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"He is the Darkey with the Glasses on": Race Trials Revisited

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INTRODUCTION TO THE NORTH CAROLINA LAW REVIEW SYMPOSIUM, *RACE TRIALS*:

"HE IS THE DARKEY WITH THE GLASSES ON": RACE TRIALS REVISITED*

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E.A. Stephens, a Georgia assistant solicitor: *Officer Watson, or Mr. W.B. Martin, I don't recollect which, brought this darkey, Angelo Herndon, to the solicitor's office.*

Attorney Davis: *Mr. Stephens refers to the defendant as "darkey." Your Honor . . . it is prejudicial to our case.*

The Court [Wyatt]: *I don't know whether it is or not; but suppose you refer to him as the defendant . . . .*

Stephens: *I will refer to him as "negro" which is better; he gave the name of Alonzo Herndon—Angelo Herndon; he is the darkey with the glasses on.*[1]

INTRODUCTION

He is the darkey with the glasses on. Civil rights and criminal defense lawyers heard trial narratives of this kind in southern

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1. Transcript of Record at 60–61, Herndon v. Georgia, 295 U.S. 441 (1935) (No. 665).

courtrooms throughout much of the early and middle twentieth century. Yet, subsequent generations of law school students and graduates in the South and elsewhere may not, indeed may never, have heard such *race talk* in a courtroom. Now in the second decade of a new "post-racial" century,[2] law students and graduates are unlikely to hear the words "darkey" or "nigger" when prosecuting or defending race cases in federal and state courts. Instead, they are likely to hear the more neutral, less pejorative words "Black" or "African American." Nonetheless, in prosecuting and defending race cases, they, like their predecessors, will construct—by force of implicit or explicit bias[3]—long-dominant racialized narratives of cultural inferiority and social stigma.

For many legal scholars and practitioners, identity-constructing words and narratives gleaned from the antebellum past ("Slaves" and "Free Blacks"), framed by the Civil War and Reconstruction era, and the multiracial present ("Latina/os" and "Asian Americans"), framed by post-World War II immigration, form part of a larger, sociolegal discourse of race common to modern civil rights and criminal trials. Despite the conventionality and increasing banality of that discourse in law and society, lawyers still lack a clear set of shared professional guidelines regulating the use of race talk in courtrooms and in advocacy more generally.[4] Descriptively, race talk oftentimes defies easy definition. Categorical distinctions among race-neutral,[5] race-coded,[6] and race-conscious[7] trial narratives, for example, may not be

2. The concept of post-racialism broadly suggests that race no longer carries salience in matters of law, culture, and society. *See* Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1595 (2009). For criticism of post-racial transformative claims, see Mario L. Barnes, *Reflections on a Dream World: Race, Post-Race and the Question of Making It Over*, 11 BERKELEY J. AFR.-AM. L. & POL'Y 6, 12 (2009); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1024–25 (2010); john a. powell, *Post-Racialism or Targeted Universalism?*, 86 DENV. U. L. REV. 785, 789–90 (2009).

3. On implicit bias in courtroom decision making, see generally Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012) (discussing implicit bias in courtroom proceedings and suggesting methods for combating it).

4. On the racial ethics of advocacy, see generally Anthony V. Alfieri, *Ethics, Race, and Reform*, 54 STAN. L. REV. 1389, 1403–04 (2002) (discussing the importance of "allowing race-consciousness to inform the lawyer's advocacy, counseling, and advisory roles while mitigating harm to persons and communities of color").

5. Race neutrality connotes a sense of colorblindness. *See* Anthony V. Alfieri, Gideon *in White/*Gideon *in Black: Race and Identity in Lawyering*, 114 YALE L.J. 1459, 1464–68 (2005).

6. "Race-coded claims [refer] to both mutable and immutable characteristics in describing individuals, groups, and communities." Anthony V. Alfieri, *Jim Crow Ethics and the Defense of the Jena Six*, 94 IOWA L. REV. 1651, 1654 (2009) [hereinafter Alfieri,

immediately discernible. Moreover, these unsettled boundary lines may shift with geography, litigation posture, and subject matter. Prescriptively, gauged by the persistence of public and private discriminatory practices in advocacy, race talk also resists simple regulation. Adversary ethics rules[8] and standards,[9] for example, may permit and even encourage race-coded or race-conscious trial narratives. For many advocates, adversary system obligations and the commands of professional role may seem ethically to compel race-coded or race-conscious trial narratives. In this way, advocates may feel obliged to "play" on the biases and prejudices of courtroom actors—judges, jurors, witnesses, and others.[10]

