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# Objecting to Race

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# Objecting to Race

ANTHONY V. ALFIERI\*

“‘You’ve got African-Americans, you’ve got Hispanics, you’ve got a bag full of money. Does that tell you—a light bulb doesn’t go off in your head and say, ‘This is a drug deal?’”<sup>1</sup>

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1. *Calhoun v. United States*, 133 S. Ct. 1136, 1136 (2013) (Statement of Sotomayor, J.) (quoting an Assistant United States Attorney, Western District of Texas).

## INTRODUCTION

On America's inner-city streets and in its criminal courts, the new, long awaited post-racial century of equal justice has yet to come.<sup>2</sup> For low-income communities of color, and young Black<sup>3</sup> and Hispanic men in particular, stigmatizing visions and narratives of racial identity pervade the criminal justice system. At discrete moments and in distinct locales, prosecutors, criminal defense lawyers, and judges all see, hear, or speak of the cultural and social stigma of race in both run-of-the-mill and high profile cases. Their *race talk* constructs part of the socio-legal discourse typical of contemporary federal and state criminal trials, and oftentimes civil rights trials, across the nation.

Modern efforts by bar associations, courts, and legislatures to regulate the use of race talk in civil rights and criminal cases have faltered<sup>4</sup> not only in describing its various race-neutral,<sup>5</sup> race-coded,<sup>6</sup> and race-conscious<sup>7</sup> forms, but also in prescribing the scope of its permissible use under legal ethics codes<sup>8</sup> and standards,<sup>9</sup> judicial rules, and statutes.<sup>10</sup> The descriptive and prescriptive difficulty of defining and regulating race talk in the courtroom and in advocacy more generally raises fundamental normative and instrumental questions about racial justice and professional ethics in the lawyering process, a process marked by the daily exercise of mainly unseen and mostly unaccountable discretion.<sup>11</sup>

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2. See Mario L. Barnes, *Reflection 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); Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1595 (2009); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1024-25 (2010).

3. This Essay capitalizes the terms "Black" and "White" when used as nouns to describe a racialized group. See 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, 1488 n.5 (2013) (reviewing KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER (2012) and DEVON W. CARBADO & MITU GULATI, ACTING WHITE? RETHINKING RACE IN POST-RACIAL AMERICA (2012)) (preferring use of the term "Blacks" to the term "African Americans" because of its greater inclusivity); see also Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) (explaining that "Blacks, like Asians, Latinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun").

4. See Anthony V. Alfieri, *Ethics, Race, and Reform*, 54 STAN. L. REV. 1389, 1403-04 (2002).

5. See Anthony V. Alfieri, *Gideon in White/Gideon in Black: Race and Identity in Lawyering*, 114 YALE L.J. 1459, 1464-68 (2005) [hereinafter Alfieri, *Gideon in White*].

6. See Anthony V. Alfieri, *Jim Crow Ethics and the Defense of the Jena Six*, 94 IOWA L. REV. 1651, 1654 (2009); Alfieri, *Gideon in White*, note 5, at 1467-74.

7. See Anthony V. Alfieri, *Faith in Community: Representing "Colored Town,"* 95 CAL. L. REV. 1829, 1834 (2007); Alfieri, *Gideon in White*, *supra* note 5, at 1474-75.

8. See MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (2013) [hereinafter MODEL RULES] (defining misconduct).

9. See STANDARDS FOR CRIMINAL JUSTICE, The Defense Function, Standard No. 4-7.1 (Am. Bar Ass'n 3d ed. 1993) (governing the defense function and courtroom professionalism); STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function, Standard No. 3-5.8(c) (Am. Bar Ass'n 3d ed. 1993) (recommending that prosecutors "should not use arguments calculated to inflame the passions or prejudices of the jury").

10. *C.f.*, e.g., FED. R. CIV. P. 47 (selecting jurors); 28 U.S.C. § 1870 (2014) (peremptory challenges).

11. See William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1083 (1988).

Normative questions—*whether lawyers should object to race*—turn on intrinsic personal and professional value commitments to race, dignity, identity, and role. Instrumental questions—*when and how lawyers should object to race*—rest on tactical, outcome-oriented calculations about the best interests of clients, groups, organizations, and sometimes whole communities.

