

# WHEN FICTION INTRUDES UPON REALITY: A BRIEF REPLY TO PROFESSOR CHIN

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It must seem ironic to the lay observer that lawyers debate this issue at all. After all, it is lawyers who often credit themselves with the legal eradication of racial discrimination.<sup>1</sup> Yet, now we argue that because our position is somehow more special and sacred than others, we claim the right to engage in giving free rein to our racial and gender biases in deciding whom we represent. Leaving that bit of irony aside, the other jurisprudential chestnut of many legal scholars is that our profession is a neutral, objective application of dispassionate rules to static sets of facts. Indeed, that is the way most of us have been taught in law school from the very first time we learned to brief a case. But as so many nonlawyers know, it just ain't so. For much of society—certainly people of color—law operates as the application of normative assumptions masquerading as objective rules.<sup>2</sup> Indeed, there is no better illustration of how normative assumptions dictate legal analysis than in the discussion of the difficult issue presented in *Stropnick v. Nathanson*.<sup>3</sup>

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As an initial matter, my reply to Professor Chin should in no way be interpreted that my respect for his desire to eradicate discrimination and injustice is diminished. I have learned much from him already and continue to learn from his insight and knowledge. We are friends, colleagues, and brothers in the struggle against racial subordination—and remain so even though we disagree here.

1. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (striking down racial segregation in public education).

2. See, e.g., *Introduction to CRITICAL RACE THEORY, THE KEY WRITINGS THAT FORMED THE MOVEMENT XXV* (Kimberle Crenshaw et al. eds., 1995).

Racial power, in our view, was not simply—or even primarily—a product of biased decision-making on the part of judges, but instead, the sum total of the pervasive ways in which the law shapes and is shaped by “[sic]race relations” across the social plane. Laws produced racial power not simply through narrowing the scope of, say, of [sic] anti-discrimination remedies, nor through racially-biased decision-making, but instead, through myriad legal rules, many of them having nothing to do with rules against discrimination . . . .

*Id.*

3. 19 M.D.L.R. (Landlaw, Inc.) 39 (MCAD Feb. 25, 1997). Indeed, with respect to the decision in *Nathanson*, I agree with Professor Chin that the decision was wrongly

Professor Chin's thesis is simple: lawyers should be allowed to discriminate on the basis of sex, race, gender, national origin and sexual orientation because the integrity of the legal system's principle of unimpaired advocacy outweighs society's need to compel equal access. He comes to this conclusion by reasoning that any other rule is unenforceable, political lawyers whose interest are protecting the rights of the poor and people of color will be disproportionately affected, and that an attorney's relationship with her client is uniquely different from that of doctor, or clergyperson because property, liberty, and often life hangs in the balance of an attorney's zeal. This is an impressive catalogue of reasons—if only the basis for his concerns existed in reality.<sup>4</sup>

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decided as to the result. Indeed, I think the decision reflected the formalism that has infected recent equal protection jurisprudence. See *infra* notes 9-14 and accompanying text.

The facts indicate that Nathanson represented men in other aspects of her practice. See *Stropnicki*, 19 M.D.L.R. at 39. She even offered to review the Complainant's legal concern once he expressed his displeasure with her, but he declined and proceeded without counsel. See *id.* at 40. Thus, as a factual matter, there is ample indication from the record that factors other than Stropnicki's "concern" for equal access may have been at work in bringing the complaint. Moreover, notwithstanding that factual inference, Nathanson's decision not to represent Stropnicki could also have been determined by the factfinder to be a political stance related to her "area of interest" in eliminating gender bias against women in divorce actions, and not a bias against representing men due to a generalized gender animus. See Bruce K. Miller, *Lawyers' Identities, Client Selection and the Antidiscrimination Principle: Thoughts on the Sanctioning of Judith Nathanson*, 20 W. NEW ENG. L. REV. 93 (1998), for a thoughtful analysis of this point.

4. Since this is only a brief reply, I will limit my remarks to what I believe is Professor Chin's major assumption. On the other hand, I cannot resist commenting about his other reasons. The availability of potential pretexts for discrimination cannot be a reason for prohibiting attorney discrimination. Indeed, if that were the case, all civil rights law would be unenforceable. With respect to those attorneys who have particular interests or political practices advocating for the rights of people of color or women, the prohibition would probably have in actuality the least effect on them. It is these attorneys who presumably would be *least concerned* about the gender or race of their clients—so long as the stance of the case and the posture of the client's legal position was strategically in the interest of their longterm goals. Nathanson's practice specialized in the litigation of divorce issues and their effect and impact upon women's status in society. As such, she could have rejected Stropnicki on any number of other permissible grounds, including the fact that she didn't like him and suspected his reasons for trying to retain her (i.e., to prevent his wife from retaining her expertise). Indeed, is Professor Chin suggesting that all laws now forbidding racial discrimination be dismantled because they have been allowed by the courts to be used as a weapon against affirmative action?