The absence of descriptive and prescriptive clarity in the meaning and regulation of race talk raises several important questions germane to lawyer courtroom conduct. The questions address objecting to, exploiting, and reintegrating race talk at trial and in litigation. To begin, when should lawyers normatively *object* to race talk? Moreover, when should lawyers strategically *exploit* race talk? Further, when should lawyers procedurally and substantively *reintegrate* race talk into the spoken and written texts of the courtroom? In research elsewhere, I and others have begun to examine these questions in the context of civil rights policy and practice.[11] The research addresses normative concerns, strategic and tactical considerations, and procedural and substantive rules relevant to race talk. Cast widely, this research goes beyond an assessment of the appropriate timing of regulation to consider the proper party or

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Jim Crow Ethics]; *see also* Alfieri, *supra* note 5, at 1467–74 (exploring the conceptualized role of race in legal representation of disadvantaged defendants).

7. Race consciousness eschews colorblind claims of neutrality and posits "that race matters both intrinsically and instrumentally." Anthony V. Alfieri, *Faith in Community: Representing "Colored Town"*, 95 CALIF. L. REV. 1829, 1834 (2007) [hereinafter Alfieri, *Faith in Community*]; *see also* Alfieri, *supra* note 5, at 1474–81 (discussing the practice of using race narratives in criminal defense work and distinguishing between those that victimize and those that empower racial identities).

8. *See* MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (2012) (defining misconduct).

9. *See* STANDARDS FOR CRIMINAL JUSTICE § 4-7.1 (1993) (governing the defense function and courtroom professionalism).

10. David Luban, *The Inevitability of Conscience: A Response to My Critics*, 93 CORNELL L. REV. 1459, 1462–65 (2008).

11. *See generally* Anthony V. Alfieri & Angela Onwuachi-Willig, *Next-Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 YALE L.J. 1484 (2013) (book review) ("This Book Review's purpose is to develop new methods of teaching law students and lawyers to make normative and instrumental choices about civil rights programs and policies in ways that are designed to address persistent racial inequities, and about the means they may choose to influence the meaning of race and combat the practice of racism in our society." *Id.* at 1491.).

subject of regulation, the protocol and social cost of regulation, and the justification for regulation itself.

This introductory Essay lays the groundwork for an expanded investigation into the sociolegal meaning, lawyer usage, and ethical regulation of race talk in American civil and criminal courtrooms. Here, the elements of that groundwork come from the assembled work of a distinguished group of academics in the fields of criminal law (Cynthia Lee[12]), legal history (Alfred Brophy,[13] Alejandro de la Fuente and Ariela Gross,[14] and Martha Jones[15]), race and ethnic studies (Gabriel Chin, Cindy Hwang Chiang, and Shirley S. Park,[16] and Kevin Johnson and Joanna Cuevas Ingram[17]), trial advocacy (Steven Lubet[18]), and outsider jurisprudence (Richard Delgado[19]). Culled from a recent symposium generously sponsored by the *North Carolina Law Review*, the work collectively addresses the complex sociolegal texts and contexts of *race trials*.

Broadly defined, race trials feature not only spoken and written texts (oral argument and witness testimony, as well as legal briefs and memoranda), but also physical and symbolic texts (courthouse art, architecture, and design objects). A text is a cultural and social artifact, a temporal record of inscribed beliefs and practices. Read, heard, and seen inside and outside courtrooms, trial and litigation texts present the competing and sometimes contradictory race-neutral, race-coded, and race-conscious perspectives of law's agents—lawyers, judges, parties, witnesses, and court personnel. Those discrete though frequently overlapping perspectives inform the discourse of race in civil rights and criminal cases. Echoing across diverse cultural and social contexts, that discourse mixes with the mediums of class, ethnicity, gender, sexuality, and geography to shape

12. Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013).

13. Alfred L. Brophy, *The Nat Turner Trials*, 91 N.C. L. REV. 1817 (2013).

14. Ariela Gross & Alejandro de la Fuente, *Slaves, Free Blacks, and Race in the Legal Regimes of Cuba, Louisiana, and Virginia: A Comparison*, 91 N.C. L. REV. 1699 (2013).

15. Martha S. Jones, Hughes v. Jackson*: Race and Rights Beyond* Dred Scott, 91 N.C. L. REV. 1757 (2013).

16. Gabriel J. Chin, Cindy Hwang Chiang & Shirley S. Park, *The Lost* Brown v. Board of Education *for Asian Pacific Americans*, 91 N.C. L. REV. 1657 (2013).