For two decades I have explored both sets of questions through case studies of the prosecution<sup>12</sup> and defense<sup>13</sup> of black and white offenders in the criminal justice system and case studies of individuals and communities of color in civil rights litigation.<sup>14</sup> The studies have analyzed the meaning of racial identity and narrative,<sup>15</sup> the trial<sup>16</sup> and retrial<sup>17</sup> of race cases, the relationship between race and ethics,<sup>18</sup> the impact of racial and ethnic differences on civil rights and criminal trials,<sup>19</sup> and the interconnections of race and community.<sup>20</sup> At bottom, these studies share certain basic moral, socio-cultural, and political assumptions. The first is that race talk implicates difference-based individual, group, and

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12. See generally Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157 (1999) (exploring race-conscious models of prosecutorial discretion); Anthony V. Alfieri, *Prosecuting the Jena Six*, 93 CORNELL L. REV. 1285 (2008) (explicating racialized norms of prosecution); Anthony V. Alfieri, *Prosecuting Violence/Reconstructing Community*, 52 STAN. L. REV. 809 (2000) (linking the prosecution of racial violence and the reconstruction of interracial community); Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 GEO. L.J. 2227 (2001) (comparing the role and impact of race within both criminal prosecution and defense functions).

13. See generally Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995) (parsing the racial form and content of criminal defenses in cases of black-on-white racial violence); Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063 (1997) (presenting a modern taxonomy of racialized defenses).

14. See generally Anthony V. Alfieri, *Community Education and Access to Justice in a Time of Scarcity: Notes from the West Grove Trolley Garage Case*, 2013 WIS. L. REV. 121 (mapping community education and outreach partnerships with low-income communities of color); Anthony V. Alfieri, *Integrating into a Burning House: Race- and Identity-Conscious Visions in Brown's Inner City*, 84 S. CAL. L. REV. 541 (2011) (locating interconnections between civil rights advocacy and faith-based community organizing); Anthony V. Alfieri, *Paternalistic Interventions in Civil Rights and Poverty Law: A Case Study of Environmental Justice*, 112 MICH. L. REV. 1157 (2014) (reviewing SARAH CONLY, *AGAINST AUTONOMY: JUSTIFYING COERCIVE PATERNALISM* (2013)) (searching out paternalism rationales in legal-political campaigns for environmental justice).

15. See generally Anthony V. Alfieri, *(Un)Covering Identity in Civil Rights and Poverty Law*, 121 HARV. L. REV. 805 (2008) [hereinafter Alfieri, *(Un)Covering Identity*] (exploring the content of racial identity and narrative in civil rights and poverty law advocacy).

16. See generally Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293 (1998) (sketching the advocacy contours and ethical implications of race trials).

17. See generally Anthony V. Alfieri, *Retrying Race*, 101 MICH. L. REV. 1141 (2003) (considering the normative and sociolegal meaning of the resurgent prosecution of long-dormant cases of white-on-black racial violence).

18. See generally Anthony V. Alfieri, *(Er)Race-ing an Ethic of Justice*, 51 STAN. L. REV. 935 (1999) (framing race-conscious approaches to community representation and ethical regulation); Anthony V. Alfieri, *Race-ing Legal Ethics*, 96 COLUM. L. REV. 800 (1996) (integrating racial norms and narratives into professional ethics canons).

19. See generally Anthony V. Alfieri, *Color/Identity/Justice: Chicano Trials*, 53 DUKE L.J. 1569 (2004) (reviewing IAN F. HANEY LOPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* (2003)) (extending racial critique of American law to the study of ethnicity in Chicano communities of color).

20. See generally Anthony V. Alfieri, *Community Prosecutors*, 90 CAL. L. REV. 1465 (2002) (evaluating the efficacy of community-based criminal prosecution initiatives).

community identities. The second is that race talk often, though perhaps not always, inflicts cultural and social stigma that harms individual dignity, inhibits individual self-elaboration as the public expression of personhood, and hinders full participatory group integration into civic culture and society. The third is that a strong individual and collective sense of dignity or personhood enables human authenticity, moral agency, and rational volition. And the fourth is that participatory group integration entails open engagement in the political process and affords equal opportunity in the economic marketplace untainted by bias and discrimination.<sup>21</sup> The upshot of these clustered assumptions is a still developing, albeit inchoate, socio-legal account of race talk as inimical to human dignity, authentic self-elaboration, equal treatment, and full political and economic liberty.<sup>22</sup>

