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# LEGAL ETHICS AND MORAL DILEMMAS: STRATEGIZING AROUND RACE IN THE PROVISION OF CLIENT SERVICE

RICHELLE SAMUEL\*

## RÉSUMÉ

Le présent article explore les questions de droit et de déontologie que soulève le racisme dans la prestation de services en clinique. L'auteur traite non seulement de la façon dont le racisme trouve sa place dans les cliniques, mais aussi des difficultés auxquelles font face les prestataires de services juridiques lorsque des clients affichent un comportement raciste. On tente avant tout de définir quand une telle conduite peut justifier une privation des services. Devrait-on tenir compte du type de comportement raciste? En répondant à ces questions, l'article examine les effets sur la prestation de services à des clients racistes des règles d'éthique professionnelle et de l'exercice du droit selon des critères moraux personnels.

As a woman of colour in law school, I greeted the opportunity to leave its halls with much enthusiasm and anticipation. My exodus from the law school would be temporary, as I was to spend one semester working at a poverty law clinic as part of my school's academic intensive program. Up to that point, I had found my experience at law school to be one of racist and sexist marginalization. When I arrived at the legal clinic, I welcomed the experience as one that would be vastly different from my experience at the law school. After my first day at the clinic I had begun to think it was an entirely different world unto itself: fully insulated from the racial ills that had sent me running from law school. By my second day at the clinic, however, the reality I had begun to weave began to unravel faster than I could imagine. As a new student in the program I had been "shadowing" a student for the day, interviewing prospective clients when the following exchange took place:

Me: So Mr. X, you have been denied disability benefits?

Mr. X: Yeah. I mean, what does it take before they think I'm disabled?

Me: Yes, yes, I understand your frustration. Well, Mr. X, I'll just write my name and extension on the back of this card so that you can get in touch with me. [At this point I proceed to write my name, including my last name S-A-M-U-E-L].

Mr. X: [Grinning] Well, I guess I can't call you Sam. [Laughter]

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Me: [Confused] Excuse me? I don't understand.

Mr. X: You know, Sambo. That's what we used to call a friend of ours, he was black. We'd say, "Here comes Sam," but he knew we didn't mean nothing by it. We used to joke around like that, you know.

This essay seeks to address the legal and ethical obligations that legal-service providers have toward clients who are racist. The focus of this essay will be on the community clinic, as this legal setting typically provides service to a racially diverse clientele. It should be noted at the outset that this essay deliberately isolates race from other types of oppression, namely gender, class, and sexuality. These types of oppression certainly have implications for the provision of legal service but will not be the focus of this essay. To that end, this paper will explore a number of questions that arise when serving racist clients. For instance, how can one respect the integrity of the legal-service provider if racist clients are served? In determining which clients should receive service, is it plausible to make distinctions between those clients whose display of racism can be characterized as unconscious as opposed to conscious? A further question arises about the mandate of a community legal clinic. The unique character of a community legal clinic is such that it seeks to provide more than just legal services: it also seeks to facilitate community development, education, and law reform. The question then becomes whether this mandate is furthered or hindered by condoning the racist behaviour of clients.

The methodology of this paper will entail an analysis of race and will explore in some detail the phenomenon of racism in Canada. Towards exploring the questions raised above, this paper will also review and analyze codes of professional conduct and examine the principles of moral theory. Through an exploration of these theoretical frameworks, it will be demonstrated that issues of race in the provision of legal service cannot be resolved by employing a set of "discrete off/on yes/no choices"<sup>1</sup> but rather entail a difficult balancing of professional codes of conduct and moral theory.

## FRAMING THE PROBLEM: THE NATURE OF RACISM

### Racism in Canada

There can be little doubt that in the minds of most Canadians, race is a normative concept; so normative, in fact, that to refer to it as a "concept" belies its intrinsic nature. According to this mode of reasoning, race is as ordinary as biology. As the work of anti-racist theorists reminds us, however, there is no intrinsic truth to race; race is very much a social construct.<sup>2</sup> According to Ashley Montague, the social construction of race is firmly rooted in the notion of group distinctions. He notes,

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1. David B. Wilkins, "Race Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?" (1995) 63 *Geo. Wash. L. R.* 1030 at 1070.
  2. Angelo N. Ancheta, *Race, Rights, and the Asian American Experience*, (New Brunswick, NJ: Rutgers University Press, 1998) at 43.