17. Kevin R. Johnson & Joanna Cuevas Ingram, *Anatomy of a Modern-Day Lynching: The Relationship Between Hate Crimes Against Latina/os and the Debate over Immigration Reform*, 91 N.C. L. REV. 1613 (2013).

18. Steven Lubet, *Execution in Virginia, 1859: The Trials of Green and Copeland*, 91 N.C. L. REV. 1785 (2013).

19. Richard Delgado, *Precious Knowledge: State Bans on Ethnic Studies, Book Traffickers* (Librotraficantes)*, and a New Type of Race Trial*, 91 N.C. L. REV. 1513 (2013).

and continuously reshape the form and content of race talk in American courtrooms.[20]

To better understand the sociolegal meaning of race talk within the context of race trials, this Essay proceeds in two parts. Part I revisits my own previous efforts to map the contours of race trials in light of the important scholarship collected here. Those efforts emphasize the significance of racial identity, racialized narrative, and other race-ing factors to legal representation, and extend here through the work of Brophy, Delgado, Lubet, and Jones, to American cultural and social history more broadly. Part II outlines new research directions for the continued mapping of race trials. Those directions point to normative objection, strategic exploitation, and procedural and substantive reintegration, here steered by the work of Chin, Chiang, and Park on immigration, Gross and de la Fuente on colonial culture, and Lee, Johnson, and Ingram on criminal justice reform. By obtaining a fuller appreciation of race, interracial conflict, and multiracial community, this sociolegal landscape analysis may help transform the current pedagogy and practice of civil rights and criminal law in legal education and in American courts.

I. RACE TRIALS REMAPPED

For two decades I have investigated the prosecution[21] and defense[22] of race in the criminal justice system. The investigation has examined the form and content of racial identity,[23] the trial[24] and

20. Additional mediums may include age, alienage, disability, illness, and related identity categories.

21. *See generally* Anthony V. Alfieri, *Prosecuting the Jena Six*, 93 CORNELL L. REV. 1285 (2008) (exploring "Jim Crow legal ethics" and the prosecution of the Jena Six); Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157 (1999) (presenting a community-oriented prosecutorial scheme); Anthony V. Alfieri, *Prosecuting Violence/Reconstructing Community*, 52 STAN. L. REV. 809, 814 (2000) (exploring "prosecutorial policies of community activism . . . in reconciling segregated communities divided by racial violence"); Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 GEO. L.J. 2227 (2001) (discussing prosecution in race-based violence cases).

22. *See generally* Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995) (examining defense strategies in black-on-white violent crimes); Alfieri, *Jim Crow Ethics*, *supra* note 6, at 1651; Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063 (1997) (exploring defense tactics in race-based violence cases).

23. *See generally* Alfieri, *supra* note 5, at 1459 (discussing the interplay of community and racial identity within the context of litigation); Anthony V. Alfieri, *(Un)Covering Identity in Civil Rights and Poverty Law*, 121 HARV. L. REV. 805 (2008) (stressing the importance of racial identity awareness in civil rights practice).

24. *See generally* Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293 (1998) (exploring racial dialogue in the context of trials).

retrial[25] of race cases, the relationship between race and ethics,[26] the impact of racial and ethnic differences on the character and conduct of trials,[27] and the bonds of race and community.[28] This Part of the Essay revisits that prior body of work, contemplating the prosecution and defense of race cases in a range of civil rights and criminal proceedings and the consequences of such proceedings for law, legal ethics, and society. The starting point for this renewed investigation is the concept of racial identity and its corresponding expression in racialized narrative. Both racial identity and racialized narrative are markers of race trials in the prosecution and defense of racially motivated violence and in civil rights cases more generally. Together they convey racial status distinctions and hierarchies, particularly the stigma of inferior and subordinate caste status. Status hierarchy based on racial identity is reproduced in narratives of advocacy and adjudication through laws, legal institutions, and sociolegal relationships, and reinforced through politics, culture, and society.[29] These outside influences stand out as "race-ing factors." Turn first to racial identity.

A. Racial Identity

Law constructs racial identity by naming parties and witnesses, classifying their speech and conduct, and assigning their rights and duties in terms of color. Constitutional, statutory, and common law rules of color determine racial privilege. Bar, bench, and legislative judgments of racial privilege animate the practices of representation inside the public space of courtrooms and influence cultural status and social standing outside of courtrooms.[30] Central to such judgments are narratives of order and violence. In *The Nat Turner Trials*,[31] Al Brophy addresses the ordering and legitimizing functions

25. *See generally* Anthony V. Alfieri, *Retrying Race*, 101 MICH. L. REV. 1141 (2003) (exploring renewed prosecution of 1950s and 1960s white-on-black race-based violence cases).