To further advance that account, this Essay revisits ongoing questions of race talk and racial representation in the context of current civil rights and criminal justice practice through the prism of the recent United State Supreme Court decision in *Calhoun v. United States* and its underlying federal trial and appellate proceedings.<sup>23</sup> Building on *Calhoun*'s factual and legal foundation, the Essay proceeds in three parts. Part I explores the definition of race talk garnered from the text of Justice Sotomayor's statement in *Calhoun*. Part II examines the prosecutorial exploitation of race talk gleaned from the briefs of the U.S. Attorney's Office for the Western District of Texas and the Solicitor General's Office of the U.S. Department of Justice. Part III considers defense-driven objections to race talk culled from the *Calhoun* defense team's federal appellate brief and petition for writ of certiorari and from the opinions of the U.S. Court of Appeals for the Fifth Circuit and the statement of Justice Sotomayor. Although limited in scope, the Essay seeks in pursuing these inquiries to transform the pedagogy and practice of civil rights and criminal law in American courtrooms as well as in law school classrooms and community clinics.

## I. DEFINING RACE TALK

"I hope never to see a case like this again."<sup>24</sup>

Race talk is contingent on law, culture, and society. Historically constructed, it is shaped by, and gives shape to, legal doctrine and lawyering strategy, cultural identity, and social caste in local, regional, national, and even international contexts.<sup>25</sup> In lexical terms, race talk sounds in epithets,<sup>26</sup> colloquial speech,<sup>27</sup>

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21. For a fuller discussion of these assumptions, see Alfieri, *(Un)Covering Identity*, *supra* note 15, at 806-09.

22. See Alfieri, *(Un)Covering Identity*, *supra* note 15, at 809.

23. *Calhoun v. United States*, 133 S. Ct. 1136, 1136 (2013) (Statement of Sotomayor, J.).

24. *Id.* at 1138 (Statement of Sotomayor, J.).

25. In local contexts, for example, race and immigration narratives mix to give rise to "citizenship talk." See generally Jennifer Gordon & R.A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and*

and coded idioms.<sup>28</sup> In performative and visual terms, it conjures up images<sup>29</sup> and engenders practices which influence behavior, cognition, and interpretation.<sup>30</sup> Rooted in conscious, unconscious,<sup>31</sup> or implicit<sup>32</sup> bias, race talk often intersects with other categories of bias, including ethnicity<sup>33</sup> and gender.<sup>34</sup> The intersection

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*Race Perspectives*, 75 FORDHAM L. REV. 2493 (2007) (comparing notions of citizenship in race and immigration scholarship); Kathryn Abrams, *Performative Citizenship in the Civil Rights and Immigrant Rights Movement* (Apr. 2014) (unpublished manuscript) (on file with author) (tracing commonalities in civil rights and immigrant rights movements). See also Leisy J. Abrego, *Legal Consciousness of Undocumented Latinos: Fear and Stigma as Barriers to Claims-Making for First- and 1.5-Generation Immigrants*, 45 LAW & SOC'Y REV. 337 (2011) (tracking elements of fear and stigma in the legal consciousness of multi-generational immigrants).

26. See generally Sheri Lynn Johnson, John H. Blume, & Patrick M. Wilson, *Racial Epithets in the Criminal Process*, 2011 MICH. ST. L. REV. 755 (reporting on use of racial epithets in criminal trials and misconduct-based standards of assessment).

27. See generally Anthony V. Alfieri, "He is the Darkey with the Glasses On": *Race Trials Revisited*, 91 N.C. L. REV. 1497 (2013) (outlining new research directions for the continued study of race trials).

28. See generally Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994) (evaluating race-based self-defense claims by criminal defendants).

29. See N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1330-39 (2004); Bernard E. Harcourt, *Imagery and Adjudication in the Criminal Law: The Relationship between Images of Criminal Defendants and Ideologies of Criminal Law in Southern Antebellum and Modern Appellate Decisions*, 61 BROOK. L. REV. 1165, 1184-05 (1995); Joan W. Howarth, *Representing Black Male Innocence*, 1 J. GENDER RACE & JUST. 97, 120-38 (1997); Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1743-66 (1993).

30. See Jennifer L. Eberhardt, et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 877, 889-91 (2004); Christine Chambers Goodman, *The Color Of Our Character: Confronting The Racial Character of Rule 404(B) Evidence*, 25 LAW & INEQ. 1, 11-24 (2007).

31. See generally Adjoa Artis Aiyetoro, *Can We Talk? How Triggers for Unconscious Racism Strengthen the Importance of Dialogue*, 22 NAT'L BLACK L.J. 1 (2009) (recommending open dialogue on race and unconscious racism); Ralph R. Banks & Richard T. Ford, *(How) Does Unconscious Bias Matter? Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053 (2009) (citing the role of unconscious bias in racial discrimination); Tanya Kateri Hernandez, *Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence"*, 99 YALE L.J. 845 (1990) (documenting race-tainted prosecution of bias-related violence); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988) (surveying race-infected criminal law doctrine and criminal court performance).