When members of a society act out their emotions and beliefs in relation to the members of other groups in discriminatory ways, based on a conception of the other which is socially determined, we are clearly dealing with a group distinction.<sup>3</sup>

These group distinctions are based on the idea that physical and behavioural characteristics are linked and that these characteristics are held together by this thing called "race." These linkages of the physical and behavioural will vary between different groups; however, within a group these links are deemed to be held in common. They represent points of convergence and as such are considered to be indications of common ancestry.<sup>4</sup> For example, kinky hair, brown skin, and a "natural ability to dance" are all physical and behavioural traits that have been typically used to compartmentalize those of African descent into a discreet racial category. Moreover, apart from physical and behavioural characteristics, the cultural achievement of groups sharing common ancestry has also been linked to notions of race.<sup>5</sup> This process of racialization is not formulated in a vacuum. Instead, it is linked to social, historical, and political processes that shift over time. By noting this phenomenon, it is in no way being suggested that "whiteness" is not itself socially constructed. What is being suggested is that the process through which bodies become racialized is closely linked to issues of power, because those who hold power are able to influence our social and political realities. In Canada context, the intersection of social, political, and historical factors have led to the racialization of persons of colour, positing them in the category of "other" in relation to whites, who are posited as the "norm." It is this social construction of race that provides the foundation in which racism occurs.

Race discrimination or racism has typically been defined as racial prejudice supplemented by institutional power. Racism is used to the advantage of one racial/ethnic group and the disadvantage of other groups. The effect of racism is to subordinate individuals because of their colour or ethnicity.<sup>6</sup> It is important to note that racism differs from prejudice, for while both constitute forms of discrimination, prejudice does not rely upon the backup of institutional power. When subordinated groups engage in speech or conduct that that appears to be racist, what we are in fact dealing with is racial prejudice. As Donna Young notes, an understanding of this phenomenon must be grounded in an understanding of the "differential of historical and social power of racial groups."<sup>7</sup> In Canada, racism has been used to "regulat[e] the presence, aspirations, actions and livelihood of non-white people."<sup>8</sup> To that end, racism in Canada is premised on the subordination of persons of colour. In order to appreciate

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3. Ashley Montague, "Race the History of an Idea," in Ruth Miller & Paul Dolan, eds., *Race Awareness: The Nightmare & the Vision* (New York: Oxford University Press, 1971) 175.
  4. *Ibid.*
  5. *Ibid.*
  6. Resources from the Council on Interracial Books for Children (New York: The Center, 1994).
  7. Anti-Racism Advisory Committee of the OHRC, *The Donna Young Report: The Handling of Race Discrimination Complaints at the Ontario Human Rights Commission* (Toronto: OHRC, 1992) 20.
  8. Dionne Brand & Krishanta Sri Bhaggiyadatta, *Rivers Have Sources, Trees Have Roots* (Toronto: Cross Cultural Communications Centre, 1986) 3.

how and why the issue of race is a significant aspect of the day-to-day operations of a community legal clinic, it is important to explore the nature and depth of racism as it exists. An exploration of race relations in Canada reveals that racism is, and continues to be, a deeply entrenched ideological construct that shapes the major and minor institutions in Canadian society.

Despite professions of “multiculturalism” and “tolerance,” Canada’s legacy of race relations reveals a history marred by systemic exclusionary practices linked to race. Canadian immigration policy, for example, has traditionally been premised on keeping undesirable “races” out of Canada. According to Lisa Marie Jakubowski, Canada’s immigration laws have seen patterns of emergence and disappearance of the term *race*. By this it is meant that, at various periods in Canadian immigration policy, race was a criterion that was either blatantly revealed in immigration policy or manifested in more subtle ways.<sup>9</sup> Certainly in the early days of Canadian immigration policy, “race” was a prominent criterion for determining who could get into Canada. During this period, determination of who could enter was largely based on “race.” Canada’s immigration policy made no effort to conceal its preference for white immigrants, clearly satisfying its objective of maintaining a “white Canada.” This “white Canada” policy was the basis for restricting the integration of blacks, Chinese, Japanese, and other racial groups into Canadian society.<sup>10</sup>

It has been suggested that these types of exclusionary race-based practices are still very much in existence in Canada’s immigration policies. Evidence can be seen in such policies as the “head tax” levied against Chinese immigrants, as well as the routine rejection of refugee applications of refugees from African and other “Third World” countries.<sup>11</sup> Moreover, social policies like the colonization and subsequent cultural genocide of Canada’s Aboriginal community, the enslavement of African peoples, the expulsion of Japanese Canadians, and the disenfranchisement of Chinese, South Asian, and Jewish Canadians are all features of Canadian history that, while rarely discussed, continue to play a prominent role in current race relations.