26. *See generally* Anthony V. Alfieri, *(Er)Race-ing an Ethic of Justice*, 51 STAN. L. REV. 935 (1999) (suggesting an "ethic of representation in race cases"); Anthony V. Alfieri, *Race-ing Legal Ethics*, 96 COLUM. L. REV. 800 (1996) (discussing the intersection of race consciousness and professional responsibility).

27. *See generally* Anthony V. Alfieri, *Color/Identity/Justice: Chicano Trials*, 53 DUKE L.J. 1569 (2004) (reviewing IAN F. HANEY LÓPEZ, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE (2003)).

28. *See generally* Anthony V. Alfieri, *Community Prosecutors*, 90 CALIF. L. REV. 1465 (2002) (discussing the role of race in community prosecution); Alfieri, *Faith in Community*, *supra* note 7, at 1829 (discussing race consciousness in representing communities of color).

29. Alfieri, *supra* note 24, at 1305.

30. *Id.* at 1306–11.

31. Brophy, *supra* note 13.

of race trials in American history, highlighting the trials of African Americans in Virginia and North Carolina from 1830 to 1834. In particular, he examines two North Carolina trials of racial violence—*State v. Mann*[32] and *State v. Will*[33]—in which a white man attacked a slave in his custody and, subsequently, in which a slave killed his overseer. He also explores the 1831 Nat Turner rebellion in Virginia and the trials of the Turner rebels in North Carolina. Brophy uses the term *micro trials* to describe the summary proceedings in *State v. Mann* and the Turner prosecutions, especially their doctrinal imposition and maintenance of a proslavery punitive order and property-based market economy.[34] To the extent that micro trials fostered the development of doctrinal rules limiting the liability of masters for slaves' torts and the liability of agents who injured slaves in their possession, Brophy contends, such trials promoted slavery and the economics of the slave market.[35] At the same time, he remarks, the common law doctrines of contract and tort imposed rule-of-law constraints on the retributive function of trials, for example in *State v. Will* where North Carolina courts recognized a slave's legal right to resist a brutal attack by his overseer.[36] The identity-making tensions of racial trials and the doctrinal freedom and constraint of nineteenth century courts in adjudicating the common law and local statutory rights of slaveholders and slaves are embodied, then as now, in racialized narratives.

B. Racialized Narratives

Racialized narratives imbue constitutional, statutory, and common law texts. Their colorblind claims, color-coded inferences, and color-conscious stereotypes infect the legal reasoning and decision making of lawyers, judges, and other legal agents. The coherence and logic of those inferences and stereotypes create dilemmas of racial representation for lawyers advocating on behalf of clients and communities of color in civil rights and criminal cases. Richard Delgado dissects the complex operation of modern racialized narratives in *Precious Knowledge: State Bans on*

32. 13 N.C. (2 Dev.) 263 (1829).

33. 18 N.C. (1 Dev. & Bat.) 121 (1834).

34. Brophy explains: "The trials tell compact, linear stories about why someone is being punished (or not). The trials are obscure, but collectively they tell a powerful story about the role of law in American history as a vehicle for establishing order." Brophy, *supra* note 13, at 1818.

35. *Id.* at 1819–20.

36. *Id.* at 74–76.

Ethnic Studies, Book Traffickers (Librotraficantes), *and a New Type of Race Trial.*[37] Delgado points to the implicit and explicit racialized narratives embedded in the ongoing litigation over Latino immigration, language rights, and workplace discrimination, and in the emerging litigation over the Latino right to cultural identity and education, a right contingent on public access to information and self-knowledge. He connects the right to learn group history and culture, and the theory of social and inter-group recognition, to the preservation of the Mexican American Studies school program in Tucson, Arizona. Reaching outside the black-white binary paradigm of race to embrace cross-racial issues of culture and pluralism, Delgado inspects the legal and political backdrop of the Tucson controversy, specifically the history of the anti-Mexican American Studies law (H.B. 2281) prohibiting the teaching of ethnic classes.[38] Beneath this legal-political controversy and its multiple lawsuits, he uncovers narratives of minority group self-understanding, local curricula need, and psychic health and educational wholeness.[39] These narratives and corresponding interests, Delgado explains, show the adverse impact of "recognition harm" in social interaction and the significance of self-recognition to the preservation of group culture.[40] The politics of interest group pluralism, he argues, requires that citizens understand their own culture, history, and self-interest vigorously and knowledgeably.[41] In this way, the litigation of race cases links together cultural knowledge, sociolegal narrative, and political participation in communities of color.[42] Consider various additional factors race-ing civil rights and criminal trials located within such communities.

