumstances at that particular time and place as it relates to Damian Williams. Nothing else."[109] The court admonished Faal: "[T]his is not the place to talk about the politics of riots, in general, or this particular riot."[110]

Despite courts' commitment to the separation of law and politics and to the personalization of criminal responsibility under a regime of liberal legalism, critical race theorists continue to assert the relevance of community-based defiance narratives. Regina Austin, for example, locates such community-based narratives in the criminal behavior of black "lawbreakers."[111] The narratives combine the civil rights discourse of "racial justice" with the militant nationalist discourse of "race resistance" to fashion a "politics of identification."[112] Consistent with this politics, Austin explains, " 'the black community' " evaluates black lawbreaking "behavior in terms of its impact on the overall progress of the race."[113] The community praises criminal behavior that generates "a positive impact on the social, political, and economic well-being of black communal life" and scorns behavior that provokes a deleterious effect.[114]

***1318** For Austin, the acts of black lawbreakers exemplify a form of "direct action" politics[115] as well as a "kind of resistance against material and cultural subjugation."[116] Although the "impolitic ways"[117] of resistance may not grow into a full-blown political strategy of direct action,[118] they represent a "critical challenge to white supremacy"[119] consonant with the militant tradition of black nationalism.[120] Searching this tradition, Gary Peller contends that black nationalism supplies an "alternative, coherent, and reasoned analysis of the meaning of racial domination."[121] Such an analysis, he points out, repudiates the liberal integrationist ideology of colorblind, racial transcendence.[122]

Austin's lawbreaker thesis aims to transform, rather than transcend, notions of criminal behavior.[123] Her mission is to reconfigure lawbreaking into a responsible politics of difference that contributes to the collective security and welfare of the black community.[124] Reconfiguration furnishes lawbreakers with a chance for "redemption" not only in the criminal justice system, but also in the broader socioeconomic system.[125] Echoing these conceptions at the Williams-Watson sentencing hearing, Faal pressed the court to grant Williams "a second chance," a chance to "reform himself and be a productive citizen."[126] Reform and redemption hinge on deciphering the social or collective meaning of difference embedded ***1319** in historical practices of opposition and subordination,[127] especially "difference turned violent."[128]

Black lawbreakers exhibit what Austin Sarat and Roger Berkowitz call "disorderly differences," that is, "differences that threaten society's allegedly fragile harmony and stability."[129] Sarat and Berkowitz claim that prevailing theories of liberal legalism[130] and civic republicanism[131] fail to embrace difference, despite pronouncements of tolerance and community. They ascribe this failure to an erroneous construction of difference as disorderly.[132] Faal summoned this construction in depicting Williams's "background" and "thoughtlessness."[133]

Instead of disorder[134] and danger,[135] however, difference brings the promise of an "orderly"[136] realignment of racialized social practices.[137] Faal alluded to the promise of realignment through education, noting ***1320** that a "lack of education is a significant contributing factor to criminal or deviant conduct."[138] Williams, he admitted, had not been "diligent" in pursuing an education.[139] Because Williams "had not seen education as a priority in his life," Faal elaborated, "he's in the problem that he is here today. If he had gone on to complete his high school and gone to college most likely he wouldn't be sitting before you here today."[140] To Faal, Williams can be "rescue[d]" and his disorderly differences cured.[141]

Faal's vision of rescue and realignment flows from an indigenous politics of difference within the black community. This politics generates defiance narratives antedating the narratives of black nationalism. Austin's elucidation of the "resistance" narratives accompanying the Montgomery bus boycott of 1955 -1956 and the more recent Los Angeles consumer boycotts unearths the historical roots of defiance narratives.[142] Like Ackerson's and Faal's defiance narratives, resistance narratives contest the deviant "pathologies of subordination and repression" assigned to the black community.[143]

Although defiance and resistance narratives draw on a powerful tradition of community struggle, they do not address the destructive effects of deviance narratives in legal storytelling. Deviance narratives of mob behavior are essentialist and invidious, not colorblind. Hence, they warrant race-conscious challenge. Applauding elements of rebellion or revolution in black criminal behavior provides no such challenge.[144] Even if those lesser elements of defiance narrative buttress a defense of race-motivated retribution or retaliation,[145] they offer nothing to counter the dominant narrative of racialized deviance and moral irresponsibility. Conventional ethical regimes of liberal legalism tolerate that dominance.

II. Ethical Regimes

Conventional ethical regimes condone the use of racialized deviance narratives in defense of black male lawbreakers. The regimes rely for authority on texts woven by both contractarian and communitarian strands of liberal theory: the American Bar Association (ABA) Model Code of ***1321** Professional Responsibility[146] and the ABA Model Rules of Professional Conduct.[147] Neither the Model Code nor the Model Rules expressly sanction the use of racialized narratives.[148] Each affirms, however, a colorblind vision of practice susceptible to racialized forms of narrative. This susceptibility stems from the core principles of conventional ethics: partisanship and nonaccountability. By now familiar, these principles establish the partisan injunction of zealous advocacy[149] and the corollary license of moral nonaccountability.[150] The fusion of aggressive advo - cacy[151] and pretextual neutrality[152] results in a colorblind standard conception of role morality[153] that allows lawyers to deny and, at the same time, to exploit racial difference without professional consequences.

*1322 A. Race and Liberal Theory

The ethic of race- conscious responsibility derives from an alternative, still evolving vision of legal practice animated by respect for client racial difference. Three principles distinguish this vision: race- consciousness, contingency, and collectivity. The principle of race- consciousness acknowledges racial difference as a crucial component of individual client and community identity. The principle of contingency decenters the client as an autonomous subject unconnected to community contexts and unconstrained by sociolegal practices. The principle of collectivity holds lawyers and clients jointly responsible for the community harm caused by racialized narratives. Application of these principles disrupts the liberal conventions of criminal defense ethics. Disruption of the often rehearsed ethics of criminal defense advocacy comes from internal critique and rebellion instigated by clients opposed to the dominant narrative of lawyer-devised deviance case theory[154] as well as from external critique questioning the epistemic and normative commitments of deviance case theory. Both internal and external critiques challenge the ordinary, common sense conventions of criminal defense practice.

Consider the Williams and Watson defense teams' use of expert witness testimony to support a group contagion theory of diminished capacity. The use of expert testimony to establish an objective basis for excusing or justifying lawbreaking behavior represents a standard epistemic tactic in criminal cases. To that end, the defense teams put forward the claim of black male deviance as a neutral and an objective phenomenon open to empirical verification. In her opening statement, Ackerson characterized the events in South Central Los Angeles as a chaotic "explosion of anger" by individuals who "came from their homes . . . somewhat confused . . . hostile and apparently upset over the Rodney King verdicts."[155] These individuals, she pointed out, found "absolutely, positively no police presence . . . no direction . . . no control . . . no organization . . . no order . . . no figures of authority . . . absolutely no guidance" when they entered into a crowd and succumbed to "complete anarchy."[156] Faal's direct examination of Morales adduced testimony that young males predominate in violent group contagion behavior, motivated in large part by "frustration" and "anger."[157]

Taken together, Ackerson and Faal seem to suggest that black male deviance, manifested in lawbreaking violence, rises out of frustration and anger over socioeconomic inequality. Indeed, during his cross-examination of Dr. Paul Tracy, a criminologist and a prosecution witness, Faal ***1323** asked: "Would you concede that in situations where individuals act collectively in a violent manner that sometimes their conduct has nothing to [[[do] with socialization, but was motivated by their frustration over inequities?"[158] Ackerson pressed further, indicating that the black community collapses into violent anarchy when deprived of the direction, control, and organization of an external authority figure, namely, the police. By this, Ackerson intimates that the black community lacks the internal resources to provide moral guidance to its members and to maintain civil order on its streets. This far-ranging implication reveals the problem of iterability in racialized criminal defense strategies. Defined as "the capacity to be repeated in new contexts,"[159] iterability pushes racialized narratives out of the narrow, juridical arena into the broader field of culture and society where the narratives change from a concrete description of two young black males to an abstract generalization about all young black males.

Additionally, following the conventions of criminal defense practice, the defense teams pursued a rights-based advocacy strategy to protect Williams and Watson against the wrongful incursions of the "powerful state."[160] Both teams, for example,

joined in a pretrial defense motion of "discriminatory prosecution."[161] Furthermore, Faal claimed that "some of the charges, particularly the charge for aggravated mayhem and attempted murder were filed for improper political reasons."[162] Specifically, he contended that "the prosecution intentionally and arbitrarily discriminated against [Williams and Watson] because: (a) they are black, and (b) they are not police officers."[163] The normative value underlying this defense tactic finds roots in a deep -seated liberal commitment to "safeguard" individual rights.[164]

The exploitation of race in criminal cases, such as the Williams-Watson case, taints the foundational principles of neutrality, objectivity, and individual rights enforcement, thereby putting customary liberal beliefs and values in controversy. Recall the defense teams' reliance on expert ***1324** opinion to substantiate the claim of diminished capacity. Conventional ethical regimes treat that reliance as value-neutral with respect to the form of the direct examination and the content of the elicited testimony. The counter-regime of race- conscious responsibility views that same reliance as a racialized strategy of extracting deviant narrative. By privileging a narrative of racial deviance, the defense teams help constitute[165] black men and their communities in terms of pathological violence. In a sense, the defense "color-coded" criminal violence.

1. The Contractarian Model. -- Liberal theory tolerates racialized or color-coded criminal defense strategies on individualist and communitarian grounds. The individualist account posits a contractarian model of the lawyer- client relationship the plausibility of which rests on a cluster of limiting assumptions. Deprived of these underpinnings, the model collapses. A threshold assumption concerns client rationality or competence. Negotiation of the lawyer- client contractual relationship requires independent, rational client decisionmaking. Competence serves as a precondition for reasoned client judgments. The next assumption pertains to client willful, voluntary action. The lawyer- client contractual relationship grows out of free, arm's length bargaining. As such, it expresses the voluntarist preferences of unencumbered client will. A further assumption regards the vitality of client knowledge and consent. Parties to a contractual relationship prudently seek full information before reaching an accord. Information that goes to the nature of the transaction under negotiation, here for legal services, facilitates lawyer-client consensual exchange.

In accord with these abstract and generalized assumptions, a lawyer undertakes an express duty to implement the rationally expressed and voluntarily espoused will or preference of a client. That duty entails a distant, deferential stance to the ordered liberty of client preferences,[166] thereby casting the lawyer- client relationship as a meeting of private, rather than public or political, agents.[167] This separation or splitting off of the public from the private conforms to the moral psychology of liberal individualism.[168]

***1325** Liberal thought conceives of individual personality in terms of "self-authentication and self- command."[169] The liberal subject imagines its self to be "in charge of its own thoughts and actions," and thus, to be the "spontaneous author of plans and doer of acts inspired by its own cognitions, calculations, and desires."[170] On this conception, the client subject is "ethically several, interest-bearing, self-activating, communicative, and self-conscious (or self-reflective)."[171] Construed by Euro -American legal discourse, the client subject devolves into a " 'natural rights-bearing person' " positioned "against the interests of the collectivity."[172]

The contractarian model becomes valid when these rationalist, consensual, and voluntarist assumptions match up with some objective reality. Certain circumstances weaken the assumptions, dissipating the force of the model and, hence, the cogency of an individualist justification for racialized criminal defense strategies. Otherwise competent clients, for instance, may perceive the need for deliberative, reason-giving assistance before exercising their decisionmaking powers. Similarly, clients may sense that laws and sociolegal practices inhibit their ability to engage in willful, voluntary acts. Likewise, clients may feel prodded to assent to lawyer-devised defense strategies despite lingering doubts and reservations.

Such alternate factual renderings of the lawyer-client relationship suggest that the baseline assumptions accompanying the contractarian model falter when extended beyond narrow, simplified grounds. Strict adherence to those grounds requires an ideal agency situation of freely chosen, reasoned client action. Legal consciousness and culture, however, preclude a situation of client agency free of the structural constraints of laws, legal institutions, and legal actors. Yet, structural constraints lack the power to bind agency totally.[173] In the arena of criminal advocacy, client agency and legal structure have no fixed valence;

instead, their interplay "varies" across contexts and over time.[174] That drift yields contextual instability marked by changing conditions of client freedom and constraint. Thus, notwithstanding contractarian premises, the client-fashioned liberal subject inhabits a position of only relative freedom.