While one is obliged to acknowledge that a history riddled with racism will, if unchecked, have implications for current race relations, the notion of Canada as a racist society is, for the most part, beyond most Canadians. According to the African Canadian Legal Clinic’s (ACLC) report to the Canadian Bar Association, “many Canadians . . . maintain that there is no racism in Canada.”<sup>12</sup> Members of racially

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9. Lisa Marie Jakubowski, *Immigration and the Legalization of Racism* (Halifax: Fernwood Publishing, 1997) at 11.
  10. David R. Hughes & Evelyn Kallen, *The Anatomy of Racism: Canadian Dimensions* (Montreal: Harvest House, 1974) at 98.
  11. Judy Vashti Persad & Salome Loucas, *Measuring our Ground, Creating the Future: Establishing an Anti-Racism Action Centre to Provide One-to-One Support Services to Individuals Experiencing Racism (Need, Concept and Feasibility)* (Toronto: Anti-Racism Action Centre, 1996) at 4, and The African Canadian Legal Clinic (ACLC), *Presentation to the CBA Working Group on Racial Equality in the Legal Profession* (Toronto: African Canadian Legal Clinic, 1996) at 5.
  12. ACLC, *supra* note 11, at 8.

marginalized groups who are confronted by racist remarks are frequently cautioned not to take these remarks seriously and to “relax,” because they are “nothing more than jokes” (remember Mr. X’s comments to me). This is how the notion of Canada as a non-racist society is perpetuated. Likewise, this idea is evident in the *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*<sup>13</sup> While the focus of the report is on racism in the criminal justice system, the remarks of judges and lawyers surveyed in the report indicate a larger ideology that is indifferent racism in Canada context. Consider the following comments:

“The idea that there is widespread racism in the administration of justice is patently false. These ideas result from an ill informed, politically correct minority who, I believe, have no experience in the criminal justice system.”

“From what I have observed, I do not see that racism is as great a problem in the justice system as [do] the media and some individuals and self-serving interest groups.”<sup>14</sup>

An examination of Canadian jurisprudence also reveals a type of apathy toward the notion that racism exists in Canada. In her report on the handling of racial discrimination complaints by the Ontario Human Rights Commission, Donna Young notes that the Commission is reluctant to acknowledge the racist underpinnings of cases. In *Nimako v. Canadian National Hotels*, the complainant’s charge of racism was effectively undermined through the Commission’s inability to give effect to the realities of racism in the Canadian context:

The words [fucking black bastard] were provoked not by Mr. Nimako’s colour, but by his conduct. They expressed anger towards a man who just happened to be black, referring to his colour, in order, perhaps, to underscore the speaker’s outrage. The implication was not that he was a “bastard” because he was black, but that he was a “bastard” who happened to be black. It would run counter to common sense, surely, to suggest that anyone who utters such an expression in such circumstances is therefore racially prejudiced, that he does not like blacks, and would treat them unfairly in comparison with others if given the chance.<sup>15</sup>

Denial that racism exists, as evidenced in *Nimako*, speaks to the larger issue of the normalcy of racism. One reason that racism is pervasive in Canadian society is that it is often discernable to the individual displaying the racist conduct or to the receiver of that conduct. This makes it easy to deny its very existence. In the anecdote above, Mr. X’s comments, insidious and inappropriate as they were, can be characterized as unconscious racism.

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13. David P. Cole & Margaret Gittens, *Report of the Commission on Systemic Racism in the Criminal Justice System* (Toronto: The Commission, 1995).

14. *Ibid.*, at 22.

15. *Nimako v. Canadian National Hotels* [1987] 8 C.H.R.R. D/3985, in Young, *supra* note 7 at 20.