C. Race-ing Factors

Beyond racial identity and racialized narrative, numerous factors color the law, legal institutions, and sociolegal relationships at stake in the litigation of civil rights and criminal cases, including the race of judges, lawyers, parties, and victims; the racial composition of juries; and the politics of race embodied in culture and society.[43] In

37. Delgado, *supra* note 19.
38. *Id.* at 1513–14.
39. *Id.* at 1532.
40. *Id.*
41. *Id.* at 1544–45.
42. *Id.* at 1531–32.
43. Alfieri, *supra* note 24, at 1316–23.

Execution in Virginia, 1859: The Trials of Green and Copeland,[44] Steven Lubet underscores the importance of regional politics and substantive law to the conduct of race trials. For illustration, he locates the pivotal impact of the law of evidence and doctrine of jurisdiction in the trials of John Brown, a radical anti-slavery abolitionist; John Copeland, a free black man from Oberlin, Ohio; and Shields Green, a fugitive slave from North Carolina, arising out of their participation in the abolitionist raid on Harpers Ferry in 1859.[45] Parsing the indictment of Brown, Copeland, and Green by a Virginia grand jury on multiple capital counts of murder, treason, and conspiracy to incite slave insurrection, Lubet notes Virginia's striking lack of sovereign state jurisdiction over the treason count and the notable evidentiary obstacles to establishing the elements of conspiracy to commit treason.[46]

Likewise, Martha Jones considers the import of substantive law, particularly the right of free African Americans to sue and be sued, in race trials. In Hughes v. Jackson*: Race and Rights Beyond* Dred Scott,[47] Jones focuses on the 1851 case of Samuel Jackson, a free African American laborer, against Josiah and William Hughes, two free African American farmers, in Dorchester County, Maryland, for trespass, assault and battery, breaking and entering, the misappropriation of property (Jackson's five minor children), and $1,000 in damages.[48] Jones observes that a Maryland jury award to Jackson for $750 and a subsequent appeal by Hughes to the Maryland Court of Appeals recast the antebellum history of race, rights, and citizenship for free black Americans notwithstanding the 1857 United States Supreme Court pronouncement of the limited federal rights to be accorded black personhood in *Dred Scott v. Sandford*.[49] Assaying the antebellum legal culture fashioned by state and local courts and legislatures since the 1820s, Jones finds that free black Americans repeatedly asserted their status as citizens in freedom suits and trials of racial determination, as well as in other civil and criminal actions, across state and local venues.[50] Over time the legal rights claims of such free blacks encompassed the right to travel, to bear arms, to make and enforce contracts, to freely exercise religion, and finally to

44. Lubet, *supra* note 18.
45. *Id.* at 1786–89.
46. *Id.* at 1789.
47. Jones, *supra* note 15.
48. *Id.* at 1758.
49. 60 U.S. (19 How.) 393 (1856); Jones, *supra* note 15, at 1758–59, 1767–74.
50. *See* Jones, *supra* note 15, at 1760–63.

sue and be sued.[51] This rights history underlines the centrality of local legal culture in race cases. Next turn to new directions for research on race trials.

II. RACE TRIALS: NEW RESEARCH DIRECTIONS

This Part outlines new research directions for the continuing analysis of race trials. In pursuing this research, three questions stand out. *When should lawyers normatively object to race talk? When should lawyers strategically exploit race talk? And when should lawyers procedurally and substantively reintegrate race talk into the spoken and written texts of the courtroom?* Additional related directions for research pertain to the common and differential responsibilities of white majority and nonwhite minority representatives of communities of color in race trials. In pursuing this complementary direction, several core questions arise. *What does it mean for white and nonwhite lawyers to conduct a race trial? Does the meaning of a race trial vary from run-of-the-mill to high-profile cases? And exactly what is the relationship between a race trial and a non-race trial?* Together these inquiries may help redirect the research of post-civil rights movement scholars and reinvigorate the pedagogy of clinical law teachers. Consider objections to race talk.