32. See Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1179 (2012); Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1586-1608 (2013); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 347-50 (2007); L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L. J. 2626, 2634-40 (2013); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 823 n.116 (2012).

33. See generally Andrew W. Briebresco, *Latino/a Plaintiffs and the Intersection of Stereotypes, Unconscious Bias, Race-Neutral Policies, and Personal Injury*, 13 J. GENDER RACE & JUST. 373 (2010) (finding racially disparate impact of jury bias in civil justice system); Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143, 1164-72, 1192-03 (1997).

34. See generally Phyllis Craig-Taylor, *Lifting the Veil: The Intersectionality of Ethics, Culture, and Gender Bias in Domestic Violence Cases*, 32 RUTGERS L. REV. 31 (2008) (assessing impact of racial, cultural, and gender stereotypes in domestic violence cases); Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502 (2012) (considering the relationship between the juvenile justice system and girls of color).

of multiple kinds of bias in civil rights and criminal cases<sup>35</sup> exacerbates common stereotypes and reinforces long-held prejudices.<sup>36</sup> The stereotypes evoke antebellum visions of black immorality and inferiority and rekindle postbellum class and caste prejudices.

The criminal justice system offers substantial evidence of prosecutorial misconduct<sup>37</sup> predicated on racial bias and often rooted in stereotypes.<sup>38</sup> In current federal and state courts,<sup>39</sup> prosecutors still speak of “black folk”<sup>40</sup> and

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35. See Leslie Espinoza Garvey, *The Race Card: Dealing With Domestic Violence in the Courts*, 11 AM. U. J. GENDER SOC. POL’Y & L. 287, 295-307 (2003); Tanya Kateri Hernandez, *Latino Inter-Ethnic Employment Discrimination and the “Diversity” Defense*, 42 HARV. C.R.-C.L. L. REV. 259, 316 (2007).

36. See Jody Armour, *Helping Legal Decisionmakers Break The Prejudice Habit*, 83 CAL. L. REV. 733, 738 (1995); Steven D. DeBrot, *Arguments Appealing to Racial Prejudice: Uncertainty, Impartiality, and the Harmless Error Doctrine*, 64 IND. L.J. 375, 384 (1989).

37. See, e.g., *United States v. Richardson*, 161 F.3d 728, 735-37 (D.C. Cir. 1998) (improper manipulation of racial stereotypes); *Smith v. Farley*, 59 F.3d 659, (7th Cir. 1995) (conflating race and witness credibility); *United States ex rel. Haynes v. McKendrick*, 481 F.2d 152, (2d Cir. 1973) (adverting to characteristics of black defendants); *Reynolds v. State*, 580 So. 2d 254, 255-57 (Fla. 1st Dist. Ct. App. 1991) (repeatedly citing race of the accused); *People v. Walker*, 411 N.Y.S.2d 377, (N.Y. App. Div. 1978) (describing the defendant through racial epithets); see also Ryan Patrick Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis*, 11 MICH. J. RACE & L. 325 (2006) (addressing indirect prosecutorial deployment of racial stereotypes); Michael Callahan, *“If Justice Is Not Equal For All, It is Not Justice”*: *Racial Bias, Prosecutorial Misconduct, and the Right to a Fair Trial in State v. Monday*, 35 SEATTLE U. L. REV. 827, 833-847 (2012) (assessing prosecutorial misconduct and appeals to racial bias in trials); Elizabeth L. Earle, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 COLUM. L. REV. 1212, 1222-23 & nn.67, 71 (1992) (identifying violations of the rule proscribing prosecutorial racism); Andrea D. Lyon, *Setting the Record Straight: A Proposal for Handling Prosecutorial Appeals to Racial, Ethnic or Gender Prejudice During Trial*, 6 MICH. J. RACE & L. 319, 336 (2001) (revising standards and remedies for prosecutorial misconduct); V.A. Richelle, *Racism as a Strategic Tool at Trial: Appealing Race-Based Prosecutorial Misconduct*, 67 TUL. L. REV. 2357 (1993) (outlining appellate challenges to prejudicial and inflammatory trial statements by prosecutors); see also Note, *Racial Bias and Prosecutorial Conduct at Trial*, 101 HARV. L. REV. 1588 (1988) (discussing judicial standards and remedies for prosecutorial bias). See generally BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 11:6 (2d ed. 2013) (cataloguing prosecutorial inflammatory remarks and appeals to racial prejudice).

38. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 4 (2010); Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L. J. 2236, 2241-46 (2013); William Quigley, *Racism: The Crime in Criminal Justice*, 13 LOY. J. PUB. INT. L. 417, 417 (2012); Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509, 525 (1994).

39. For discussion of judicial bias in federal and state courts, see generally Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117 (2009) (suggesting that African American judges as a group and White judges as a group perceive racial harassment differently); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1225 (2009) (observing that “judges might be overconfident about their abilities to control their own [racial] biases”); see also Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 338-39 (2012) (reporting statistically significant discrepancy between rulings of majority and minority judges on employer-specific summary judgment motions in federal district court civil rights employment discrimination cases).

40. See *State v. Monday*, 257 P.3d 551, 556 (Wash. 2011); see also *State v. Montano*, 813 N.W.2d 612, 616 (N.D. 2012) (“The defense wants you to believe that there’s something wrong with the system, that they use people like that. What’s that mean? Black people?”); *United States v. Doe*, 903 F.2d 16, 27 (D.C. Cir. 1990) (referring to “the Jamaicans”). Cf. *United States v. Cannon*, 88 F.3d 1495, 1502-03 (8th Cir. 1996); *Tannehill v.*

“niggeritous,”<sup>41</sup> distinguishing “white” men as witnesses,<sup>42</sup> “white” women,<sup>43</sup> and “white” neighborhoods<sup>44</sup> from their black cohorts, and invoking “nature” and “innate” instinct to rationalize key prosecutorial decisions in pretrial, trial, and appellate proceedings.<sup>45</sup>

Similarly, jurors hear and speak in racial tones.<sup>46</sup> Their speech sometimes articulates crude modes of racial reasoning exemplified by this juror statement in the 1983 trial of a Wisconsin prostitution case: “Let’s be logical. He’s black and he sees a seventeen year old white girl—I know the type.”<sup>47</sup> Like other types of reasoning, racial reasoning involves inferences of causation suggested by this juror statement in the 2007 trial of a New Hampshire bank robbery case: “I guess we’re profiling but they cause all the trouble.”<sup>48</sup> Racial reasoning also frames perception, indicated in this juror statement in the 1975 trial of a New York burglary case: “You can’t tell one black from another. They all look alike.”<sup>49</sup>

Like prosecutors, criminal defense lawyers employ race talk. To win acquittal, urge nullification,<sup>50</sup> or mitigate punishment, defenders talk of race,<sup>51</sup> culture,<sup>52</sup>

State, 48 So. 662, 662 (Ala. 1909); *Moseley v. State*, 73 So. 791, 791 (Miss. 1916) (“She is a negro; look at her skin. If she is not a negro, I don’t want you to convict her.”).

41. *Ivery v. State*, 686 So. 2d 495, 505 (Ala. Crim. App. 1996) (“And scripture tells us there is a time to rend or reap what one has sown and he needs to know that, quote, *this is not another case of niggeritous*.”) (emphasis in original).

42. See *Withers v. United States*, 602 F.2d 124, 125 (6th Cir. 1979) (“[N]ot one white witness has been produced in this case that contradicts the victim’s account.”); *Allison v. State*, 248 S.W.2d 147, 147 (Tex. Crim. App. 1952) (commenting on “same race” witnesses); *James v. State*, 92 So. 909 (Ala. Ct. App. 1922) (“‘Are you gentlemen going to believe that nigger sitting over there (pointing at the defendant), with a face on him like that, in preference to the testimony of [the local] deputies?’”); *Moseley*, 73 So. at 791 (“‘It is just a question of whether or not you believe this negro or [a white man].’”); *Simmons v. State*, 71 So. 979, 979 (Ala. Ct. App. 1916) (“You must deal with a negro in the light of the fact that he is a negro, and applying your experience and common sense[.]”).

43. See *Wallace v. State*, 768 So. 2d 1247, 1249 (Fla. 1st Dist. Ct. App. 2000) see also *Allen v. State*, 112 So. 177 (Ala. 1927) (“[The defendant’s lawyers] ask you to believe a couple of Negroes instead of the white girls.”). On class, gender, and race in the South during the early twentieth century, see JAMES R. ACKER, *SCOTTSBORO AND ITS LEGACY: THE CASES THAT CHALLENGED AMERICAN LEGAL AND SOCIAL JUSTICE* 21-23 (2008); DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* 25-28 (Rev. ed. 2007); JAMES GOODMAN, *STORIES OF SCOTTSBORO* 19-23, 163-72 (1994).