### Unconscious/conscious racism

According to Charles Lawrence, failure to acknowledge that racism is endemic makes it impossible to recognize that unconscious forces motivate much of the behaviour that prompts racial discrimination. Lawrence, speaking from the American experience, notes that this is not surprising when one considers that Americans share a cultural history rooted in racism. He notes,

Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about non-whites.<sup>16</sup>

The same argument can be made of Canadians, whose cultural history as noted above is also rooted in racism. While it is certainly not the intention of this paper to excuse racism, the argument that we are collectively conditioned on some level to harbour racial assumptions without knowing is valid.

A good way to comprehend unconscious racism is to examine its manifestations in our daily experiences. Two such manifestations of unconscious racism are the "slip of the tongue" and the "slip of the mind." When one inadvertently says something one did not intend to verbalize, this is known as a "slip of the tongue." Often these slips reveal the extent to which individuals have tacitly absorbed the racial assumptions and stereotypes of our society.<sup>17</sup> For example, during oral arguments in *R.D.S. v. R.*, with a "slip of the tongue" Lamer C.J. referred to Chinese-Canadians as having a penchant for gambling.<sup>18</sup> While Lamer later asserted that he had no intention to offend, his remarks show that he bought into stereotypes of Chinese-Canadians on two levels. First, his comment captures the increasingly prevalent stereotype of the wealthy Chinese, and the corresponding notion that Chinese capital is "taking over Canada."<sup>19</sup> Second, the remark embodies a backlash against Chinese capital in that the reference to gambling may be seen as negating the economic advancement of Chinese-Canadians. Psychoanalytic theory would suggest that Lamer's comments were the result of repressed stereotypes that had "momentarily slipped past [his realm of consciousness]."<sup>20</sup> This reasoning becomes plausible when one considers that Lamer would certainly not intentionally reveal such a blatantly racist remark when one central theme of the case dealt with racial bias.

The "slip of the mind," can also demonstrate unconscious racism. The defining feature of the "slip of the mind" is that "one says what one intends, [however] one fails to grasp the racist implications of one's benignly motivated words or behavior."<sup>21</sup> To put

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16. Charles R. Lawrence III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism," 39 *Stan. L. Rev.* 317 at 322.

17. *Ibid.*, at 340.

18. *R.D.S. v. R.*, Video #25063, International Duplication Services, 1997.

19. May Yee, "Finding the Home through Issues of Gender, Race, and Class," in Himani Bannerji, ed., *Returning the Gaze: Essays on Racism, Feminism, and Politics* (Toronto: Sister Vision Press, 1993) at 41.

20. Lawrence, *supra* note 16, at 340.

this theory into context, it is helpful to refer back to my encounter with Mr. X. No doubt Mr. X intended to call me Sambo. What is equally clear, however, is that Mr. X had no idea that he had offended, as evidenced by his additional comments about his “black friend.” While these unconscious forms of racism are problematic and highly contentious, deliberate and conscious displays of racism pose an entirely new set of challenges.

According to psychoanalytic theory, expressions of conscious racism occur when the rational mind finds the desires of the unconscious mind reasonable. The rational mind refuses to censor the impulses of the unconscious mind because it posits these impulses as correct, despite societal morals to the contrary.<sup>22</sup> There is a sense of deliberateness with conscious racism, because clearly the perpetrator is aware that his or her speech is racially offensive. Having said that, however, I do not suggest that unconscious racism is not, as a consequence, reprehensible. Nor should these comments minimize the impact of institutional forms of racism (which are often unconscious or systemic). What is being suggested, however, is that the individual who speaks of the “lazy nigger” or the “miserly Jew” is likely speaking from a conscious belief; a belief that was likely initiated in the unconscious mind, but has found rational expression in the conscious.