A. Normatively Objecting to Race Talk

When should lawyers normatively object to race talk? Civil rights and criminal defense lawyers derive their race-based objections from constitutional norms of nondiscrimination, civic norms of citizenship, and egalitarian norms of professionalism. Those normative bases provide the underpinnings for doctrinal principles, ethics rules, and practice regimens that encourage the authentic self-elaboration of client and group identity, socioeconomic and political equality across communities, and cultural and social liberty in both public and private spheres of life. Fueled by identity, equality, and liberty interests, race-based objections may be asserted at micro and macro levels. Narrowly tailored, micro level objections may challenge the trial conduct of lawyers in jury selection, witness examination, and closing argument. More expansive, macro-level objections may challenge the racially disparate impact of legal doctrines, procedural and evidentiary rules, and institutional policies and practices. Both sets of objections rest on affirmative, race-conscious appraisals of law,

51. *Id.* at 1763.

culture, and society.[52] And both may be pressed simultaneously, for example in addressing the recent incidents of black-on-brown racial violence in the working-class neighborhoods of New York's Staten Island.[53] Inflicted by young black men on Mexican immigrants and other Latinos, the violence (beatings and robberies) evokes potential micro and macro objections to the prosecution of race cases in state criminal and federal civil rights proceedings, the defense of black-on-brown racial violence, and the disputed interests of multiracial, black-and-brown communities.

The discriminatory treatment of Asians under immigration and naturalization laws evokes similar micro and macro objections. Consider in this regard the litigation decision to object to race explored by Gabriel Chin, Cindy Hwang Chiang, and Shirley Park in *The Lost* Brown v. Board of Education *for Asian Pacific Americans*.[54] Starting with the nineteenth-century Chinese Exclusion Act, Chin, Chiang, and Park survey the laws discriminating against Asians in immigration and naturalization, including congressional policies and federal court decisions upholding enforcement of the exclusion laws.[55] To assess efforts to remedy such discrimination, they trace federal and state court developments in the wake of *Brown v. Board of Education*[56] and thoroughly canvas the U.S. Supreme Court history of *United States* ex rel. *Lee Kum Hoy v. Shaughnessy*,[57] a mixed equal protection, due process, and statutory challenge to racial discrimination in federal immigration policy regarding the use of blood tests to determine the U.S. citizenship of Chinese families.[58] Chin, Chiang, and Park describe in detail the administrative and judicial proceedings in *Lee Kum Hoy* culminating in Supreme Court review over a five-year span, noting that the Chinese-only policy at

52. For a more expansive discussion of race conscious objections, see Alfieri & Onwuachi-Willig, *supra* note 11, at 1544–50.

53. *See* Kirk Semple, *Mexican Youth Is Attacked on Staten Island*, N.Y. TIMES, Aug. 2, 2010, at A14; Kirk Semple, *Staten Island Neighborhood Reels After Wave of Attacks on Mexicans*, N.Y. TIMES, July 31, 2010, at A14.

54. Chin et al., *supra* note 16.

55. *Id.* at 1667–71.

56. 347 U.S. 483 (1954).

57. United States *ex rel.* Lee Kum Hoy v. Shaughnessy, 133 F. Supp. 850 (S.D.N.Y. 1955) (granting writ), *rev'd*, 237 F.2d 307 (2d Cir. 1956), *rev'd per curiam sub nom.* United States *ex rel.* Lee Kum Hoy v. Murff, 355 U.S. 169 (1957); United States *ex rel.* Lee Kum Hoy v. Shaughnessy, 16 F.R.D. 558 (S.D.N.Y. 1955); United States *ex rel.* Lee Kum Hoy v. Shaughnessy, 123 F. Supp. 674 (S.D.N.Y. 1954); United States *ex rel.* Lee Kum Hoy v. Shaughnessy, 115 F. Supp. 302 (S.D.N.Y. 1953).

58. Chin et al., *supra* note 16, at 1658–61.

issue conflicted with the evolving jurisprudence of *Brown*.[59] Although the *Lee Kum Hoy* Court, in a *per curiam* opinion, ultimately reversed and remanded the case for further fact finding,[60] the rich litigation history sketched by Chin, Chiang, and Park furnishes a springboard to assess the ethics and strategy of micro and macro race-based objections. Consider next the exploitation of race talk.