Finally, I wonder whether it is not also troubling to Professor Chin, given his argument and his policy concerns, that society would insist on doctors operating on patients irrespective of their race or other characteristics. I'm sure the medical profession would argue that the patient/doctor relationship is as privileged, fiduciary, longterm, and de-

Professor Chin makes an admission toward the end of his piece, and in doing so he lays bare his assumption upon which his entire argument rests. He acknowledges that in some circumstances, such as court appointments for indigent clients, an attorney may be drafted into service over her objections because compelled counsel is better than “no counsel at all.” But unlike Professor Chin’s construction, the world is not a “buyer’s market,” divided neatly into those who have the means to pay for any counsel they choose, including “white shoe firms,” and indigents who must take whomever the court appoints.<sup>5</sup> The world is constructed mostly of people who have a very limited range—either because of finances or geography—of attorneys whom they can consider. As such, the answer to the dilemma posed by Professor Chin—does one want an attorney who doesn’t want to represent you—is really a question of given the reality of legal representation in this society—*with whom should that power ultimately rest?* As between the potential client or attorney, the answer must be that the power lies with the potential client.

If a client is confronted with an attorney who tells him that she will take his case only because she is forced to take it, and that the client’s race or gender is repugnant to her, Professor Chin worries that the poor befuddled potential client will blunder into such a relationship without considering alternatives. That may be, but the more probable reality is that such a client will go elsewhere, and more than likely accept such representation only if faced with no effective alternative—a situation in which even Professor Chin

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voted (albeit differently and arguably more so) as any relationship between a lawyer and her client. Thus, the question “do you really want a doctor operating on you who doesn’t want to?” suggests the same answer as Professor Chin’s answer to the question, “do you really want a lawyer who doesn’t want you?” Indeed, although somewhat more attenuated, a moral question is implicated in the question “do you really want a priest to pray for your soul who doesn’t want to?” Thus, is he also suggesting that doctors and clergypeople be allowed to discriminate for the “integrity” of those particular professions? What about psychiatrists, firefighters, pharmacists?

5. Another powerful operating assumption of Professor Chin’s is that “the legal profession as an institution will decline the opportunity [to discriminate].” The debate about that particular assumption including issues regarding the systemic inequality of access to legal services; the lack of dignity and respect often given by lawyers and courts to people of color, the poor, women, gays and lesbians, and the disabled; the lack of people of color on the bench or even as court personnel; the lack of people of color or women as partners in major law firms; the lack of diversity in legal academia in the teaching and student body, etc., is for another time and place. However, for the purposes of this Brief Reply it is sufficient to note that the desire of the legal profession “as an institution” to seek equity and equal access to justice is neither objective truth nor documented fact. It is Professor Chin’s assumption—and my hope.

thinks attorney coercion is acceptable.<sup>6</sup> Thus, his foundational assumption that the free play of the legal marketplace negates concern for the effects of attorney discrimination is based solely on his own assumptions about the reality of legal consumers.<sup>7</sup> And, it is that assumption that must bear critical scrutiny.

However, Professor Chin's position raises more fundamental questions about the nature of how we as a society see the interplay of issues concerning race. His zealous protection of racial and gender discrimination in the "interest of legal integrity" echoes recent jurisprudence which turns the real world topsy turvy because the "interests" of formal intellectual abstraction override rectification of social realities. We live in a perverse, Orwellian time when "civil rights initiatives" work to diminish the presence of African-Americans;<sup>8</sup> where the geometric shape of a congressional district has more constitutional weight than a community of color's historic denial of Congressional representation;<sup>9</sup> where a state university system that has had a long history of racial discrimination is constitutionally unable to remedy that condition because of the operation of the Equal Protection Clause;<sup>10</sup> where the ideal of a color-blind society has been transformed by judicial fiat into a description of our present condition that in reality leaves us frozen in a color-stratified society.<sup>11</sup>

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6. Professor Chin's analogy of representation by biased attorneys to biased judges is not accurate precisely in that client choice exists in the former, but not the latter.

7. Moreover, it sidesteps the major issue with regard to discrimination in the first place. Even if it were true that Professor Chin's world of legal consumers reflected reality and the market would alleviate the practical effects of attorney discrimination, the notion that access to service alone is sufficient harkens back to the old argument about how separate could truly be equal.