***1326 2. The Communitarian Model. -- The flawed contractarian presuppo - sition of free-wheeling client subjectivity opens the way for a communitarian revision of criminal defense strategies. A communitarian account presents a deliberative model of the lawyer- client relationship tailored to address the hard choices clients confront daily in advocacy contexts where their freedom is constrained. Deliberation is warranted because the individualist canons of utility and wealth maximization give clients little indication when to seek lawyer assistance, how to act in response to sociolegal constraints, or whether to assent to lawyer- driven schemes to overcome such constraints.**

Communitarian canons, in contrast, guide client resolution of hard choices by encouraging a deliberative process that affirms the value of civic virtue.[175] Inculcating this value involves lawyer- client deliberations of character and community. Character deliberations comprehend client rational choice in terms of the ability to grasp the moral implications of advocacy strategies.[176] This construction defines client rationality in terms of moral analysis.[177] Community deliberations understand client consensual, voluntarist decisionmaking in terms of the ability to apprehend the social purposes of advocacy.[178] On this approach, client decisionmaking entails a democratic sensitivity to the common good.[179]

Despite the presence of communitarian strands of obligation, conventional ethical regimes neglect lawyer-client deliberations of character ***1327** and community. Both the Model Code[180] and the Model Rules,[181] in fact, espouse deliberative values only to diminish their importance in favor of the overarching principle of zealous advocacy. The standard critique of partisan advocacy adverts to this diminution in approving collateral considerations of social justice.[182] The communitarian critique broadens this endorsement asserting the two -fold obligation to help clients "live good lives"[183] and reach "a mutual understanding of what justice in a constitutional democracy permits or demands."[184]

The communitarian joinder of character and community concep tions of deliberation responds to the inadequacy of the contractarian reading of lawyer-client mutuality and preference. Under conventional ethical regimes, lawyers construe the preference of criminal defendants mutually in terms of "winning acquittal or, if that fails, the lowest possible sentence."[185] When this preference is lacking and mutuality therefore is not reached, lawyers blame inadequate client information or client misapprehension. The communitarian model of deliberation[186] seeks to ***1328** cure this inadequacy of information and understanding through empathy.[187]

The communitarian notion of deliberative empathy is predicated on lawyers' good faith intentions, notwithstanding conventional skepticism toward state of mind inferences.[188] Deliberative empathy constitutes "an unmediated engagement of the other,"[189] what Milner Ball calls "devo - tion to the other."[190] Connections of this sort come from empathetic listening. Cynthia Ward distinguishes two modes of empathic listening: projective and imaginative.[191] Projective empathy transcends difference to ascertain the "essential humanity" of the other.[192] Imaginative empathy honors difference by "allow[ing] the empathizer to construct the other as a completely separate being, thereby fully acknowledging the other's diversity and removing the obstacles to perception one encounters in attempting to inject oneself into another's experience as a way of understanding it."[193]

Ward's analysis is useful in illustrating empathic methods of promoting equality[194] inside the lawyer- client relation and recognizing inequality[195] outside that relation. Nonetheless, empathy may be insufficient to ***1329** create mutuality or dialogue between a lawyer and a client. Communitarian regimes elevate lawyer- client dialogue to a first order of deliberation. If dialogue cannot be attained,[196] the regimes retreat to a second order of deliberation consisting of good faith lawyer-client debate over the meaning of character and community.[197] The constant at both levels of deliberation is trust.

Empathic, second order deliberations of character and community in criminal cases depend on lawyer-client trust.[198] Racialized narratives of deviance taint relationships of trust with clients from subordinated communities of color. Indeed, by disparaging such communities, the narratives impede empathic deliberative engagement with clients.[199] Communitarian

regimes that envision a democratic politics of deliberative dialogue, civic virtue, and citizen participation[200] ignore this race-bound impediment.

Wendy Brown-Scott cites a similar oversight in assailing communitarianism as a "reform theory."[201] Brown-Scott contends that the failure of communitarian theory to confront and to eradicate racism "perpetuates the practice of racial subordination."[202] Subordination, in turn, excludes ***1330** clients and communities of color from full participation in the "deliberative processes of defining community and values."[203] Deliberative exclusion squanders the valuable resources of such communities accumulated from historical traditions of resistance and self-governance.[204] Moreover, exclusion negates the pluralist values that inform the communitarian respect for difference and its embrace of shared power.[205]

To remedy the problem of exclusion, Brown-Scott proposes a race-conscious revision of communitarian regimes, calling for spiritual transformation or conversion to empathetic, loving relationships[206] led by a search for shared values and a reverence for difference.[207] Brown-Scott's proposed revision proceeds from the premise that racism or, for our purposes, racialized narrative, undercuts communitarian forms of deliberation. Racism demeans the identity or personhood of the subject; further, it distorts the bonds of, and thus reduces the potential for, community. The colorblind discourse of empathic deliberation masks the tolerance of racialized narrative under conventional ethical regimes. Engrafted from liberal theory, the regimes reenact racial subordination in the lawyer- client relation and reproduce patterns of subordination in legal culture and consciousness. Investigating the "local processes" of reenactment and reproduction in the conventions of criminal defense advocacy and ethics reveals the "macro social structures" of racial subordination and "provide[s] openings for creativity in reshaping those structures."[208] Postmodern theory maps those openings.

Postmodernist critique incites both the disruption and reconstruction of conventional ethical regimes. Unlike more corrosive accounts of postmodernism, the instant critique seeks to destabilize the normative ***1331** program of criminal defense ethics precisely in order to counterpose a more satisfactory alternative. Of necessity, that alternative normative approach rests on unsteady foundational grounds.[209] Foundational uncertainty, however, is the defining characteristic of postmodern legal practice. The variability of legal advocacy and the mutability of legal ethics complement this uncertainty. Postmodernism, in effect, explodes the already unsettled quality of legal practice to build a provisional and protean sense of normative understanding.

B. Race-ing Legal Ethics

The alternative ethic of race- conscious responsibility forges normative understanding out of the principles of race-consciousness, contingency, and collectivity. Those principles attempt to transform the liberal regime of colorblind criminal defense ethics from the perspective of race.[210] The transformative race-ing[211] of legal ethics dictates the explicit recognition of racial difference and subordination. Yet that recognition nowhere guarantees a halt to racial subordination, for narratives of racial difference themselves reinstall hierarchical meanings and deviant images.[212] In addition to naming race or unnaming race-neutrality,[213] ***1332** therefore, the race-ing of ethics also demands opposition to the deviant construction of racial identity in legal storytelling. To the extent that deviant constructions deny the "identity-based particularism" of racial experience, they falsify that experience.[214]

Normative understanding derived from falsely constructed racial experience obstructs moral reasoning linked to the idea of "a mature black identity."[215] Cornel West introduces a "prophetic" framework of moral reasoning basing "mature black self-love and self-respect on the moral quality of black responses to undeniable racist degradation in the American past and present."[216] West explains that "a prophetic framework encourages moral assessment of the variety of perspectives held by black people and selects those views based on black dignity and decency that eschew putting any group of people or culture on a pedestal or in the gutter."[217] He stresses that all of the diverse styles and modes of black cultural and community expression "stand in need of ethical evaluation."[218] A "[m]ature black identity," he maintains, "results from an acknowledgement of the specific black responses to white-supremacist abuses and a moral assessment of these responses such that the humanity of black people does not rest on deifying or demonizing others."[219]

The ethic of race-conscious responsibility pursues a postmodern moral assessment of the demonizing narratives of black male deviance espoused within criminal defense stories of racial violence. In tying both deviance and defiance to racial oppression, the stories entangle clients in a "profusion"[220] of meaning emanating from their accommodation of and resistance to legal structures of racial subordination. Some fragments of meaning refer to deviance as a consequence of subordination, indicating that racial oppression breeds a pathology of unruly accommodation. In the context of the Williams-Watson trial, Williams appears to suffer from this pathology, exhibiting signs of disorderly difference. Other fragments allude to deviance as a defiant response to subordination, implying that oppression sparks retaliatory acts of resistance. Watson evidently shares this proclivity. In this way, racialized storytelling seems to consolidate and isolate deviance as the only recourse open to black males living in subordinated communities, bowing to the constraints ***1333** of legal practices that "both place limits of possibility on social action and impose specific forms of discursive possibility."[221]

Postmodern moral assessment evaluates the boundaries of racialized stories, constantly checking their configuration, meaning, and context. This checking function requires ongoing judgments about "storytelling genres, familiar stereotypes, and deeply rooted cultural myths."[222] Richard Sherwin places these judgments within the ambit of "effective lawyering."[223] To Sherwin, good lawyering judgment incorporates "sound narrative analysis" of imagery, genre, and audience.[224] Postmodernist lawyering strives to upset the apparent soundness of dominant narratives by interrogating their normative baseline and thereby divulging what values they exclude or omit.[225] At the same time, it seeks to align an alternative normative framework comporting with the "images, feelings, myths, and dramatic forms"[226] of subordinate narratives, such as defiance or resistance narratives.[227] Normative realignment comes without the expectation to achieve full historical truth or understanding.[228]

The groundwork for an alternative normative foundation of criminal defense advocacy and ethics lies in the context of advocacy itself. Indeed, ***1334** contextual analysis uncovers normative values in the everyday practices of criminal advocacy.[229] Two such values stand out: physical integrity and subjective autonomy. Physical integrity refers to the condition of a client's body under threat of state pain-imposing or death-dealing acts of violence, such as the penalties of imprisonment or death. Subjective autonomy pertains to a client's capacity to make independent decisions in accord with the norms of dignity and self-respect. Although categorically distinct, the two concepts interlock. Violations of physical integrity executed through pain or death may reduce and even obliterate subjective autonomy. Moreover, encroachments on subjective autonomy through coercion or constraint may infringe on physical integrity. For these reasons, criminal defense lawyers struggle to protect the physical integrity and preserve the subjective autonomy of their clients. Because those values "enable judgment or evaluation in a variety of different situations and circumstances,"[230] they transcend the context of a single client, group, or community.

Criminal defense stories of black male deviance sever the normative link between client physical integrity and subjective autonomy. This link depends upon an integrated, ethical vision of the client as a corporeal body and a moral agent. The imputed bestiality or pathology of deviance distorts that vision by restricting the moral scope of client agency. Elevation of the value of safeguarding the client body from state interference over the value of honoring client subjectivity in legal decisionmaking further deforms that vision.

Privileging deviance and the body reduces the notion of client sub- jectivity or personhood to the narrow concept of informed preference, a liberal individualist category seemingly incompatible with difference-based collective dignity. This diminution leaves a superficial basis for engaging in normative lawyer- client dialogue and deliberation. According to Pierre Schlag, "values are ontologically superficial to the extent that they are relegated to subordinate or derivative forms of being of an individual or a group."[231] The autonomy-based value of informed preference constitutes a subordinate or derivative form of being. Subordination results from the source, framework, and background of advocacy information. Lawyers provide the main source of advocacy information; acts of informing flow from their primary understanding of the juridical world. These acts, in turn, frame clients' comprehension of available options and, by extension, their realm of preferences. The ultimate expression of those preferences occurs in a lawyer-dependent, isolated setting stripped of community.

***1335** Insofar as such preferences properly influence criminal defense strategies, they nonetheless deny the full moral "charge"[232] of subjectivity bound up in the values of individual dignity and collective decency. West's idea of mature black self-love and self-respect endows the values of dignity and decency with ontological depth. For Schlag, "[v]alues are

ontologically deep to the extent that they constitute the dominant forms of being of an individual or a group."[233] Historically, racial dignity and decency symbolize the dominant aspirational forms of being within the black community. Racialized narratives of deviance degrade the ontological status of black dignity and decency.