B. Strategically Exploiting Race Talk

When should lawyers strategically exploit race talk? Civil rights and criminal defense lawyers routinely portray their clients' character in terms of racial identity and depict their clients' actions in terms of racial narrative. Often strategically driven, these courtroom constructions regularly employ what Devon Carbado and Mitu Gulati call "identity-negating" stereotypes.[61] Such cultural and social stereotypes, Carbado and Gulati explain, rely for resonance on the "explicit racial markers" of Jim Crow era racial caste status.[62] Summoning demeaning or disabling racial stereotypes, however tactically advantageous, carries the social cost of "confirming prejudice" for individuals, groups, and even whole communities.[63] This social cost, the legal historians Ariela Gross and Alejandro de la Fuente show, harbors deep roots in the eighteenth- and nineteenth-century cultures of "Latin" and "Anglo-Saxon" America and the freedom struggle of slaves, a struggle tied to the exploitation of the science and performance of race—white and black.

In *Slaves, Free Blacks, and Race in the Legal Regimes of Cuba, Louisiana and Virginia: A Comparison*,[64] Gross and de la Fuente supply the sociolegal framework for the modern exploitation of race talk in civil rights and criminal cases, exploitation that may go forward with the express or implicit consent of affected clients in the pursuit of exculpating color, white or black.[65] From the outset, Gross and de la Fuente point to the myriad ways that slaves in the Americas drew upon commonly available legal and institutional resources to assert claims, combat abuse, and obtain freedom.[66] That engagement,

59. *Id.* at 1671–82.

60. *Lee Kum Hoy*, 355 U.S. at 169.

61. DEVON W. CARBADO & MITU GULATI, ACTING WHITE? RETHINKING RACE IN "POST-RACIAL" AMERICA (forthcoming 2013) (manuscript at 25) (on file with the North Carolina Law Review).

62. *Id.* (manuscript at 16, 108–09).

63. *Id.* (manuscript at 33).

64. Gross & de la Fuente, *supra* note 14.

65. *Id.* at 1700–08.

66. *Id.* at 1701–04, 1723–46.

they emphasize, enabled slaves to participate in the creation of legal meanings, institutions, and rights within the highly contested social and political space of the Atlantic world, particularly Virginia, Cuba, and Louisiana. Inside the legal regimes of both American and Iberian colonies, Gross and de la Fuente note, slaves interacted locally with free blacks, masters, judges, and other state officials to resist the codification and enforcement of binary racial distinctions crafted to ensure the obedience and subordination of Africans ("negro" and "slave") and their descendants in the Americas.[67] Accordingly, they devote close attention to the principle and practice of manumission (i.e., the "slaveowner's right to bestow freedom on his slaves"),[68] cataloguing slaves' legal suits for freedom and self- or family-purchase arrangements in the movement toward the integration of free people of color into society as full citizens and subjects.[69] In assessing this movement, Gross and de la Fuente demonstrate that the intersection of legal precedents, politics, racial ideology, and demography opened legal claims-making opportunities for slaves and free people of color in litigation. At trial, they show, the litigation presented two discursive ways of "knowing" or proving race and racial citizenship: scientific and performative.[70] Scientific discourses of race "located the essence of racial difference in physiological characteristics . . . and attempted to link physiological attributes with moral and intellectual difference."[71] Performative discourses of race entailed reputational proof of whiteness (white womanhood or manhood) via narrative.[72] Advocates for freedom exploited both scientific and performative narratives in pursuit of whiteness and white citizenship despite the racial cost to society.[73] Last, consider the reintegration of race.

C. *Procedurally and Substantively Reintegrating Race Talk*

When should lawyers procedurally and substantively reintegrate race talk into the spoken and written texts of the courtroom? Procedurally and substantively reintegrating race talk inside the courtroom hinges on the heightened recognition and valuation of the salience of color to client performance, lawyer presentation, jury fact

67. *Id.*
68. *Id.* at 1705.
69. *Id.*
70. *Id.* at 1752.
71. *Id.*
72. *Id.*
73. *Id.*

finding, and judicial reasoning in civil rights and criminal cases. The recognition of color locates race in the decision making process of lawyers, judges, and jurors. The valuation of color challenges the conventional stereotypes of racial identity and narrative constructed in the daily representation of minority clients and communities.[74] Cynthia Lee analyzes the salience and reintegration of race in *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*.[75]