44. See *Bates v. United States*, 766 A.2d 500, 507 (D.C. 2000) (discussing prosecutor’s rebuttal to defense counsel’s statement that the police stopped the accused because he was in a “bad neighborhood”); *People v. Armstrong*, 298 N.Y.S.2d 630, 634 (N.Y. App. Div. 1969) (“‘It was brought out that he was in a white neighborhood and he was Negro.’”).

45. See *Miller v. North Carolina*, 583 F.2d 701, 704 (4th Cir. 1978) (“I argue to you that the average white woman abhors anything of this type in nature that had to do with a black man. It is innate with us.”).

46. See Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1000 (2003); Andrew E. Taslitz, *Wrongly Accused: Is Race A Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121, 126 (2006).

47. See *Shillcutt v. Gagnon*, 827 F.2d 1155, 1156 (8th Cir. 1987).

48. See *United States v. Villar*, 586 F.3d 76, 86 (1st Cir. 2009).

49. See *Tobias v. Smith*, 468 F. Supp. 1287, 1289 (W.D.N.Y. 1979).

50. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679-80 (1995); Tania Tetlow, *Discriminatory Acquittal*, 18 WM. & MARY BILL RTS. J. 75, 112-16 (2009).



group status,<sup>53</sup> and systemic bias.<sup>54</sup> And like prosecutors, their talk pervades both routine public defender cases and prominent death penalty cases.<sup>55</sup> Also like prosecutors, their race talk mixes colorblind, color-coded, and color-conscious narratives.

#### A. COLORBLIND, COLOR-CODED, AND COLOR-CONSCIOUS RACE TALK

Colorblind, race-neutral talk<sup>56</sup> recognizes the presence of race,<sup>57</sup> for example in the area of search and seizure,<sup>58</sup> yet posits claims of neutrality.<sup>59</sup> Bound to anti-classification commitments<sup>60</sup> and apprehensive about race-based segregation<sup>61</sup> and separatism,<sup>62</sup> race-neutral talk offers analytic silence and remedial

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51. See Christopher Slobogin, *Race-Based Defenses—The Insights of Traditional Analysis*, 54 ARK. L. REV. 739, 739-41 (2002).

52. See generally Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911 (2007) (arguing that minority and immigrant cultural defense claims are more likely to receive accommodation when there is convergence between their cultural norms and American cultural norms); Cynthia Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 490-91 (1996).

53. See generally Richard Delgado, *Making Pets: Social Workers, “Problem Groups,” and the Role of the SPCA—Getting a Little More Precise About Racialized Narratives*, 77 TEX. L. REV. 1571 (1999) (broadening inquiry of racial narrative to address civil as well as criminal trials and nonwhite groups other than African Americans); Eugene R. Milhizer, *Group Status and Criminal Defenses: Logical Relationship or Marriage of Convenience?*, 71 MO. L. REV. 547, 577-78 (2006).

54. See Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS & PUB. POL’Y 999, 1009-15 (2013).

55. See Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1540-42 (2004); Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755, 756-767 (2012).

56. See Ian F. Haney López, “A Nation of Minorities”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 994-95 (2007); Christopher W. Schmidt, *Brown and the Colorblind Constitution*, 94 CORNELL L. REV. 203, 206 (2008); Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77, 88-94 (2000); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1288 (2011); Andrew E. Taslitz, *Racial Blindsight: The Absurdity of Color-Blind Criminal Justice*, 5 OHIO ST. J. CRIM. L. 1, 7 (2007).

57. See Justin Driver, *Recognizing Race*, 112 COLUM. L. REV. 404, 450-56 (2012).

58. For race-conscious accounts of search and seizure doctrine, see Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245, 247-52 (2010); Frank Rudy Cooper, *Post-Racialism and Searches Incident to Arrest*, 44 ARIZ. ST. L.J. 113, 120-22 (2012).

59. See Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 847-56. See generally T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991) (arguing that race has a deep social significance that continues to disadvantage blacks and other people of color); David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99 (arguing that the prohibition against racial discrimination bars the use of accurate racial generalizations that disadvantage blacks).

60. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggle Over Brown*, 117 HARV. L. REV. 1470, 1471-72 (2004).

61. See Sarah Spiegel, *Prison “Race Riots”: An Easy Case for Segregation?*, 95 CAL. L. REV. 2261 (2007) (maintaining that prison segregation entails racial classification and carries a racist social meaning).