The principle of race- consciousness restores the ontological status of the dignity-based value of subjective autonomy in the legal context of racial subordination. Drawing on antislavery traditions, the principle confers a measure of "autonomy sufficient to allow self- definition and sub - stantial moral choice."[234] Defiance narratives communicate self-definition and moral choice by displaying the interpretive capacity to "reappropriate and revalue"[235] racial identity in spite of subordination. Race- conscious contextual analysis maps the constraints and possibilities of interpretive reappropriation in criminal defense practice. The analysis focuses on race-related constraints on choice, evaluating the client's capacity to exercise choice given his racial experience and the "particularistic modes of decision-making" available under subordinating conditions.[236]

The principle of contingency extends this contextual analysis to the legal subject. Steve Winter finds the subject "embodied in a field of social interaction."[237] Shaped by discourse, the field provides the "formative context" for and the site of the "ongoing production" of meaning.[238] This dual function means that the embodied subject is both constituted by and constitutive of fields of meaning-making.[239] Embodiment condemns the subject to a "multiple, contextual and protean" sense of identity.[240]

***1336** The fluid and often contradictory nature of subjective identity[241] in no way abrogates moral responsibility. Indeed, Winter notes that the embodied subject "is always already implicated as a responsible actor" in a particular field of action.[242] The implication of subjective identity in fields of social action creates a legal consciousness[243] of responsibility contingent on collective social practices and contexts. The collective origins of responsibility reconfigure subjective autonomy in decisionmaking "more as a public project than a private undertaking."[244] Reconfiguration connects autonomy to a community-based vision of dignity and self-respect.[245]

Connecting autonomy and community permits both lawyers and clients to construct "new meanings and possibilities" of identity.[246] In the absence of "an a priori stable essence" to fuel identity,[247] reconstitution must be socially contingent. For postmodernists, social contingency sets the "precondition for truth."[248] Conceiving of a client as a "contingent self "[249] implies a capacity for self-constitution and self- determined responsibility. Meir Dan-Cohen distinguishes between a free will paradigm, where responsibility is "a matter of what we choose to do," and a constitutive paradigm, where responsibility is "a matter of what and who we are."[250] Working within a constitutive paradigm, Dan-Cohen mentions "the self 's ability to identify with various elements and thereby integrate ***1337** them into itself, or to distance itself from them by objectifying them and holding them at arm's length."[251]

The ability of the subject to decenter and reconstitute itself in the context of legal advocacy, Winter suggests, affirms "the subject's sense of self as the self- directing author of its practices and expose[s] the subject as but a contingent incident of those ongoing practices."[252] This disclosure places the subject in a "constantly contingent condition of provisionality"[253] that enables it to redefine and relocate the bonds of its own moral responsibility outside the free will or voluntarist paradigm of modern liberal theory.[254] Dan-Cohen contributes two meanings potentially useful to the formulation of a postmodern, race-conscious ethical responsibility: "object-responsibility" and "subject-responsibility."[255] The act of "assuming or refusing to assume object-responsibility for a certain object or event," he explains, allows the subject to "own up to or disown that object or event," to "claim or disclaim authorship of it, and in doing so," to "use the object or event as a reference point."[256] By "assuming responsibility for an object or event," he adds, the subject affirms itself as a "viable source" of "authorship" and, thereby, also assumes "subject-responsibility."[257] Conversely, by disowning and disclaiming authorship of an event such as lawbreaking violence through performative narratives of racial deviance, the subject denies subject-responsibility and, thus, performs acts of self and community destruction.

The principle of collectivity holds lawyers and clients jointly responsible for the community destruction and harm caused by racialized narratives. Imposition of a joint responsibility hinges on engaging the client as a codescriber and cointerpreter of legal texts. Guided by the teachings of lawyer- client partnership,[258] the principle locates community in collective contexts of racial self-respect and self-love in plain rejection of the ideology of colorblindness.[259] Deploying broad antiracism and

antipoverty principles to evaluate the "interests" of the black community, David ***1338** Wilkins repudiates colorblindness for its mistaken "perspectivelessness."[260] In an extension of the work of Kimberle Crenshaw,[261] Wilkins argues that perspectivelessness occurs when "the social, political, and institutional factors that frame a given legal issue are either left unexplored or treated as objective and unproblematic."[262]

To combat perspectivelessness, Wilkins asserts, black law students "must be able to recognize when the seemingly 'neutral' actions of their clients are likely to adversely affect the interests of the black community and to determine what they can do as lawyers to ameliorate these harmful consequences."[263] Perspectivelessness, he warns, "is likely to suppress" this kind of dialogue.[264] In the hope of liberating lawyer-client dialogue, Wilkins contemplates an alternative obligation thesis[265] that directs "black corporate lawyers to recognize that they have moral obligations running to the black community that must be balanced against other legitimate professional duties and personal commitments when deciding on particular actions and, more generally, when constructing a morally acceptable life plan."[266]

Elaborating upon Wilkins's obligation thesis, the principle of collectivity offers strong as well as weak versions of race-conscious responsibility. Both versions rely on the moral validity of race- conscious categories applied to eradicate unjust community hardship.[267] Under the strong version, criminal defense lawyers accept the obligation to forego narratives of racial deviance in their legal storytelling. Under the weak version, lawyers abide by a lesser obligation to inform clients of their reservations concerning the use of racialized narratives and urge them to consider through character and community deliberation the impact that such narratives may have on their communities.

***1339** To be sure, both versions of the ethic of race-conscious responsibility suffer the historical burdens of racial subordination: exclusion[268] and communicative inequality.[269] Overcoming these burdens requires "new types of text" and "new structures of public discourse."[270] Lawyer-client race-conscious dialogue presents such a text. Participants in a dialogic model of racial discourse aspire to a relation in which "both lawyer and client are engaged commonly in moral struggle irrespective of their divergent attitudes and goals."[271] The relation, Reed Loder suggests, enables both "to gain connection and understanding."[272] The key to sustaining that connection and understanding resides in the commitment to a collective, race-conscious conversation.[273]

III. Race-Consciousness Defended

The ethic of race-conscious responsibility in criminal defense advo - cacy provokes numerous objections. The objections challenge not only the principles of race- consciousness, contingency, and collectivity, but also the discretionary obligations that these principles imply. The limited scope of this Essay prevents a full-scale mapping and critique of these objections. Nonetheless, certain points of objection bear mention and response. For an initial response, I formulate a set of middle-level rules implementing both strong and weak versions of the ethic of race- conscious responsibility.

*1340 A. Objections

Salient objections arise from both theorists and practitioners of criminal law. Critical race theorists, for example, may complain that race-consciousness encourages an essentialist construction of racial identity and narrative in legal storytelling about black male lawbreakers. The Williams-Watson case demonstrates that the danger of racial essentialism is clear and present. Developing a critique from my own racially dominant position risks the reassertion of essentialist claims.[274] To avert such claims, I advance a contingent and, therefore, unstable notion of black male lawbreaking identity marked by the crosscutting tensions of deviance and defiance narratives. Admitting to these extant tensions in no way diminishes their complexity, particularly when faced with the difficulties of recognizing narrative resistance and harnessing its transformative potential.[275]

Liberal theorists may protest that the very notion of contingency sub verts client autonomy. These theorists glean autonomy from a narrow range of individual activities set apart from the obligations of community membership. In the lawyer- client

relationship, individual autonomy boils down to an often hollow exercise of informed consent that hinges on severely limiting assumptions about the force of sociolegal constraints. Weakening those counterfactual assumptions erodes the material basis of autonomy. To reinvigorate the concept of subjective autonomy, I urge the deliberative consideration of moral character and community in lawyer- client criminal defense counseling.

Practitioners may object that the principle of collectivity guiding lawyer-client character and community deliberation impinges negatively on client-centered rights and loyalties, undermining the adversarial system. But practitioners offer a crabbed notion of such rights and loyalties. The partisan duty they profess contains meager elements of client social responsibility and lawyer civic counsel. Furthermore, that duty ties loyalty to an individualist, rather than a communitarian, axis. Contextualizing lawyer-client counseling in a community setting enriches the adversarial system by reducing lawyer and client self-serving opportunism.

B. Middle-Level Rules

To implement the principles of race- consciousness, contingency, and collectivity animating the ethic of race- conscious responsibility, I ***1341** turn to middle-level rules of criminal defense practice. The move toward middle-level rules follows an earlier turn in the work of David Wilkins.[276] Citing the importance of context and contextual factors to the lawyering process, Wilkins argues that "legal ethics must develop a set of 'middle-level principles' that both isolate and respond to relevant differences in social and institutional context while providing a structural foundation for widespread compliance in the areas where they apply."[277] He contrasts a middle-level approach with the universality of traditional ethical rules and the discretion of "purely case-by- case" decisional rules, uncovering shared "problems of definition and application."[278] These problems, he concedes, compromise middle-level principles "because every generalization will exclude some arguably relevant contextual factor while allowing some room for interpretation at the point of application."[279]

Following Wilkins, middle-level rules of race- conscious criminal defense ethics must entail both context-based distinctions and context-specific discretion.[280] Two contextual approaches may serve to meet these requirements. The first, a strong version, urges criminal defense lawyers to forego unilaterally the use of racially deviant narratives except when the narratives suit a regime of "ad hoc nullification."[281] Ad hoc nullification, William Simon explains, involves a legal actor's substantive judgment "to subvert the enforcement of presumptively authoritative legal -- typically statutory -- norms."[282] According to Simon, lawyer conduct that subverts substantive legal norms and practices of "excessive and discriminatory punishment" may be "desirable."[283] To the extent that the Williams-Watson legal teams deployed racialized deviant narratives to subvert an excessive and discriminatory prosecution, their conduct may be justified.

The second approach, a weak version, prescribes lawyer- client character and community deliberation of racial identity and injury. Both the Model Rules and the Model Code contain some elements of this version. ***1342** Model Rule 2.1 provides that "[i]n 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."[284] Ethical Consideration 7- 8 of the Model Code similarly provides that the "[a]dvice of lawyer to his client need not be confined to purely legal considerations."[285] Additionally, the Model Code states: "In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible."[286] Although neither rule explicitly refers to deliberations of character and community or to matters of racial identity and injury, each contains operative terms of sufficient normative breadth to permit their inclusion. That inclusion will ensure a particularized factual inquiry into the circumstances of a racial community, including its potential for injury, seems unlikely given dominant accounts of criminal defense advocacy and ethics.

Conclusion

In this Essay, I have tried to explore the criminal defense strategy of invoking a "group contagion" theory of diminished capacity as a means of studying the historical intersection of race, lawyers, and ethics in the American criminal justice

system, notably in a case of racially-motivated private violence. The exploration problematizes the logic of categorical abstractions[287] and public/private distinctions in criminal defense advo - cacy in order to ally the concept of racial justice with a more intersubjective, communal sensibility. I hope that this account, though tentative, will launch debate over the proposition that to deny, exploit, and ultimately demean race in the name of advocacy wounds our clients, their communities, and ourselves.[288] Absent debate, the daily wounds of advocacy lie without mend.

Footnotes

[a] Associate Professor of Law, University of Miami School of Law. A.B., Brown University, 1981; J.D., Columbia University School of Law, 1984.

I am grateful to Janet Ainsworth, John Alfieri, John Cannon, Mary Coombs, Marcia Ellis, Ellen Grant, Amelia Hope, Don Jones, Sharon Keller, Peter Margulies, Kenneth Nunn, Peggy Russell, Steve Schnably, Jonathan Simon, Susan Stayn, and Steve Winter for their comments and support. I also wish to thank Marisa Gerard, Felicity McGrath, Caryn Vogel, Sally Madigan, Stuart Rohatiner, Elsa Waite, and the University of Miami School of Law library staff for their research assistance.
This Essay is dedicated to Mary Robilotti, Victor Alfieri, Tony Nigro, and Edith Capodanno.