In determining what strategy a legal clinic should take on the issue of race, it is necessary to develop a practical theory that distinguishes between unconscious and conscious racism. Clearly by doing so we are faced with the problem of saying that one form of racism is worse than another, when in fact all forms of racism are insidious. For the victims of racist speech, all forms of racism—unconscious or conscious—are hurtful. The ways in which racism affects its victims take many forms, including internalizing racist beliefs (self-hatred), isolation, low self-esteem, and humiliation.<sup>23</sup> In my encounter with Mr. X, knowing that his comments arose out of sheer ignorance did nothing to lessen by anger and embarrassment. Yet in order to devise strategies that can be effectively implemented, we must define the scope of racist speech we are prepared to deal with. Some may argue that what is needed is a broad policy that would restrict all forms of racist speech. Given my realities as a black woman in Canada and the acts of subordination I frequently encounter, I must confess that this proposition is tantalizing. However, if, as Lawrence notes, we are all affected by unconscious racist assumptions on some level, a policy that refuses to serve any racist clients would mean that community legal clinics would serve no one. Moreover, it would also mean that providers of legal services would themselves be unfit to render services because of their own unconscious racism. The challenge, therefore, is to find some equilibrium between these competing ideals. A comparative analysis of unconscious and conscious

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21. *Ibid.*, at 341.

22. *Ibid.*, at 332.

23. Richard Delgado, “Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling,” in Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado, *et al.*, *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder, CO: Westview Press, 1993) at 91.

forms of racism will aid in this task, because it will determine how narrow or broad a definition of racist speech a legal-service provider will tolerate when delivering client service.

Intent theory is the starting point for distinguishing between unconscious and conscious racism. This is not a theory that is difficult to comprehend. Certainly in our daily lives we make moral judgments of what is right and wrong based on the intent of the actor. For example, a child who accidentally breaks a vase is not blamed for her mishap, but is cautioned to be more careful in the future. Conversely, the child who deliberately intends to break the vase is treated with more seriousness and is consequently punished accordingly because of a moral understanding that says to intentionally break the vase is wrong. Likewise, principles of criminal law also adhere to notions of intent in determining whether the elements of a crime have been established. In assessing the content of racist speech, one should determine the intent of the actor in making the racist remark. Does the actor intend to cause harm with her or his speech, or does that speech stem from sheer ignorance about the harm it may cause?

In her analysis of why assaultive speech should not be protected by the First Amendment, Mari Matsuda outlines three indicators of racist hate speech, which she distinguishes from other forms of racist speech:

1. The message is of racial inferiority
2. The message is directed against a historically oppressed group.
3. The message is persecutory, hateful, and degrading.<sup>24</sup>

According to Matsuda, racist speech that meets all three criteria should not be protected by the First Amendment because such speech is deliberate, hateful, and akin to violence.

Matsuda's classification of this type of racist speech as a form of violence is particularly useful when coming to terms with unconscious and conscious forms of racism. Matsuda's model makes it clear that many unconscious forms of racism are akin to violence. Returning to my encounter with Mr. X, it is clear that his remarks displayed a tacit belief in my racial inferiority, thus meeting the first criterion. As the message was directed toward me, a black woman from a historically oppressed group, the second criterion is also met. One runs into difficulty with the third criterion, however, because, while Mr. X's comments were hurtful, they could not be said to be charged with the kind of racial animus that is persecutory or hateful. In effect, there was no deliberate, calculated effort to inflict violence. Clients who use such racist speech should fall within the category of persons served by the legal clinic. With conscious displays of racism, however, the actor intends his message to the racial inferiority of the targeted individual or group; the actor intends to direct his/her message to a

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24. Mari Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" in Mari Matsuda et al. *Words that Wound*, *supra* note 23, at 36 [hereinafter "Public Response"].

historically disadvantaged group; the actor intends for her speech to be hateful and persecutory and intends to wound with that speech.

The classification of conscious racism as a form of intentional violence makes it easier to define what forms of racist speech a clinic is prepared to contend with, and what forms it will not tolerate. An analysis of the intent behind racist speech therefore suggests that individuals intend to inflict violence when (1) they promote notions of racial inferiority, (2) they direct their speech at against historically disadvantaged groups, and (3) the content of their speech can be classified as persecutory and hateful.<sup>25</sup> Such individuals should not receive service. It should be noted that while a test of intent might be a good way of determining whether a client should be served, it might not be necessary when dealing with the racist speech of legal-service providers and staff who work in the clinic. This is so because the racist speech of these employees is already regulated by the *Ontario Human Rights Code*. Furthermore, most legal clinics have policies for their employees to prevent workplace discrimination and harassment. A client or an employee who is victimized by the racist speech of another service provider can use their clinic's complaint procedure, and if not satisfied can seek a remedy with the Human Rights Commission.<sup>26</sup> By acknowledging the already regulated nature of employee speech within the workplace, it should not be taken to mean that there is no need for legal clinics to adopt clear anti-racism policies. The principles of morality lawyering suggest that legal clinics have a moral duty to condemn conduct that is generally perceived by society (at least in theory) as reprehensible.