8. The California Civil Rights Initiative ("Proposition 209"), banning the use of race, gender, color, ethnicity or national origin in public employment, education or contracting, was held to be consistent with the Fourteenth Amendment's Equal Protection Clause. See *Coalition for Econ. Equity v. Wilson*, 110 F.3d 1431, 1440 (9th Cir. 1997), cert. denied, 118 S. Ct. 397 (1997). At the University of California at Berkeley after the Board of Regents enacted a ban on affirmative action in 1995 similar to Proposition 209, there is only one African-American student in the fall 1997 entering class of 270. See Peter Applebome, *Minority Law School Enrollment Plunges in California and Texas*, N.Y. TIMES, June 28, 1997, at A1. At UCLA Law School, the projected entering number of African-Americans is 10, a decline of almost 50% from the prior year. See *id.*

9. See *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (invalidating majority Black Congressional districts stating that in reapportionment, "appearances do matter").

10. See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), cert. denied *sub nom.* *Thurgood Marshall Legal Soc'y v. Hopwood*, 116 S. Ct. 2580 (1996).

11. See Charles R. Lawrence, III, *The Epidemiology of Color-Blindness: Learning to Think and Talk About Race, Again*, 15 B.C. THIRD WORLD L.J. 1, 6 (1995) (describ-

Indeed, traditional racial jurisprudence has come full circle in that protection of the interests of a beleaguered white population has become its signpost.<sup>12</sup> The realities and symbols of continued racial subordination—the “badges of slavery”—recede further from protection in favor of a formalism masquerading as objectivity. To allow attorneys to discriminate on the basis of race because “litigation cannot reform the souls of racist lawyers” comes chillingly too close to the traditional reasons advanced to defend racial segregation:

[T]he act of a mere individual[ ] . . . refusing accommodations to colored people, cannot be justly regarded as imposing any badge of slavery or servitude upon the applicant[ ]. . . . “It would be running the slavery argument into the ground[ ]” . . . to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain[ ] . . . or deal with in other matters of intercourse or business.<sup>13</sup>

Indeed, if Professor Chin is wary of the possibility of lawyers representing people who they dislike because of race or gender, is he equally wary of soldiers defending comrades on the battlefield they dislike because of race, gender, or sexual orientation?<sup>14</sup>

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ing how the “transformation of color-blindness from prescriptive ideal into a condition of societal denial” happens when the notion that the Constitution should be color-blind becomes “‘We are a color-blind society’”).

12. See Alexandra Natapoff, Note, *Trouble in Paradise: Equal Protection and the Dilemma of Interminority Group Conflict*, 47 STAN. L. REV. 1059 (1995). According to Natapoff, the Court “has lifted the stigma from whites without addressing the continuing pervasiveness of racial discrimination or the increasingly complex implications of a multiracial polity.” *Id.* at 1079. Natapoff takes, for example, the O’Connor opinion in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (plurality opinion), to show how it casts the situation in Richmond simply as multiple racial groups competing as equals for power and wealth, recasting the notion of “minority status” as a “temporary numerically inferior presence in a given locale, rather than a group subject to historic discrimination and in need of systemic remedy.” *Id.* at 1075.

13. *Plessy v. Ferguson*, 163 U.S. 537, 542-43 (1896) (Bradley, J.) (quoting *The Civil Rights Cases*, 109 U.S. 3, 24-25 (1883)), *overruled by* *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

14. Professor Chin’s position also assumes a world in which racial bias is completely conscious, and that unconscious racial animosity could not operate to impair an attorney’s representation. See Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 339 (1987) (noting that racially prejudiced behavior is often “experienced as a reflection of rational deduction from objective observation,” and the decisionmaker may often be “unaware of the selective perception that has produced her stereotype”). Although Professor Chin’s parade of horrors regarding the tragic consequences of attorney incompetence and unethical behavior is truly cautionary, even he, I suspect, would concede that there have been many instances where a successful representation was made irrespective of

I, like Professor Chin, am saddened by the number of lives that have been sacrificed on the altar of incompetent or unmotivated counsel. But I wonder whether allowing attorneys to reject representation on bases prohibited to everyone else will solve that. Moreover, I, like Professor Chin, am concerned about the integrity of the legal profession. But, unlike Professor Chin, I believe that an institution and profession that would enforce society's decision to ban invidious discrimination, but consciously exempt itself from that ban neither fosters nor deserves the public trust.

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the attorney's personal distaste—conscious or unconscious—for a particular attribute of her client.