[1] The seven other victims included Jorge Gonzalez, Takao Hirata, Fidel Lopez, Alicia Maldonado, Terrence Manning, Fred Mathis, and Larry Tarvan. See Record at 3210, People v. Williams (Cal. Super. Ct. 1993)(No. BA058116) [[[hereinafter Record]. Record citations preserve the original text of the trial and hearing transcripts except where clearly erroneous or ungrammatical.

[2] The legal teams consisted of Edrissa (Edi) M.O. Faal and Wilma R. Shanks for Williams, and Earl Broady and Karen Ackerson for Watson. See id.

[3] See id. at 7820 (mistaken identity); id. at 8628 -29 (diminished capacity).

[4] See id. at 7113 -14 (testimony of Dr. Armando Torres Morales).

[5] Id. at 3296 - 97.

[6] Id. at 3297.

[7] Id. at 3265.

[8] Id.

[9] Id.

10 Id.

11 The charges of attempted murder and aggravated mayhem arise under the California Penal Code. See Cal. Penal Code ss 187, 189, 205, 664 (West 1988). To establish attempted murder, California requires a showing that a person unlawfully attempted a willful, deliberate, and premeditated killing with malice aforethought. Cal. Penal Code ss 187, 189, 664. To prove aggravated mayhem, California requires evidence that a person "unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body." Cal. Penal Code s 205.
The Williams-Watson jury acquitted the defendants of both charges.

12 See Record, supra note 1, at 6617.

13 Id. at 3299.

14 For helpful background on the diminished capacity defense, see generally Peter Arenella, Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability, 39 UCLA L. Rev. 1511 (1992); Peter Arenella, The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage, 77 Colum. L. Rev. 827 (1977); Joshua Dressler, Reaffirming the Moral Legitimacy of the Doctrine of Diminished Capacity: A Brief Reply to Professor Morse, 75 J. Crim. L. & Criminology 953 (1984); Stephen J. Morse, Undiminished Confusion in Diminished Capacity, 75 J. Crim. L. & Criminology 1 (1984).

15 Faal conceded that the "perceived injustice" of the Rodney King verdict is neither a "defense" nor an "excuse," but rather "an explanation for the beating of Reginald Denny." Record, supra note 1, at 8628 -29. For a general survey of criminal law defenses, see Paul H. Robinson, Criminal Law Defenses: A Systematic Analysis, 82 Colum. L. Rev. 199 (1982).

16 The project accords with a revival in the study of race in American law. See generally Derrick A. Bell, Faces at the Bottom of the Well: The Permanence of Racism (1992); Critical Race Theory: The Cutting Edge (Richard Delgado ed., 1995) (forthcoming); Gerald P. Lopez, Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice (1992); Race-ing Justice, En-gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality (Toni Morrison, ed., 1992) [hereinafter Race-ing Justice, En-Gendering Power]; Patricia J. Williams, The Alchemy of Race and Rights (1991); Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment (Mari J. Matsuda et al. eds., 1993).

17 See, e.g., Reading Rodney King/Reading Urban Uprising (Robert Gooding-Williams ed., 1993); Colloquy: Racism in the Wake of the Los Angeles Riots, 70 Denv. U. L. Rev. 187, 187 -311 (1993); Reginald L. Robinson, "The Other Against Itself ": Deconstructing the Violent Discourse Between Korean and African Americans, 67 S. Cal. L. Rev. 15, 22 (1993) (ascribing "violent discourse" between African and Korean Americans to "structural inequities, such as racial injustice and economic inequality").

[18] For an example of a racialized criminal defense story, see George P. Fletcher, A Crime of Self-Defense: Bernhard Goetz and the Law on Trial 106 - 15, 127 -34, 205 - 09 (1988). Fletcher explains:
Reading the record of the Goetz case, one hardly finds an explicit reference to the race of anyone. But indirectly and covertly, the defense played on the racial factor. Slotnick's strategy of relentlessly attacking the "gang of four," "the predators" on society, calling them "vultures" and "savages," carried undeniable racial undertones. These verbal attacks signaled a perception of the four youths as representing something more than four individuals committing an act of aggression against a defendant. That "something more" requires extrapolation from their characteristics to the class of individuals for which they stand. There is no doubt that one of the characteristics that figures in this implicit extrapolation is their blackness. Id. at 206.

[19] See Anthony V. Alfieri, Disabled Clients, Disabling Lawyers, 43 Hastings L.J. 769, 771 (1992); Anthony V. Alfieri, Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative, 100 Yale L.J. 2107, 2118 (1991) [hereinafter Reconstructive Poverty Law Practice].

[20] The narratives of deviance and defiance pervade African-American literature, inventing fractured characters like Richard Wright's Bigger Thomas. See Richard Wright, Native Son (1940); see also Robert James Butler, The Function of Violence in Native Son, in Bigger Thomas 103 -16 (Harold Bloom ed., 1990); John M. Reilly, Giving Bigger a Voice: The Politics of Narrative in Native Son, in New Essays on Native Son 35 - 62 (Keneth Kinnamon ed., 1990); Valerie Smith, Alienation and Creativity in Native Son, in Bigger Thomas 143 - 50 (Harold Bloom ed., 1990); Craig Werner, Bigger's Blues: Native Son and the Articulation of Afro -American Modernism, in New Essays on Native Son 117 -52 (Keneth Kinnamon ed., 1990). See generally Henry L. Gates, Jr., Figures in Black: Words, Signs, and the "Racial" Self (1987); Henry L. Gates, Jr., The Signifying Monkey: A Theory of Afro -American Literary Criticism (1988).

[21] For a trenchant discussion of the deviant construction of black criminality, see Richard Delgado, Rodrigo's Eighth Chronicle: Black Crime, White Fears -- on the Social Construction of Threat, 80 Va. L. Rev. 503 (1994).
Deviant social construction also emerges in death penalty and juvenile defense strategies. See Austin Sarat, Speaking of Death: Narratives of Violence in Capital Trials, 27 Law & Soc'y Rev. 19 (1993); Abbe Smith, Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer, 21 N.Y.U. Rev. L. & Soc. Change (forthcoming 1995); Sara Cobb, Stabilizing Violence: Structural Complexity and Moral Transparency in Penalty Phase Narratives (July 1994) (unpublished manuscript, on file with the Columbia Law Review); Abbe Smith, They Dream of Growing Older: On Kids and Crime (Feb. 1995) (unpublished manuscript, on file with the Columbia Law Review).

[22] Kimberle Crenshaw & Gary Peller, Reel Time/Real Justice, 70 Denv. L. Rev. 283, 294 (1993); see also Wendy Brown-Scott, The Communitarian State: Lawlessness or Law Reform for African-Americans?, 107 Harv. L. Rev. 1209, 1216 -17 (1994) (citing "recurring riots and uprisings in subordinated communities"); Manning Marable, US commentary: At the End of the Rainbow, 34 Race & Class 75, 75 (1992) (referring to the Los Angeles "racial uprising"); Robinson, supra note 17, at 24 -25 (describing anger as "an authentic voice and a vehicle for rooting out racism, racial injustice, and economic inequality").

[23] On the proliferation of discourses in law, see generally Michel Foucault, The History of Sexuality: An Introduction 18 (1978) (describing the "multiplication of discourses concerning sex in the field of exercise of power").

[24] See Alan Hunt, Foucault's Expulsion of Law: Toward a Retrieval, 17 Law & Soc. Inquiry 1, 32 (1992) (arguing that

"every social field is traversed by a series of incommensurate but not necessarily contradictory discourses").

[25] See Crenshaw & Peller, supra note 22, at 286 ("Law in general and the courtroom in particular are arenas where narratives are contested and the power of interpretation exercised.").

[26] For Michel Foucault, the "language of power is law," embodied in "a more- or-less organised, hierarchical, co-ordinated cluster of relations" and "machinery" of practices. Michel Foucault, Power/Knowledge: Selected Interviews and Other Writings, 1972 -1977, at 201, 198, 156 (Colin Gordon, ed., 1980). Power, on this view, " is 'always already there.' " Id. at 141; see also Patricia Ewick, Postmodern Melancholia, 26 Law & Soc'y Rev. 755, 758 (1992) (describing "technical, faceless, and individuated" character of "contemporary (postmodern/disciplinary) power").

[27] See Hunt, supra note 24, at 32 (claiming that "[n]o single discourse generally achieves exclusive dominance but borrows from, incorporates, and makes concessions to other coexisting discourses").

[28] For recent debate on interpretive responsibility in storytelling, see, e.g., Jane B. Baron, Resistance to Stories, 67 S. Cal. L. Rev. 255 (1994); Richard Delgado, On Telling Stories in School: A Reply to Farber and Sherry, 46 Vand. L. Rev. 665 (1993); William N. Eskridge, Jr., Gaylegal Narratives, 46 Stan. L. Rev. 607 (1994); Marc A. Fajer, Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship, 82 Geo. L.J. 1845 (1994); Daniel A. Farber & Suzanna Sherry, Telling Stories Out of School: An Essay on Legal Narratives, 45 Stan. L. Rev. 807 (1993); Daniel A. Farber & Suzanna Sherry, The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth, 46 Stan. L. Rev. 647 (1994).

[29] On the imperfection of lawyer construction of client story, see, e.g., Naomi R. Cahn, Inconsistent Stories, 81 Geo. L.J. 2475, 2490 - 91 (1993); Clark D. Cunningham, The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse, 77 Cornell L. Rev. 1298 (1992); Herbert A. Eastman, Speaking Truth to Power: The Language of Civil Rights Litigators, 104 Yale L.J. 763, 773 - 88 (1995); Binny Miller, Give Them Back Their Lives: Recognizing Client Narrative in Case Theory, 93 Mich. L. Rev. (forthcoming 1994).

[30] See, e.g., David A. Binder et al., Lawyers As Counselors: A Client-Centered Approach 19 -23 (1991); see also Charles J. Ogletree, Jr., The People vs. Anita Hill: A Case for Client-Centered Advocacy (Jan. 1995) (unpublished manuscript, on file with the Columbia Law Review). But see Stephen Ellmann, Lawyers and Clients, 34 UCLA L. Rev. 717, 776 -78 (1987); Michelle Jacobs, People from the Footnotes: The Missing Element in Client Centered Counseling (Mar. 1995) (unpublished manuscript, on file with the Columbia Law Review).

[31] See, e.g., Marvin E. Frankel, The Search for Truth: An Umpireal View, 123 U. Pa. L. Rev. 1031 (1975); Eugene R. Gaetke, Lawyers as Officers of the Court, 42 Vand. L. Rev. 39 (1989).

[32] See, e.g., Anthony T. Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession (1993).

[33] See, e.g., William H. Simon, Ethical Discretion in Lawyering, 101 Harv. L. Rev. 1083 (1988).

34 See, e.g., Robert W. Gordon, The Independence of Lawyers, 68 B.U. L. Rev. 1 (1988).

35 See, e.g., Peter Margulies, "Who Are You to Tell Me That?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients, 68 N.C. L. Rev. 213 (1990).

36 See Meir Dan-Cohen, Between Selves and Collectivities: Toward a Jurisprudence of Identity, 61 U. Chi. L. Rev. 1213, 1233 (1994) ("By writing or revising the scripts of social roles, the law participates in the constitution of selves and in the construction of collectivities."); Angela P. Harris, Foreword: The Jurisprudence of Reconstruction, 82 Cal. L. Rev. 741, 764 (1994) ("Storytelling serves to create and confirm identity, both individual and collective.") (footnote omitted).

37 On "spillover" in sociolegal roles, see Dan-Cohen, supra note 36, at 1235 -36.

38 On public and private sites of racial subordination, see Regina Austin, "A Nation of Thieves": Securing Black People's Right to Shop and to Sell in White America, 1994 Utah L. Rev. 147, 147 -56 (demonstrating negative labeling and treatment of blacks engaged in buying and selling goods and services); Richard T. Ford, The Boundaries of Race: Political Geography in Legal Analysis, 107 Harv. L. Rev. 1841, 1861 (1994) (showing that "contemporary local government law perpetuates the historically imposed segregation of the races").