This paper deliberately isolates issues of class for analysis. While this is true, it is helpful and necessary to address one possible critique to that proposal. This critique challenges the very basis of my proposal, because it suggests that generic talk of racism in a community legal clinic is misguided. If one operates under the premise that racism in Canada entails the subordination of non-whites by whites, and if racism entails racial prejudice coupled with institutional power, how can we suggest that clients in the clinic, who are often economically repressed and who themselves lack institutional power, are racist? The critique is valid on one hand and misguided on the other. It is valid because it recognizes what I have previously referred to as multiple types of oppression. It recognizes that essentialist notions of oppression fail to encapsulate the myriad ways in which other factors subordinate individuals. The critique is misguided, however, because it distorts the nature of racism. While poor white clients may be economically disempowered and may not have the power to effect structural change, they do, however, benefit from institutional power structures. As Derrick Bell notes, speaking of black and white relations in the American context,

Even those whites who lack wealth and power are sustained in their sense of racial superiority by policy decisions that sacrifice black rights. The subordination of blacks seems to reassure whites of an unspoken, but no less certain, property right

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25. *Ibid.*

26. Interview with J.R. Richards, African Canadian Legal Clinic, 28 March 2000.

in their "whiteness". This right is recognized by courts and society as all property rights are upheld under a government created and sustained primarily for that purpose.<sup>27</sup>

While class is important in understanding issues of racism, it in no way precludes an individual from being racist. One must be mindful of the fact that some forms of oppression are transitional, meaning that they change over time, while others are permanent.<sup>28</sup> Simply put, poverty can be eliminated, but one cannot change the colour of one's skin.

Any policy that purports to resolve issues of race in a community legal clinic must also be grounded in an analysis of the principles of legal ethics and morality theory. An exploration of legal ethics and moral theory will help define a clinic's mandate. This will allow for a determination to be made on whether a policy to deny service to certain types of racist clients is in line with the clinic's legal obligations as dictated by the profession, as well as its moral obligations to the community it serves.

### Legal ethics and moral theory

The traditional model of professional conduct posits lawyers as having two key obligations. The first is that lawyers must diligently advocate for the interests of their clients. This is essentially the traditional agency model of lawyering, which characterizes the lawyer-client relationship as a power dynamic in which lawyers exert influence over their clients.<sup>29</sup> The underlying reasoning of this model is that since clients are ignorant about the law, they depend on their lawyers to look after their best interests. The Canadian Bar Association, as well as all the provincial law societies, recognizes this principle.<sup>30</sup> In Ontario, for instance, Rule 10 of the Law Society of Upper Canada's (LSUC) *Professional Conduct Handbook* notes that the "lawyer . . . must represent the client resolutely and honourably within the limits of the law."<sup>31</sup> The second obligation recognizes that lawyers have obligations to the profession as "officers of the court." In this model a lawyer has a duty to uphold the administration of justice.<sup>32</sup> While these codes of professional conduct are intended to direct the conduct of lawyers in the profession, when it comes to issues of race, these codes offer the lawyer little or no guidance.<sup>33</sup> The fundamental reason for this lack of guidance

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27. Derrick Bell, "Racial Realism—After We're Gone: Prudent Speculations on America in a Post-Racial Epoch" in Delgado, *supra* note 23 at 7.
  28. Barb Thomas adapted from Enid Lee, *Letters to Marcia: A Teacher's Guide to Anti-Racist Education* (Toronto: Cross Cultural Communication Centre, 1985).
  29. David B. Wilkins, "Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars" (1998) 11 *Geo. J. Legal Ethics* 855 at 855 [hereinafter "Do Clients Have"].
  30. Carol Aylward, *Canadian Critical Race Theory: Racism and the Law* (Halifax: Fernwood, 1999) at 175.
  31. Law Society of Upper Canada, *Professional Conduct Handbook* (1998, as amended), at 29 [hereinafter the LSUC].
  32. "Do Clients Have" at 855.
  33. Aylward, *supra* note 30, at 175. An example of this can be seen in Rule 28 of the LSUC's *Professional Conduct Handbook*. While it is one of few provincial codes to address the issue of race discrimination, it provides no concrete ways to create a strategy on the issue.

on issues of race is that the codes of professional conduct are premised on a belief that race does not matter.