Lee's analysis addresses the 2012 interracial killing of Trayvon Martin by George Zimmerman in Sanford, Florida, and the larger operation of implicit racial bias in criminal cases involving claims of self-defense.[76] Drawing on social cognition research and social science studies of aversive racism,[77] Lee argues that race influences human perception and behavior unconsciously.[78] Given this influence, she reasons, colorblind stances that cloak or deny negative racial stereotypes may actually exacerbate racial bias in courtroom settings.[79] To defuse or mitigate this adverse influence, Lee recommends calling attention to the prevalence of racial stereotypes in culture and society outside the courtroom and, furthermore, making race more salient inside the courtroom.[80] For fact finders and decision makers in civil rights and criminal cases, enhancing race salience entails not only encouraging egalitarian beliefs and questioning racially biased stereotypes, but also raising awareness about the management of racial stereotypes and the grave risks of racial bias to the criminal justice system.[81] Lee points to the integration of racially salient practices in the courtroom regulation of pre-trial publicity, voir dire, opening and closing statements, lay and expert witness testimony, and jury instructions.[82]

Kevin Johnson and Joanna Ingram also offer racially salient strategies of reintegration in *Anatomy of a Modern Day Lynching:*

74. For a fuller discussion, see Alfieri & Onwuachi-Willig, *supra* note 11, at 1550–56.

75. Lee, *supra* note 12.

76. *Id.* at 1557–59.

77. In contrast to overt racism, aversive racism "represents a subtle, often unintentional, form of bias that characterizes many white Americans who possess strong egalitarian values and who believe that they are nonprejudiced." John F. Dovidio & Samuel L. Gaertner, *On the Nature of Contemporary Prejudice: The Causes, Consequences, and Challenges of Aversive Racism*, *in* CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 3, 5 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998).

78. Lee, *supra* note 12, at 1559.

79. *Id.*

80. *Id.* at 1557–64.

81. *Id.* at 1584–1600.

82. *Id.*

The Relationship Between Hate Crimes Against Latina/os and the Debate over Immigration Reform.[83] Johnson and Ingram focus on the impact of federal and state immigration enforcement policies on communities of color.[84] They contend that both federal and state authorities unfairly target Asians and Latinas/os for immigration enforcement, producing civil rights deprivations and racially charged hate crimes.[85] Johnson and Ingram link such deprivations and crimes to a history of racial subordination by whites of minority immigrant groups.[86] To contextualize that history and to explicate the reforms required to punish and to deter hate violence directed toward Latina/os and immigrants, they consider the 2006 killing of a young Mexican immigrant, Luis Ramirez, by a group of white teenagers in the rural town of Hazleton, Pennsylvania.[87] The Ramirez killing, they explain, generated multiple criminal prosecutions, including a federal criminal civil rights prosecution led by the U.S. Department of Justice, that provide a remedial strategy for reducing hate crimes against Latina/os and immigrants.[88] Part of that multi-pronged strategy, Johnson and Ingram comment, involves more federal prosecutions, more investigations by the U.S. Commission on Civil Rights, and more intervention by local civil and human rights commissions.[89] Part of their strategy also includes criminal justice reforms to enforce the regulation of race-based peremptory challenges in jury selection and to ensure more racially diverse and representative juries.[90] A final part entails a public acknowledgement of the racial salience of anti-immigrant sentiment in American culture, politics, and society.[91]

CONCLUSION

He is the darkey with the glasses on. Despite the advent of a new "post-racial" century, civil rights and criminal defense lawyers continue to construct racialized cultural and social narratives of minority inferiority and stigma. They do so in part because of a lack of shared professional guidelines regulating the use of race talk in courtrooms and in advocacy more generally. The absence of

83. Johnson & Ingram, *supra* note 17.
84. *Id.* at 1617–22, 1639–44.
85. *Id.* at 1614–15.
86. *Id.* at 1615–16.
87. *Id.* at 1630–32.
88. *Id.* at 1632–33. 1636–37.
89. *Id.* at 1650–55.
90. *Id.*
91. *Id.* at 1636–37.

descriptive and prescriptive guidance in the regulation of race talk raises critical questions: *When should trial lawyers normatively object to race talk? When should trial lawyers strategically exploit race talk? When should trial lawyers procedurally and substantively reintegrate race talk into the spoken and written texts of the courtroom?* Built on the assembled work of a distinguished group of academics in the fields of criminal law, legal history, race and ethnic studies, trial advocacy, and outsider jurisprudence, this Essay extends work started elsewhere addressing the normative concerns, strategic and tactical considerations, and procedural and substantive rules relevant to race talk. That body of work, enlarged by the significant contributions to this Symposium, alters previous efforts to map the contours of race trials and charts new research directions for the study of race trials. Both pedagogically and practically, the collective task is to rediscover the pain and the promise in the words we use for race.