39 Regina Austin, "The Black Community," Its Lawbreakers, and a Politics of Identification, 65 S. Cal. L. Rev. 1769, 1773 (1992) (footnotes omitted); see also Adeno Addis, Recycling in Hell, 67 Tul. L. Rev. 2253, 2265 (1993) (discussing the public image of the "transgressing black").

40 For studies of young black male identity, see Elijah Anderson, Streetwise: Race, Class, and Change in an Urban Community 163 -206 (1990); Richard Majors & Janet M. Billson, Cool Pose: The Dilemmas of Black Manhood in America (1992).

41 See Record, supra note 1, at 7931. Reginald Robinson asserts that in the African American community, violence, like rage, only finds meaning in the context of collective historical suffering and under a political regime of "white supremacy." See Robinson, supra note 17, at 93.

42 Record, supra note 1, at 7931.

43 Id. at 7916.

44 Id. at 7701.

45 Id. at 7913.

46 The defense teams' "doubling" of narratives signifying the "black experience" of Williams and Watson creates a problem of textual indeterminacy common to African American literature. See Henry L. Gates, Jr., The Blackness of Blackness: A Critique of the Sign and the Signifying Monkey, in Black Literature and Literary Theory 285, 305 (Henry L. Gates, Jr. ed., 1984).

47 On the division of the social world into "good" citizens and "evil" predators, see Kathleen Daly, Comment, Men's Violence, Victim Advocacy, and Feminist Redress, 28 Law & Soc'y Rev. 777, 779 (1994).

48 Record, supra note 1, at 5124, 5131.

49 See id. at 3294 - 95.

50 Id. at 5236, 5250.

51 Id. at 7691.

52 See id. at 7922.

53 Id. at 7912.

54 Id. at 7925, 7921.

55 See id. at 8535. Faal's reference to the Rodney King case prompted an objection from Deputy District Attorney Janet Moore. Moore stated: "All along we have said that this case is not the Rodney King case. This is Damian Williams['s] case. And those two cases cannot be compared particularly when it comes to the point of sentencing." Id. Faal responded: "The prosecution keeps saying that this case has nothing to do with the Rodney King case, yet during the trial the court kept repeatedly telling the jurors not to relate this case to the Rodney King case, which suggests there is a relationship." Id. at 8536.

56 Id. at 8536 -37.

57 Id. at 8629.

58 Id. at 8630.

59 Id. at 8630, 8537.

60 See Austin, supra note 39, at 1773 (mentioning that "lawless behavior by some blacks stigmatizes all and impedes

collective progress" of the black community).

61 For a discussion of formalist and instrumentalist styles of deliberation in poverty law practice, see Anthony V. Alfieri, Impoverished Practices, 81 Geo. L.J. 2567 (1993).

62 On trial lawyers' instrumental use of racialized narratives in jury selection, see Darryl K. Brown, The Role of Race in Jury Impartiality and Venue Transfers, 53 Md. L. Rev. 107, 147 (1994) (discussing trial lawyers' assumption that "race, as an indication of group membership and social experience, affects how a juror will interpret events and whether a trial argument will seem persuasive or commonsensical").

63 Michael Coffino observes that "[s]trict fidelity to historical fact" in the legal narratives of criminal trials "competes with the lawyer's need to ensure the right 'moral' to his or her story -- the conclusion favorable to the client." Michael A. Coffino, Genre, Narrative and Judgment: Legal and Protest Song Stories in Two Criminal Cases, 1994 Wis. L. Rev. 679, 687.

64 Prosecutors disputed the admissibility of expert opinion regarding group contagion theory, challenging the scientific basis of the proffered testimony. See Record, supra note 1, at 6665 - 66, 6738 -39.
On evidence of bias in expert testimony, see David Faust, Use and Then Prove, or Prove and Then Use? Some Thoughts on the Ethics of Mental Health Professionals' Courtroom Involvement, 3 Ethics & Behav. 359, 375 (1993) (remarking that "much of what psychologists and psychiatrists present in court is supported by little more than personal validation"); Michael L. Perlin, Pretexts and Mental Disability Law: The Case of Competency, 47 U. Miami L. Rev. 625, 642 - 43 (1993) (pointing out that "variables such as race, sex, culture, gender preference, physical attractiveness and economic status significantly affect expert testimony").

65 Randall Kennedy contests the notion of a unitary "black community." See Randall Kennedy, The State, Criminal Law, and Racial Discrimination: A Comment, 107 Harv. L. Rev. 1255, 1276 (1994) (noting "intra-racial complexities that stem from socio- economic, ideological, and other sorts of differences within black communities").

66 Record, supra note 1, at 6667.

67 Id.

68 Id.

69 Id. at 6667 - 68.

70 Id. at 7114.

71 Id. at 7113.

72 Id. at 7114, 7127.

73 Id. at 7114, 7144.

74 On disorder-related defenses, see Stephen J. Morse, Culpability and Control, 142 U. Pa. L. Rev. 1587, 1634 -35 (1994) (observing that "the psychopath lacks empathy and conscience, traits whose absence surely predispose an actor strongly to selfish, antisocial, and perhaps criminal conduct"); Michael A. Tesner, Note, Racial Paranoia as a Defense to Crimes of Violence: An Emerging Theory of Self-Defense or Insanity?, 11 B.C. Third World L.J. 307 (1991) (urging recognition of racial paranoia-induced delusional disorder as valid insanity defense).

75 For a broad exploration of the meaning of competence, see Richard J. Bonnie, The Competence of Criminal Defendants: Beyond Dusky and Drope, 47 U. Miami L. Rev. 539, 554 (1993) (distinguishing between foundational concept of "competence to assist counsel" and contextualized concept of "decisional competence").

76 The defense of cultural deprivation commonly arises on behalf of immigrants, refugees, and indigenous people. See Alison D. Renteln, A Justification of the Cultural Defense as Partial Excuse, 2 S. Cal. Rev. L. & Women's Stud. 437, 439 (1993) (calling for formal establishment and admission of cultural defense). When successful, Renteln explains, the defense "permit [[[s] the reduction (and possible elimination) of a charge, with a concomitant reduction in punishment." Id. The defense offers alternative cognitive and volitional logics for this reduction: "either (i) the individual simply did not believe that his or her actions contravened any laws (cognitive case), or (ii) the individual was compelled to act the way he or she did (volitional case)." Id.
Both logics seemed to operate during the French excision trials of 1991 and 1993. See Bronwyn Winter, Women, the Law, and Cultural Relativism in France: The Case of Excision, 19 Signs 939, 948 -51 (1994). At the trials, Winter reports, defense lawyers asserted that " 'poor illiterate Africans don't know any better,' " and thus stood "incapable of doing anything but unthinkingly following their [female excision] traditions." Id. at 948, 951. She adds that defense lawyers reinforced "the image of the 'ignorant Africans' " through expert witness testimony concerning "the idea of a 'group superego' that controls the actions of the members of the group." Id. at 949.
Winter admits "that it is difficult to determine how much of this role is actually being played by the defendants concerned and how much of it is merely being attributed to them by others." Id. But, she insists, "when the only role allocated in the first place is that of 'the ignorant African,' it is somewhat difficult to appear as anything different, since any other reality, any other persona, is denied." Id. Moreover, she speculates that defense lawyers "encouraged the defendants to exhibit such behavior." Id.

77 On theories of environmental deprivation, see Richard Delgado, "Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?, 3 Law & Ineq. J. 9 (1985); R. George Wright, The Progressive Logic of Criminal Responsibility and the Circumstances of the Most Deprived, 43 Cath. U. L. Rev. 459 (1994). But see Morse, supra note 74, at 1654 (contending that "a history of deprivation itself does not furnish grounds for a control excuse, even when it is causally relevant to the actor's offense").

78 Record, supra note 1, at 8652.

79 Id.

80 Cf. Morse, supra note 74, at 1600 (declaring that human beings "can be subject to momentary and apparently capricious passions that leave them feeling subjectively unfree and that seem to compromise their ability to control themselves").

81 Recognizing the likelihood of this result, Deputy District Attorney Moore argued:
[T]hese are not impulsive actions. These are callous actions, they're vicious actions, they're actions that were thought out to the extent that Mr. Williams knew what he was doing. We're not talking about a child here. This is a man that's old enough to vote. He himself has fathered a child. He's had the opportunity to have an education. He's functioned in his community. This is not a baby that we're talking about here. This is an individual who can recognize the consequences of his acts.... And all we are doing here is asking this court to hold the defendant responsible for what he, as an adult, as a thinking individual chose to do. Record, supra note 1, at 8660, 8662.

82 Id. at 7930 -31.

83 See Morse, supra note 74, at 1602; see also Fed. R. Evid. 404(a). Rule 404(a) addresses the circumstantial use of character evidence to infer that a person acted consistently with his character on a specific occasion. See Fed. R. Evid. 404(a) advisory committee's note. Under the Rule, the "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except" when offered by an accused or by the prosecution to rebut evidence relevant to the character of an accused, the victim, or a witness. See Fed. R. Evid. 404(a)(1) -(3). Evidence of other crimes, wrongs, or acts may be admissible for other specified purposes. See Fed. R. Evid. 404(b). The advisory committee's note cautions that the circumstantial use of character evidence raises issues regarding relevancy, prejudice, and methods of proof. See Fed. R. Evid. 404 advisory committee's note; see also McCormick on Evidence 786 - 830 (John W. Strong ed., 4th ed. 1992).

84 See Morse, supra note 74, at 1599.

85 Id. at 1653.

86 Record, supra note 1, at 7680.

87 Id.

88 Id. at 7690.

89 On the epistemological underpinnings of culpability attribution in criminal law, see Rebecca Dresser, Culpability and Other Minds, 2 S. Cal. Interdisciplinary L.J. 41, 42, 87 (1993) (addressing mental state attribution as a cultural practice and contending that "[c]ulpability attribution is embedded in and bounded by the cultural system in which it occurs").

90 On the cognitive dimensions of race, see D. Marvin Jones, Darkness Made Visible: Law, Metaphor, and the Racial Self, 82 Geo. L.J. 437, 441 & n.14 (1993) (approaching the "figure of race" as a "cognitive concept" existing "prior to

and distinct from the inferences one makes about race and prior to social structures of race-based domination"); D. Marvin Jones, No Time for Trumpets: Title VII, Equality, and the Fin de Siecle, 92 Mich. L. Rev. 2311, 2367 (1994) [hereinafter Jones, No Time for Trumpets] (describing "race as a window through which we look at the world").

91 Record, supra note 1, at 8671.

92 Id. at 8650.

93 Id. at 8634 -35.

94 See Evan Stark, Black Violence: Racism and the Construction of Reality, 28 Clearinghouse Rev. 433, 435 (1994) (exploring the discriminatory "source" of the "portrait of an underclass of violent, drug-abusing black males").

95 See Lee A. Fennell, Interdependence and Choice in Distributive Justice: The Welfare Conundrum, 1994 Wis. L. Rev. 235, 270 (noting "the possibility that vast disparities in wealth and income create conditions conducive to crime and rioting") (footnote omitted); Tom R. Tyler & Gregory Mitchell, Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights, 43 Duke L.J. 703, 789 (1994) (commenting that "disparities [in wealth] are at the root of judgments of relative deprivation that can lead to feelings of government illegitimacy and collective disorder, as in the recent Los Angeles riots").

96 See James A. Kushner, Growth Management and the City, 12 Yale L. & Pol'y Rev. 68, 77 (1994) (observing that "minority urban school districts are unable to finance good schools and unable to cope with the special educational needs and problems of today's urban students who lack the traditional preparation and familial support provided in many suburban districts") (footnote omitted).

97 See Jon C. Dubin, From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color, 77 Minn. L. Rev. 739, 757 (1993) (asserting that "[d]iscriminatory zoning practices have created and perpetuated separate residential communities for African-Americans") (footnote omitted).