Canadian codes of professional conduct are rooted in the principle of legal liberalism that emphasizes “the rule of law, formalism, neutrality, abstraction and individual rights.”<sup>34</sup> As far as issues of race are concerned, legal liberalism operates from the belief that the rule of law is and should be applied equally to all, without distinctions based on race or other status. So arguments that raise the issue of “difference” jeopardize this principle and are therefore not considered legitimate. Critical Race theorists correctly challenge this principle,<sup>35</sup> because legal liberalism diminishes the salience of race in the larger societal context, as well as in the legal profession. Critical Race theorists argue that legal liberalism provides a colour-blind, ahistoric, and decontextualized model of lawyering that is incapable of acknowledging the subordination of people of colour.<sup>36</sup> If this is so, one might ask what good the codes of professional conduct are in helping legal clinics deal with issues of race. While the codes of professional conduct are indeed problematic, if combined with the race analysis given above, they can provide some guidance for the clinician in dealing with racist clients. It is necessary, therefore, to examine what the rules of professional conduct say about the lawyer’s duty to serve clients.

A review of the LSUC’s *Professional Conduct Handbook* reveals that there is no express obligation for lawyers to represent each client that comes before them. In other words, there is room within existing professional codes of conduct to withhold service. Granted that the basis for withholding service should not be grounded in discriminatory practices as noted in Rule 28, the option to withhold service is available to the lawyer. As Rule 12 Commentary 5 (“Right to Decline Employment”) notes,

The lawyer has a general right to decline a particular employment (except when assigned as counsel by a court), but it is a right to be exercised prudently . . . Generally speaking a lawyer should not exercise the right merely because a person seeking legal services or that person’s cause is unpopular or notorious.<sup>37</sup>

Reading Commentary 5 in isolation from other rules suggests that a clinic is obliged to serve not only the unconscious racist, but the conscious racist as well. An analysis of Rule 5 (“Conflict of Interest”), however, reveals that this is not the case. Rule 5 notes,

The lawyer must not advise or represent both sides of a dispute and . . . should not act or continue to act in a matter when there is or there is likely to be a conflicting interest.<sup>38</sup>

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34. *Ibid.*, at 19.

35. Critical Race Theory (CRT) developed out of scholarship in the United States. Its central theme is that racism is a normal part of daily life and that ideologies and assumptions are fully entrenched in the political and legal structures of society. The focus of CRT has been on challenging legal liberalism and the belief that law can create an equitable, just society.

36. Matsuda et al., *supra* note 24 at 6.

37. LSUC, *supra* note 31, at 41.

Commentary 2 notes,

The reason for the Rule is self-evident; the client or the client's affairs may be seriously prejudiced unless the lawyer's judgement and freedom of action on the client's behalf are as free as possible from compromising influences.<sup>39</sup>

Finally, Commentary 3 notes,

Conflicting interests include but are not limited to the financial interest of the lawyer or associate of the lawyer, and the duties and loyalties of the lawyer to any other client . . . <sup>40</sup>

One must therefore ask whether there would be a conflict of interest if a community legal clinic served clients who might be regarded as conscious racists. This paper suggests that there is indeed a conflict of interest. One mandate of a community legal clinic is community development. To that end, many clinics have adopted a variety of policies to further this commitment to community development.<sup>41</sup> The service of clients who deliberately inflict violence through their speech would amount to a conflict of interest for a community legal clinic. Advocacy organizations that serve conscious racists would destroy the confidence and legitimacy community that legal clinics have with the larger community. Because of this conflict, a community legal clinic would be justified in withholding service from such clients.

The principles of moral theory also reveal that legal clinics are justified in refusing service to clients who are conscious racists. Moral theory recognizes that individuals have identities that are distinct and insular from their profession. So the personal moral commitments of individuals are just as significant and worthy of reflection as professional commitments.<sup>42</sup> The principle of moral theory as it relates to the legal profession therefore suggests that lawyers possess non-professional identities and that these identities are often shaped by distinct commitments and obligations. There is, however, a benefit to this. As moral theorists note, "personal morality models of lawyering seek to protect values important to our legal order as professional norms must always be justified in terms of some wider set of moral criteria"<sup>43</sup> It is also necessary to add that personal morality codes of lawyering also allow for the protection of those values important to our society. The moral obligations and commitments of lawyers often

38. *Ibid.*, at 11.