62. See J. Harvie Wilkinson III, *The Law of Civil Rights and the Dangers of Separatism in Multicultural America*, 47 STAN. L. REV. 993, 1004-08 (1995).

inaction when confronted with racialized conduct in law and society.<sup>63</sup> Color- or race-coded talk,<sup>64</sup> by comparison, deals with race through veiled stereotypes<sup>65</sup> illustrated in drug prosecutions,<sup>66</sup> party identification<sup>67</sup> and profiling disputes,<sup>68</sup> religious affiliation,<sup>69</sup> and even geographical associations.<sup>70</sup> Race-conscious talk, in contrast, discerns extant racial consciousness in law<sup>71</sup> and in the social and political construction of color among individuals, groups, and communities.<sup>72</sup> To exploit, and at times to thwart, bias in criminal trials, prosecutors,<sup>73</sup> defenders,<sup>74</sup> and judges<sup>75</sup> repeatedly embrace in whole or in part a color-conscious ethic of advocacy and adjudication. However partial, their embrace signals the possible

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63. Cf. Margalynne J. Armstrong and Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635, 651-663 (2008) (illustrating the silence and inaction that race neutrality creates in the classroom).

64. See, e.g., *State v. Cabrera*, 700 N.W.2d 469, 474 (Minn. 2005) (“You heard nothing about gangs other than what came from the State’s witnesses telling about their past association and some wild and, I submit, racist speculation on the part of counsel here, that because these men who happen to be black are in-have been in gangs in the past, despite their testimony about trying to get on with their lives, that they are people to be feared, they’re rough characters. Well, we know what that’s a code word for. He’s a big, strong black man, but he’s a rough character.”) (emphasis added).

65. See Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1273-75 (2002); Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes about Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483, 489-90 (2004).

66. See Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL’Y REV. 257, 261-65 (2009); Editorial Board, *How Race Skews Prosecutions*, N.Y. TIMES, July 13, 2014, <http://www.nytimes.com/2014/07/14/opinion/how-race-skews-prosecutions.html>.

67. See Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 935-338 (1984).

68. See Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 60-81 (2001); Brooks Holland, *Racial Profiling and a Punitive Exclusionary Rule*, 20 TEMP. POL. & CIV. RTS. L. REV. 29, 40-42 (2010).

69. See Christie Stancil Matthews, *Missing Faith in Batson: Continued Discrimination Against African Americans Through Religion-Based Peremptory Challenges*, 23 TEMP. POL. & CIV. RTS. L. REV. 45, 46 (2013).

70. See *State v. Franklin*, 526 S.W.2d 86, 90 (Mo. Ct. App. 1975) (discussing crime victims and racial geography).

71. See Justin Murray, *Reimagining Criminal Prosecution: Toward a Color-Conscious Professional Ethic for Prosecutors*, 49 AM. CRIM. L. REV. 1541, 1542-1553 (2012). Cf. Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269, 280-93 (1994) (examining ways that raced coding and embedded narratives of racial domination maintain and recreate white racism in law); Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781, 787 (2006) (surveying U.S. Supreme Court doctrine on affirmative action in higher education and government contracting as well as race-conscious redistricting to identify the principal concern to which different requirements of individualized consideration respond).

72. See George A. Martínez, *African-Americans, Latinos, and the Construction of Race: Toward an Epistemic Coalition*, 19 CHICANO-LATINO L. REV. 213, 219-21 (1998); Deborah Ramirez, *Multicultural Empowerment: It’s Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 958-60 (1995).

73. See Murray, *supra* note 71, at 1568-89; see also Aya Gruber, *Murder, Minority Victims, and Mercy*, 85 U. COLO. L. REV. 129, 164-70 (2014).

74. See Abbe Smith, *Burdening the Least of Us: “Race-Conscious” Ethics in Criminal Defense*, 77 TEX. L. REV. 1585, 1600-01 (1999).

75. See Michael Pinard, *Limitations on Judicial Activism in Criminal Trials*, 33 CONN. L. REV. 243, 244-245 (2000); Abbe Smith, *Defense-Oriented Judges*, 32 HOFSTRA L. REV. 1483, 1487-1488 (2004).

emergence of an alternative color-conscious canon<sup>76</sup> or a modified vision of racialism.<sup>77</sup> Of necessity, this alternative canon or vision of the prosecution and defense function in the advocacy and adjudication of race cases within the criminal justice system must address questions of both normative prescription—*whether lawyers should object to race*—and instrumental calculation—*when and how lawyers should object to race*.