98 See Dorothy E. Roberts, Crime, Race, and Reproduction, 67 Tul. L. Rev. 1945, 1946 - 61 (1993).

99 See Sheri L. Johnson, Racial Imagery in Criminal Cases, 67 Tul. L. Rev. 1739 (1993).

100 On the normalization of deviance in the context of difference, see Brad Sears, Case Comment, Winning Arguments/Losing Themselves: The (Dys)Functional Approach in Thomas S. v. Robin Y., 29 Harv. C.R.- C.L. L. Rev. 559, 575 (1994) (describing societal process of constructing deviance illustrated by the term "queer").

101 See Austin, supra note 39, at 1773 ("Deviance confirms stereotypes and plays into the hands of an enemy eager to justify discrimination.").

102 Record, supra note 1, at 8529.

103 Id. at 8530.

104 See id. at 8531.

105 See id. at 8532.

106 Id. at 8533.

107 See Charles W. Mills, Under Class Under Standings, 104 Ethics 855, 858 (1994) (reviewing Christopher Jencks, Rethinking Social Policy: Race, Poverty, and the Underclass (1992) and The Underclass Question (Bill E. Lawson ed., 1992)) (mentioning that term underclass "mystifies and stigmatizes, begging crucial questions about causation and agency").

108 Record, supra note 1, at 8532 -33.

109 Id. at 8534.

110 Id.

111 See Austin, supra note 39, at 1774 (observing that the black community "chooses to identify itself with its lawbreakers and does so as an act of defiance").

112 Id.

113 Id. at 1772.

114 Id.; see also Regina Austin, Black Women, Sisterhood, and the Difference/Deviance Divide, 26 New Eng. L. Rev. 877, 878 (1992) (pointing out that the black community excludes from "good standing" some of those considered deviant by whites because they undermine community "claims to greater respect and a larger share of the nation's bounty"); Kennedy, supra note 65, at 1255 (addressing the importance of "efforts to control criminality" in the black community).

115 Austin, supra note 39, at 1791 ("Lawbreaker culture supports the use of direct words and direct action that more refined segments of society would find distasteful.").

116 Id. at 1780.

117 Austin, supra note 114, at 879.

118 See Austin, supra note 39, at 1787 ("The lawbreakers' rebellion is limited because it is not based on a thoroughgoing critique that attacks the systemic sources of their material deprivation.").

119 Austin, supra note 114, at 879.

120 See Gary Peller, Race Consciousness, 1990 Duke L.J. 758, 763, 812 (explicating marginalization of black nationalism as "extremist ideology").

121 Id. at 763. Peller notes that "black nationalists asserted a positive and liberating role for race consciousness, as a source of community, culture, and solidarity to build upon rather than transcend." Id. at 761.

122 See id. at 769; see also David R. Papke, The Black Panther Party's Narratives of Resistance, 18 Vt. L. Rev 645, 661 (1994) (disclosing that "[Black Panther Party] ideology told a story of the oppression of African-Americans and, more importantly, projected liberation through the concentrated efforts of a boldly politicized lumpen proletariat of color").

123 See Austin, supra note 114, at 887 (urging transformation of "the boundary between difference and deviance into free space, a time and place in which racial, sexual, and economic emancipation can be imagined, experimented with, and even enjoyed").

124 See id. at 878 -79 ("Theirs is a deviance that is different because it is defiant and resistant of the racial status quo; these deviants are likely to be admired by other blacks for just that reason.").

125 See Austin, supra note 39, at 1815.

126 Record, supra note 1, at 8637, 8647.

127 See Peller, supra note 120, at 794 (searching "historical structures" of racial community and oppression for "social meaning").

128 Austin Sarat & Roger Berkowitz, Disorderly Differences: Recognition, Accommodation, and American Law, 6 Yale J.L. & Human. 285, 287 (1994).

129 Id. at 287. Sarat and Berkowitz comment:
When acted upon, disorderly differences impose themselves violently and brutally on others. They forcefully present the question of when and how differences can (and should) be recognized and accommodated. Disorderly differences require us to ask whether we can (or should) justify or excuse conduct which, while seemingly reprehensible to us,

reflects another person's deeply felt cultural or religious conviction. Id. at 287 - 88 (footnotes omitted).

130 See id. at 309 ("[T]hrough collective appeal to a rationally governed civic realm, liberals imagine that disorderly differences can be made orderly.") (footnote omitted).

131 See id. at 311 -12 (claiming that civic republicanism "posits values, or the pursuit of values, that can bring unity out of apparent diversity and, in this way, denies the desirability of maintaining and supporting meaningful difference").

132 See id. at 307 (contending that "although liberalism and civic republicanism purport to balance the competing imperatives of freedom and order, both are ultimately deeply hostile to difference because they construct difference as disorderly").

133 Record, supra note 1, at 7914, 8642.

134 See Sarat & Berkowitz, supra note 128, at 304 ("Before difference can be recognized and accommodated, we must stop seeing difference as the prelude to disorder.").

135 See id. at 297 ("For law to welcome difference it must code that difference in a way that tames its disordering potential and reassures itself and its audience that difference is not dangerous.").

136 Sarat & Berkowitz call for a reconceptualization of the meaning of order. See id. at 289. They explain:
[F]riends of difference must learn to think and speak about order -- indeed, to recognize order as the indispensable partner of difference itself. What is required is not only a more accommodating understanding of difference, but also an enhanced vocabulary for speaking about order. All too often, the friends of difference refuse to speak of order; in so doing, we leave the field to others. As a result, the potential for orderly difference remains unrealized. Id. at 289 - 90 (footnote omitted).

137 Cf. id. at 312 ("Our law knows no way to celebrate difference as a site of alternative visions of orderliness or to recognize the potential within differences to instruct others about useful realignments in existing practices.") (footnote omitted).

138 Record, supra note 1, at 8648.

139 See id.

140 Id.

141 See id. at 8649.

142 See Austin, supra note 38, at 155. See generally Jo Ann G. Robinson, The Montgomery Bus Boycott and the Women Who Started It (David J. Garrow ed., 1987).

143 Peller, supra note 120, at 818.

144 See Mills, supra note 107, at 869 ("It would clearly be absurd, and morally irresponsible, to take the position of some elements of the white Left in the late 1960s - early 1970s that all black criminal activity is somehow 'revolutionary.' ").

145 For a discussion of defense strategies based on male characterizations of justifiable retaliation in domestic violence cases, see Donna K. Coker, Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill, 2 S. Cal. Rev. L. & Women's Stud. 71, 103 -14 (1992).

146 Model Code of Professional Responsibility (1983).

147 Model Rules of Professional Conduct (1983). The ABA Standards for Criminal Justice provide an additional source of regulation. See Standards for Criminal Justice (1994).

148 On the tactical use of bias and prejudice in criminal defense advocacy, see Eva S. Nilsen, The Criminal Defense Lawyer's Reliance on Bias and Prejudice, 8 Geo. J. Legal Ethics 1 (1994).

149 See David Luban, Are Criminal Defenders Different?, 91 Mich. L. Rev. 1729, 1757 -58 (1993); see also David Luban, Lawyers and Justice: An Ethical Study 12 (1988) [hereinafter Luban, Lawyers and Justice] (asserting that "[a] lawyer must, within the established constraints on professional behavior, maximize the likelihood that the client's objectives will be attained"); Barbara A. Babcock, Defending the Guilty, 32 Clev. St. L. Rev. 175, 184 (1983 -1984) (discussing criminal lawyer "tradition of unmitigated devotion to the client's interest"); Deborah L. Rhode, Ethical Perspectives on Legal Practice, 37 Stan. L. Rev. 589, 605 (1985) (recognizing that "[t]he force of the bar's deontological claims derives in large measure from the criminal defense paradigm, where the case for undiluted partisanship is most compelling"). See generally Monroe H. Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469 (1966).

150 See Luban, Lawyers and Justice, supra note 149, at 7, 393 - 403 (" 'When acting as an advocate for a client ... a lawyer is neither legally, professionally, nor morally accountable for the means used or the ends achieved.' ") (quoting Murray L. Schwartz, The Professionalism and Accountability of Lawyers, 66 Cal. L. Rev. 669, 671, 673 (1978)).

151 See William H. Simon, The Ethics of Criminal Defense, 91 Mich. L. Rev. 1703, 1703 (1993) (criticizing ethical basis of "aggressive criminal defense" practice).

152 See Gerald J. Postema, Moral Responsibility in Professional Ethics, 55 N.Y.U. L. Rev. 63, 73 (1980) ("[O]nce he has accepted the client's case, the lawyer must represent the client, or pursue the client's objectives, regardless of the

lawyer's opinion of the client's character and reputation, and the moral merits of the client's objectives."); Ted Schneyer, Moral Philosophy's Standard Misconception of Legal Ethics, 1984 Wis. L. Rev. 1529, 1534 ("Neutrality requires a lawyer to practice without regard to her personal views concerning either a client's character or the moral status of his objectives.").

153 Cf. Richard Wasserstrom, Lawyers as Professionals: Some Moral Issues, 5 Hum. Rts. 1, 12 -13 (1975) (discussing lawyers' "role-differentiated amorality"); Charles P. Curtis, The Ethics of Advocacy, 4 Stan. L. Rev. 3, 21 -23 (1951 -1952) (approving detached treatment of advocacy as a game or a craft); Charles Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation, 85 Yale L.J. 1060, 1066 (1976) (defending moral validity of the lawyer's professional role); Stephen L. Pepper, The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities, 1986 Am. B. Found. Res. J. 613, 614 -15 (justifying the lawyer's amoral professional role).

154 Clark Cunningham and Lucie White sketch powerful renderings of internal client critique and rebellion. See Cunningham, supra note 29, at 1329 -31; Lucie E. White, Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G., 38 Buff. L. Rev. 1, 21 -32 (1990).

155 Record, supra note 1, at 3295 - 96.

156 Id. at 3296.

157 See id. at 7127.

158 Id. at 7315.

159 J.M. Balkin, Transcendental Deconstruction, Transcendent Justice, 92 Mich. L. Rev. 1131, 1133 (1994).

160 See Charles J. Ogletree, Jr., Beyond Justifications: Seeking Motivations to Sustain Public Defenders, 106 Harv. L. Rev. 1239, 1257 -58, 1275 -76 (1993) (describing heroic "glory" of public defenders engaged in "fighting the state"); see also David Luban, Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann, 90 Colum. L. Rev. 1004, 1028 -29 (1990) (urging protection of individuals against public and private institutions that "pose chronic threats to their well-being"); cf. David Wasserman, Should A Good Lawyer Do the Right Thing? David Luban on the Morality of Adversary Representation, 49 Md. L. Rev. 392, 404 (1990) (declaring that duty of unqualified advocacy "cannot justify every act of zeal").

161 See Record, supra note 1, at 1632 -59.

162 Id. at 6192, 1405.

163 Id. at 1652.

164 Cf. Deborah L. Rhode, Institutionalizing Ethics, 44 Case W. Res. L. Rev. 665, 671 (1994) (analyzing rights-based justifications for neutral partisanship).

165 See Sara Cobb & Janet Rifkin, Practice and Paradox: Deconstructing Neutrality in Mediation, 16 Law & Soc. Inquiry 35, 39 (1991) (noting that "language functions to constitute 'reality' and masks its own role in that process").

166 Misgivings about client competence dispel this deferential attitude. See Norman G. Poythress et al., Client Abilities to Assist Counsel and Make Decisions in Criminal Cases, 18 L. & Hum. Beh. 437, 450 (1994) (finding "that clients whose competence is doubted are disproportionately passive in their overall involvement in their defense, and that the majority of defendants, whether perceived as being of doubtful competence or not, are actively involved in the key decisions in which legal norms mandate personal involvement").

167 On legal representation as a "political" relationship, see John Leubsdorf, Pluralizing the Client-Lawyer Relationship, 77 Cornell L. Rev. 825, 840 (1992).

168 Cf. Linda R. Hirshman, Is the Original Position Inherently Male-Superior?, 94 Colum. L. Rev. 1860, 1867 (1994) (asserting the contestability of moral psychology under idealistic contractarian regimes).

169 Frank I. Michelman, The Subject of Liberalism, 46 Stan. L. Rev. 1807, 1809 (1994) (reviewing John Rawls, Political Liberalism (1993)).