39. *Ibid.*

40. *Ibid.*

41. Parkdale Community Legal Services, for example, has adopted the position that it will not tolerate conduct that "breaks down" the community. For example, Policy 6.15 ("Policy for Withholding Services from Certain Clients") indicates that the clinic will consider withholding service from clients who are or have been either physically or verbally abusive to staff, students, or clients. Similarly, in the clinic's Spousal Assault Policy (Policy 6.17), there is a clear understanding that violence is unacceptable.

42. David B. Wilkins, "Identities and Roles: Race, Recognition, and Professional Responsibility" (1998) 57 Maryland L.R. 1502 at 1526 [hereinafter "Identities and Roles"].

43. *Ibid.*, at 1527.

influence the manner in which they interpret their professional responsibilities. As a result, moral theorists deem personal moral values to be essential to the lawyer's role.<sup>44</sup> While much of a lawyer's job entails adhering to legal rules and principles, it also entails the exercise good judgment. The ability to exercise good judgment is, according to moral theorists, linked to one's moral personality.<sup>45</sup>

One might ask how notions of personal morality lawyering are relevant to the clinical setting, because legal clinics are essentially organizations comprising many personal identities. This is indeed true and should be underscored; however, the argument can be made that legal clinics have their own distinct identity as well. Those employed by legal clinics are judged to have a certain common interest that governs their actions. This is, of course, not always true in practice, but certainly it has merit at the theoretical level. How, then, does this relate to the issue of serving racist clients, one might ask? To illustrate this notion, an examination of the policy directives of Parkdale Community Legal Services is instructive. A review of that clinic's anti-racism policy reveals that it has embraced the principles of personal morality lawyering. Through its anti-racism policy, the clinic has explicitly recognized that racism is a moral wrong that contradicts its moral personality—a personality closely linked to the best interest of the community it serves:

Parkdale Community Legal Services is committed to seeking justice for those who are affected by racism. We recognize that racism plays a significant role in the problems our clients experience. Identifying racism, and developing policies and actions aimed at preventing it, must be integral to the services we provide, or we fail the community.<sup>46</sup>

Withholding service to clients who may be classified as conscious racists is justified by the principles of personal morality lawyering, which recognizes that the personal moral obligations of lawyers are instrumental in shaping their legal obligations. This is not to suggest that we do away with professional codes of conduct, nor does it suggest that principles of personal morality lawyering will always trump legal ethics. What is being suggested, however, is that a clinic's decision to serve or not to serve racist clients must not be limited solely to analysis of legal norms, but must also engage the lawyer in an exploration of his or her own personal morals.

## CONCLUSION

This paper set out to explore the legal ethics and moral dilemmas that arise in the provision of legal service to clients who are racist. The racist speech of clients is not an isolated, random phenomenon, but rather is linked to the larger social and historical realities of Canada's history—a history marred by racism. In effect, conscious and

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44. *Ibid.*, 1530.

45. Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge: Belknap Press of Harvard University Press, 1993) in Wilkins, *supra* note 41, at 1528.

46. Anti-Racism Policy (Policy 6.23), "Parkdale Community Legal Services Clinic Manual" (January 1, 1996) [unpublished].

unconscious forms of racism are the by-products of Canadian history. A determination of which clients will and will not be served therefore turns on understanding these conscious and unconscious forms of racism. An exploration of the intent behind speech suggests that conscious forms of racism entail deliberate attempts to wound. Service should therefore be withheld to clients who exhibit this behaviour. It has been shown that the denial of service to conscious racists need not contravene the principles of professional conduct. In some instances, in fact, the rules of professional conduct justify the denial of service to conscious racists. Moreover, the denial of service to such clients can also be justified on the basis of moral theory. The challenge for the legal-service provider, therefore, is to recognize that the decision to serve or not to serve racist clients cannot be made in isolation from larger social and historical phenomena. The complexity of issues of race, legal ethics, and moral theory suggests that a decision to provide or withhold service to racist clients will always be challenging and will always engage the provider of legal services in a difficult balance.