170 Id.

171 Id. at 1812.

172 Jeanne L. Carriere, Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act, 79 Iowa L. Rev. 585, 594 (1994).

173 See Katharine T. Bartlett, Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality, 92 Mich. L. Rev. 2541, 2548 (1994) (remarking that "it is not necessary to view the individual subject as either wholly free or wholly constrained by social forces").

174 Cf. J.M. Balkin, Ideological Drift and the Struggle Over Meaning, 25 Conn. L. Rev. 869, 870 (1993) (arguing that "[s]tyles of legal argument, theories of jurisprudence, and theories of constitutional interpretation do not have a fixed normative or political valence").

175 See Amy Gutmann, Can Virtue Be Taught to Lawyers?, 45 Stan. L. Rev. 1759, 1759, 1765 (1993) (finding virtue in "the disposition and capacity of lawyers to deliberate with nonlawyers (call us ordinary people) about the practical implications of legal action and its alternatives" through "a mutual interchange of information and understanding oriented toward decision making about both ends and means").

176 For Susan Wolf, possession of this ability evinces the normative competence "to recognize and appreciate a set of reasons sufficient to show which action or choice would be right." Susan Wolf, Freedom Within Reason 124, 143 (1990); see also Martha C. Nussbaum, The Use and Abuse of Philosophy in Legal Education, 45 Stan. L. Rev. 1627, 1630 -33 (1993).

177 See Reed E. Loder, Moral Skepticism and Lawyers, 1990 Utah L. Rev. 47, 82 (contending that "careful moral analysis in its widest dimension, which includes imagination and feeling, is essential to justifying moral action and thus is essential to being moral").

178 Cf. Walter Probert, The Lawyer as Moral Advisor: The Cohen Strategy, 15 J. Legal Prof. 53, 58 (1990) ("A client should be warned that doing what is legal is not necessarily what is best for him because of the risks of his own 'injury' by moral reaction within his group or community.").

179 Anthony Cook lauds this sensitivity as an essential part of reconstructive jurisprudence. See Anthony E. Cook, Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr., 103 Harv. L. Rev. 985 (1990); Anthony E. Cook, The Death of God in American Pragmatism and Realism: Resurrecting the Value of Love in Contemporary Jurisprudence, 82 Geo. L.J. 1431 (1994) [hereinafter Cook, Death of God].

180 Model Code of Professional Responsibility EC 7- 9 ("[W]hen an action in the best interest of his client seems to him to be unjust, [a lawyer] may ask his client for permission to forego such action."); id. DR 7-101(B)(1) ("Where permissible, [a lawyer may] exercise his professional judgment to waive or fail to assert a right or position of his client."); id. EC 7- 8 ("In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.").

181 Model Rules of Professional Conduct 2.1 ("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."); see also id. Rule 2.1 (comment) ("It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.").

182 See Gutmann, supra note 175, at 1760 ("The standard critique of zealous advocacy focuses on the need for lawyers to temper their defense of clients' causes with an appreciation of the larger purpose of their legal actions: social justice."). Lawyers, Gutman explains, "cannot know if and when they should be advocates without thinking about the larger social purposes of law, in particular about the central place of law in serving social justice in a constitutional democracy." Id. at 1762. Considerations of social justice, she asserts, demand "the willingness and capacity of lawyers to act according to the demands of justice, rather than the preferences (even the informed preferences) of their clients when the two conflict." Id. at 1763.

183 Id. at 1767 (defending a "character conception of legal virtue"); see also Timothy L. Hall, Moral Character, The Practice of Law, and Legal Education, 60 Miss. L.J. 511, 517 (1990) (asserting that "ethical acts are born out of the habits and inclinations of character").

184 Gutmann, supra note 175, at 1764.

185 Stephen J. Schulhofer & David D. Friedman, Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants, 31 Am. Crim. L. Rev. 73, 77 (1993).

186 See Gutmann, supra note 175, at 1761 (defining lawyer deliberative virtues to "include the disposition to discuss various legal strategies with clients, and to understand clients' goals and their informed reaction to relevant legal strategies to the extent feasible").

187 See Carrie Menkel-Meadow, Is Altruism Possible in Lawyering?, 8 Ga. St. U. L. Rev. 385 (1992) (proposing altruistic ethic of care and empathy in lawyering); Deborah L. Rhode, Missing Questions: Feminist Perspectives on Legal Education, 45 Stan. L. Rev. 1547, 1560 (1993) (noting that "skills of empathetic listening are not the unique preserve of psychoanalysis"). But cf. Cynthia V. Ward, A Kindler, Gentler Liberalism? Visions of Empathy in Feminist and Communitarian Literature, 61 U. Chi. L. Rev. 929, 931 (1994) (contending that "empathy cannot validly be deployed either to attack liberal legalism or to construct its replacement").

188 See Sanford Levinson, Identifying the Compelling State Interest: On "Due Process of Lawmaking" and the Professional Responsibility of the Public Lawyer, 45 Hastings L.J. 1035, 1051 (1994) (arguing that there is "no basis for inferring from a lawyer's stated arguments evidence as to his or her internal state of mind about the matter in question").

189 Richard Weisberg, In Search of Faulkner's Law, 92 Mich. L. Rev. 1776, 1784 (1994) (reviewing Jay Watson, Forensic Fictions: The Lawyer Figure in Faulkner (1993)) (suggesting that Faulkner permits his characters "to break free from a dependence on language and to enter the world of justice through experience").

190 Milner S. Ball, Power from the People, 92 Mich. L. Rev. 1725, 1731 (1994) (reviewing Gerald P. Lopez, Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice (1992)).

191 See Ward, supra note 187, at 949.

192 See id.

193 Id.

194 See id. at 943. Ward adds:
Empathy must create a sense that the outsider's claims are just; it does so by making us realize that were we in the circumstances of the other's life, we would also make her claims. This capacity for empathic interaction to create a sense of equality is vital to empathy's potential to combat racism and sexism, both of which are based on a conviction of the inferiority of others. Id.

195 See id. at 941 (indicating that "empathy can result in a realization of the unjust inequalities created by law").

196 Richard Delgado insists that " '[d]ialog won't work for systemic social ills,' " explaining that " '[w]e don't see -- can't see -- faults in the paradigm, the very structures by which we communicate, make ourselves understood, and explain, understand, and construct reality.' " Richard Delgado, Rodrigo's Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial, 45 Stan. L. Rev. 1581, 1604 (1993). Racial dialogue fails, Delgado notes, " 'because we have assigned [Blacks] low status, low credibility in the stigma-pictures we've made of them and still disseminate.' " Id.

197 Debate may extend to other legal actors and institutions, such as the jury. See Phoebe A. Haddon, Rethinking the Jury, 3 Wm. & Mary Bill Rts. J. 29, 101 (1994) (arguing that voir dire "should include an opportunity for lawyers and judges to sensitize jurors about differences among decision-makers and about the social context of the case").

198 See Bill O. Hing, Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses, 45 Stan. L. Rev. 1807, 1807 (1993) (emphasizing development of lawyer relationships of trust with indigent criminal clients from subordinated communities).

199 See Gutmann, supra note 175, at 1765 (claiming that deliberation "requires an active engagement with clients that aims at a better understanding of the value of legal action and its alternatives than either party to the deliberation probably had at the outset").

200 See generally Frank Michelman, Law's Republic, 97 Yale L.J. 1493 (1988); Cass Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539 (1988).

201 See Brown-Scott, supra note 22, at 1210 -11 (declaring communitarianism to be "deficient unless modified from a race-conscious perspective"); see also Derrick Bell & Preeta Bansal, The Republican Revival and Racial Politics, 97 Yale L.J. 1609, 1611 (1988) (warning that "society retains racial domination as a consensus ideology by promising a nondiscriminatory present while simultaneously locking in the racial disadvantages of our blatantly racist past"); Stephen M. Feldman, Whose Common Good? Racism in the Political Community, 80 Geo. L.J. 1835, 1837 (1992) (asserting that "racism muffles and silences the voices of minorities" in communal dialogue). But cf. Alex M. Johnson, Jr., The New Voice of Color, 100 Yale L.J. 2007, 2011, 2058 - 61 (1991) (noting that scholars of color embrace "communitarian/republican norms of political theory").

202 Brown-Scott, supra note 22, at 1211.

203 Id. at 1211, 1217 n.40.

204 See id. at 1218 (noting that "the communitarian emphasis on collective responsibility is consistent with certain traditional practices of African-American communities").

205 See id. at 1218 -22.

206 See id. at 1223. This conversion may be hindered by the tendency of dominant legal agents to misjudge their own empathic motive. Cynthia Ward points out that subordinate agents may in fact possess "the greatest incentive to be empathic." Ward, supra note 187, at 950 ("The person at the bottom of the hierarchy must at some level be aware that his well-being depends on the powerful other, and so has good reason to learn that other's psychology in order to please her.").

207 See Brown-Scott, supra note 22, at 1224. Additionally, Brown-Scott urges the deprivileging of whiteness through acts that "deny to whites the dominance and privilege that comes with membership in the white community." Brown-Scott, supra note 22, at 1224. Further, she recommends structural transformations within community-forming institutions to encourage people of color to participate in civic discourse and to foster community dialogue. See id. at 1225. Moreover, she pushes for a relaxation of the public/private dichotomy that regulates the separation of character and community deliberation. See id. at 1226. Last, she reminds the "dominant" white community to "accept responsibility for its complicity in the enslavement and persistent subordination of people of color." Id. at 1227.

208 Susan S. Silbey, Making a Place for Cultural Analyses of Law, 17 Law & Soc. Inquiry 39, 41 (1992).

209 For discussions of foundational uncertainty, see Kate Nash, The Feminist Production of Knowledge: Is Deconstruction a Practice for Women? 47 Feminist Rev. 65, 72 (1994) (claiming "there is no methodical procedure for obtaining certain knowledge, as modern philosophy of science supposes; knowledge consists in having, at best, good reasons for holding the beliefs one holds about the world and, at least, no good reasons for giving them up"); see also Cass R. Sunstein, On Analogical Reasoning, 106 Harv. L. Rev. 741, 780 n.130 (1993) (maintaining that lack of "extra-human foundations for human knowledge does not mean that knowledge is impossible").

210 On the conservative implication of colorblind narrative in liberal jurisprudence, see Cook, Death of God, supra note 179, at 1512 ("[T]he narrative of colorblindness suggests that the lesson we should draw from centuries of race-based laws, traditions, and customs designed to subordinate blacks is that race should seldom be used as a criterion for decisionmaking, even when its use purports to make restitution for the present effects of a racist past.").

211 The term "race-ing" holds a complex genealogy. Kendall Thomas apparently introduced the term at the Frontiers of Legal Thought Conference at Duke Law School in 1990 to describe the constructed meaning of race through speech/acts. See Charles Lawrence, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke L.J. 431, 443 n.52. Subsequently, Jerome McCristal Culp expanded the term to suggest that while people are "raced," they "are also cultured and the two are interdependent." Jerome McC. Culp, Jr., The Michael Jackson Pill: Equality, Race, and Culture, 92 Mich. L. Rev. 2613, 2617 (1994). To Culp, there are "positive and negative sides to the issue of race. Black people invent themselves as black people through culture and history." Id. Here, I further enlarge usage of the term: to race legal ethics is to posit an alternative framework of moral reasoning and normative understanding.

212 Compare Cook, Death of God, supra note 179, at 1513 (noting that "recognition of racial difference has not been the cause of, but the occasion for, black exclusion and subordination").

213 On the power of naming, see Jones, No Time for Trumpets, supra note 90, at 2368 ("It is only when the slave names or defines his own reality that she begins to have power, that she begins to live."); Ruthann Robson, Resisting the Family: Repositioning Lesbians in Legal Theory, 19 Signs 975, 992 (1994) ("Unnaming is an important, if underutilized, form of resistance.").

214 Cook, Death of God, supra note 179, at 1515 -16.

215 Cornel West, Black Leadership and the Pitfalls of Racial Reasoning, in Race-ing Justice, En- Gendering Power, supra note 16, at 390, 396.

216 Id. at 396.

217 Id. at 397.

218 Id.

219 Id.

220 I borrow the term from Steve Winter. See Steven L. Winter, Human Values in a Postmodern World, 6 Yale J.L. & Human. 233, 242 (1994); see also Allan C. Hutchinson, Identity Crisis: The Politics of Interpretation, 26 New Eng. L. Rev. 1173, 1185 (1992) (conceding "possibility" of interpretive "meaning" and "agreement").

221 Hunt, supra note 24, at 31; see also Winter, supra note 220, at 244 (explaining that "constraints cannot be avoided because they provide the enabling conditions of possibility").

222 Richard K. Sherwin, The Narrative Construction of Legal Reality, 18 Vt. L. Rev. 681, 708 (1994). Sherwin proclaims "the ineradicable need for judgment, the need to reach particular outcomes in particular cases, and the need for belief to sustain the meanings that legal stories and arguments call to mind for the sake of judgment." Id. He adds that "capturing belief both in straightforward, causally-sequenced tales (of detection, for instance) and in acausal, nonlinear stories (of isolated imagery or latent mythic archetypes) is an inescapable part of the workaday world in which we live and in which law and lawyers operate." Id. at 708 - 09.

223 Id. at 709.

224 Id. For Sherwin, sound narrative analysis entails:
choice of imagery, and the associations that one's images conjure; choice of genre, and the narrative expectations that the genre produces; choice of role for one's audience, and the passive deference to externally posited meaning schemata or the active participation in the construction of meaning from interior sources that the role invites. Id. To be effective, Sherwin remarks, this "strategic narrative" analysis "must be deliberately cultivated, consciously assessed, and reflexively practiced." Id.

225 See Anthony E. Cook, Reflections on Postmodernism, 26 New. Eng. L. Rev. 751, 754 (1992) (arguing that "postmodern critique illuminates the underside of master narratives, thereby exposing the subordination and

marginality of alternative social visions whose relegation to the status of exception to the rule, counter-tradition or minority perspective can no longer be objectively justified").

226 Sherwin, supra note 222, at 681, 693.

227 See Papke, supra note 122, at 680 (explaining how Black Panther leaders "found meaningful ways to present their individual lives, to construct a liberationist ideology, and to critique legal institutions including the police[ ]" through the "primary tool" of narrative).

228 See Hutchinson, supra note 220, at 1187 ("Lives can never be recovered or understood in their entirety: they can never be placed outside of history nor put beyond interpretation in history.").

229 See Winter, supra note 220, at 235 ("Values are not to be found elsewhere, outside ourselves and our practices; they are profoundly human products made real by human action.").

230 Pierre Schlag, Values, 6 Yale J.L. & Human. 219, 220 (1994).

231 Id. at 225.

232 The term stems from Pierre Schlag. See id. at 222.

233 Id. at 225.

234 Peggy C. Davis, Contested Images of Family Values: The Role of the State, 107 Harv. L. Rev. 1348, 1349 (1994).

235 Winter, supra note 220, at 245.

236 Mark Tushnet, Spite Fences and Scholars: Why Race Is and Is Not Different, 26 Conn. L. Rev. 285, 292 (1993). Tushnet praises critical race theory scholars for investigating "more particularistic modes of decision-making" in law and society. Id. This investigation, he notes, challenges claims to universalism espoused by defenders of the dominant culture. See id.

237 Winter, supra note 220, at 244.

238 Id.

239 See Balkin, supra note 174, at 886 ("We are constituted by the culture that we collectively make through our acts of reason and persuasion."); Hutchinson, supra note 220, at 1185 ("[C]ommunicating subjects are themselves constituted

in and through ... discourse itself.").

240 Hutchinson, supra note 220, at 1185.

241 See id. at 1192, 1214 ("In a postmodern perspective, identity is always constructed, often inconsistent and occasionally self- contradictory.").

242 Winter, supra note 220, at 243 - 44 ("There can be no possibility of transcendence when our very ability to have a world is contingent on the kinds of bodies that we have and the ways in which those bodies interact with our physical and social environment.").

243 Patricia Ewick and Susan Silbey describe sociolegal consciousness "as something local, contextual, pluralistic, filled with conflict and contradiction," but not without "shape and pattern." Patricia Ewick & Susan S. Silbey, Conformity, Contestation, and Resistance: An Account of Legal Consciousness, 26 New. Eng. L. Rev. 731, 742 (1992). They emphasize the "collective construction and the constraints" molding consciousness "in any particular setting or community" and "the subject's work in making interpretations and affixing meanings." Id.

244 Hutchinson, supra note 220, at 1193.

245 But cf. Markus D. Dubber, Rediscovering Hegel's Theory of Crime and Punishment, 92 Mich. L. Rev. 1577, 1620 (1994) (noting "Hegel's emphasis on the offender's continued membership in our community of rational persons and on the offender's dignity as a fellow rational person").

246 Bartlett, supra note 173, at 2548 (asserting that "[m]eaning and identity are continually shaped by social arrangements and institutions and at the same time continually reshaped by the interventions of individuals").

247 The phrase comes from Kendall Thomas, Beyond the Privacy Principle, 92 Colum. L. Rev. 1431, 1449 (1992).

248 Winter, supra note 220, at 235.

249 Meir Dan-Cohen, Responsibility and the Boundaries of the Self, 105 Harv. L. Rev. 959, 965 (1992). Dan-Cohen understands human beings not in terms of "some essential properties or in terms of a fixed, unalterable nature," but in terms of contingency and plasticity. Id.

250 Id. at 961.

251 Id. at 966 ("Such identification or detachment applies to the various dimensions along which the self can be constituted, such as the mental, the physical, and the social.").

252 Winter, supra note 220, at 241 - 42.

253 Hutchinson, supra note 220, at 1185.

254 See Dan-Cohen, supra note 249, at 959 ("In the free will paradigm, responsibility is grounded in the agent's capacity to choose her actions freely.").

255 Id. at 963.

256 Id.

257 Id.

258 See Hing, supra note 198, at 1808 (observing that "[g]ood community oriented lawyers ... work in partnership with the client").

259 See David B. Wilkins, Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers, 45 Stan. L. Rev. 1981, 2015 -16 (1993) (assailing the "ideology of colorblindness"); see also Jerome McCristal Culp, Jr., Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims, 69 N.Y.U. L. Rev. 162, 163 (1994) (asserting that "colorblindness permits us to avoid any discussion of the morality or justice of assimilation, nationalism, or cultural difference").

260 Wilkins, supra note 259, at 2008 -16.

261 Kimberle W. Crenshaw, Foreword: Toward a Race-Conscious Pedagogy in Legal Education, 11 Nat'l Black L.J. 1, 12 (1989) (claiming that "objectivity of legal analysis is grounded in the apparent perspectivelessness of the dominant discourse").

262 Wilkins, supra note 259, at 2015.

263 Id.

264 Id.

265 Wilkins claims that "some of th[e] traditional features of lawyer professionalism, such as the duty to engage in law reform, the duty to provide legal counsel to those who cannot afford to pay for it, and the duty to counsel clients on both the legal and moral consequences of their conduct, are supportive of the model of lawyering contemplated by the obligation thesis." Id. at 2019.

266 Id. at 1984.

267 Wilkins contends that "a proper analysis of the moral validity of race conscious categories must account for the current disparity in the relative economic, social, and political power of blacks and whites." Id. at 2020. Consideration of this disparity, Wilkins insists, legitimately charges black professionals with the moral duty "to pay particular attention to the interests of the black community [a]s a necessary step towards eradicating the unjustified hardship that this community has faced for more than three centuries." Id. at 2021.

268 See Reed E. Loder, Out from Uncertainty: A Model of the Lawyer-Client Relationship, 2 S. Cal. Interdisciplinary L.J. 89, 142 - 43 (1993) (maintaining that "[e]xclusion limits the moral imagination needed to conceive of factual variations in a situation that help to identify important presuppositions and expose them to question").

269 Both Sherene Razack and Thomas McCarthy point to "massive" cross-cultural inequalities in the conditions of dominant/subordinate group communication. See Thomas McCarthy, Doing the Right Thing in Cross-cultural Representation, 102 Ethics 635, 645, 648 (1992); Sherene Razack, What Is to Be Gained by Looking White People in the Eye? Culture, Race, and Gender in Cases of Sexual Violence, 19 Signs 894, 918 (1994).

270 McCarthy, supra note 269, at 648. McCarthy explains:
[W]hen previously subordinated groups can speak in their own voices, there are marked changes in the very construction of texts dealing with them.... [N]ew types of text can assist in the formation of new structures of public discourse. There is an interplay here between institutional and textual dynamics, between the empowerment of different voices and writing in different voices, between politics and poetics. Id.

271 Loder, supra note 268, at 92, 141 (suggesting dialogic model of the lawyer- client relation is "shaped by the participants' struggles for moral knowledge").

272 Id. at 141.

273 On collective dialogue, see Drucilla Cornell, Toward a Modern/Postmodern Reconstruction of Ethics, 133 U. Pa. L. Rev. 291, 378 (1985) ("Dialogism involves a commitment to universality: we are all to be recognized as participants in our collective conversation, and we are to hold it out as a real possibility that generalizable interests will emerge in the course of that conversation.").

274 Kathleen Daly confronts a similar obstacle in conceptualizing how race operates in the criminal law and in the criminal justice system. See Kathleen Daly, Criminal Law and Justice System Practices as Racist, White, and Racialized, 51 Wash. & Lee L. Rev. 431, 433, 435 -38 (1994). Daly asks: "Can I make reliable or reasonable claims about race when I am on the dominant side of the relationship?" Id. at 437.

275 On the hindrances to the academic study of black resistance and transformation, see Dorothy E. Roberts, Deviance, Resistance, and Love, 1994 Utah L. Rev. 179, 186 (noting "complexity of distinguishing between resistance and accommodation, between what merely reproduces the status quo and what subverts it").

276 See David B. Wilkins, Legal Realism for Lawyers, 104 Harv. L. Rev. 468, 515 -19 (1990) [hereinafter Wilkins, Legal Realism]; David B. Wilkins, Making Context Count: Regulating Lawyers After Kaye, Scholer, 66 S. Cal. L. Rev. 1145, 1216 -17 (1993) [hereinafter Wilkins, Making Context Count].

277 Wilkins, Legal Realism, supra note 276, at 516 (footnote omitted). Wilkins takes the notion of middle-level principles from Dennis F. Thompson, Political Ethics and Public Office (1987). Thompson recommends middle-level principles to citizens engaged in politics as a way "to make reasoned collective judgments without presuming the truth of any single foundational theory." Id. at 8. Thompson asserts: "Even if the conflicts with which political ethics deals can be resolved at some fundamental level of philosophy, we still need some middle-level principles to guide our judgments at the level of political action." Id.

278 Wilkins, Legal Realism, supra note 276, at 515, 519.

279 Id. at 516 (footnote omitted).

280 See Wilkins, Making Context Count, supra note 276, at 1216 -17.

281 William H. Simon, Reply: Further Reflections on Libertarian Criminal Defense, 91 Mich. L. Rev. 1767, 1771 (1993).

282 Simon, supra note 151, at 1724.

283 Id. at 1724 -25.

284 Model Rules of Professional Conduct Rule 2.1.

285 Model Code of Professional Responsibility EC 7- 8.

286 Id.

287 Categorical abstractions of race inhibit empathy. See Thomas Ross, The Rhetorical Tapestry of Race: White Innocence and Black Abstraction, 32 Wm. & Mary L. Rev. 1, 6 (1990) (maintaining that "black abstraction" blunts "empathetic response").

288 Fundamentally, the account seeks to explode the instrumental logic of criminal defense advocacy and ethics, to rid us of the "belief that the tools of legal understanding remain separated from us when we engage in legal understanding, that we are unaffected, that we are free." J.M. Balkin, Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence, 103 Yale L.J. 105, 165 (1993).

95 CLMLR 1301

End of Document