### B. CALHOUN V. UNITED STATES

Recently, in *Calhoun v. United States*, the U.S. Supreme Court addressed the prosecutorial use of, and the appropriate objection to, race talk.<sup>78</sup> In *Calhoun*, the Supreme Court denied the petition of Bongani Charles Calhoun, a black convicted felon, for a writ of certiorari.<sup>79</sup> In a statement addressing the denial of the writ petition, Justice Sotomayor, joined by Justice Breyer, opined: “I write to dispel any doubt whether the Court’s denial of certiorari should be understood to signal our tolerance of a federal prosecutor’s racially charged remark.”<sup>80</sup> Unequivocally, she announced: “It should not.”<sup>81</sup>

Sotomayor’s uncommon certiorari statement opened with a brief recitation of the procedural and factual underpinnings of the *Calhoun* case. Calhoun, Sotomayor began, “stood trial in a federal court in Texas for participating in a drug conspiracy.”<sup>82</sup> The primary issue at trial, she explained: “was whether

76. See Shani King, *The Family Law Canon in a (Post?) Racial Era*, 72 OHIO ST. L.J. 575, 633-39 (2011).

77. See Ralph Richard Banks, *Beyond Color Blindness: Neo-Racialism and the Future of Race and Law Scholarship*, 25 HARV. BLACKLETTER L.J. 41, 41-42 (2009).

78. *Calhoun v. United States*, 133 S. Ct. 1136, 1136 (2013) (Statement of Sotomayor, J.). On August 4, 2010, a federal grand jury in San Antonio, Texas returned a three-count superseding indictment charging Calhoun for conspiracy and the unlawful, knowing, and intentional attempt to possess with intent to distribute five or more kilograms of cocaine, and for possession of a firearm during the commission of a drug trafficking crime. Brief for Appellee at \*2, *United States v. Calhoun*, 478 Fed. App’x 193 (5th Cir. 2012) (citing R. 112-15). On March 7, 2011, Calhoun proceeded to a jury trial before U.S. District Court Judge Harry Lee Hudspeth. *Id.* (citing R. 161-64). On March 8, 2011, the jury convicted Calhoun on all three counts of the superseding indictment. *Id.* (citing R. 163-64). On June 21, 2011, Judge Hudspeth sentenced Calhoun to a 180-month term of imprisonment along with five years supervised release. *Id.* at \*2-\*3 (citing. 206-07). On July 1, 2011, Calhoun filed a timely Notice of Appeal in the U.S. Court of Appeals for the Fifth Circuit. *Id.* On June 7, 2012, the Fifth Circuit affirmed Calhoun’s conviction. *United States v. Calhoun*, 478 Fed. App’x 193, 196 (5th Cir. 2012) (per curiam).

79. *Calhoun*, 133 S. Ct. at 1136; Petition for Writ of Certiorari at 1, *Calhoun v. United States*, 133 S. Ct. 1136 (2012) (No. 12-6142).

80. *Calhoun*, 133 S. Ct. at 1136.

81. *Id.*

82. *Id.* At trial, Judge Hudspeth granted Calhoun’s voir dire request to question the venire in order to learn whether “anyone has any problems or feelings or emotions against African-Americans.” Brief for Appellee at \*13 n.4, *United States v. Calhoun*, 478 Fed. App’x 193 (5th Cir.) (No. 11-50605) (citing R. 291). Judge Hudspeth stated: “Ladies and gentlemen, the record of course wouldn’t show this until somebody brought it up, but all of you who are in the courtroom, all of us, know with regard to the subject of race or ethnicity that Mr. Calhoun, the defendant in this case, is an African-American.” *Id.* He added: “And my question of course would be: Is there anyone who feels from [sic] any reason that he or she would be influenced by that and it would make it more difficult for you to serve as a fair and impartial juror in this case?” *Id.* (citing R. 291-92). Judge Hudspeth

Calhoun knew that the friend he had accompanied on a road trip, along with the friend's associates, were about to engage in a drug transaction, or whether instead Calhoun was merely present during the group's drive home, when the others attempted to purchase cocaine from undercover Drug Enforcement Agency (DEA) agents."<sup>83</sup> Law enforcement officers, she pointed out, "testified that they discussed the drugs with Calhoun immediately before they broke cover to arrest the group, and that Calhoun had a gun when he was arrested."<sup>84</sup> Alluding to post-arrest trial proceedings, Sotomayor referred to Calhoun's own testimony that "he was not part of and had no knowledge of his friend's plan to purchase drugs, that he did not understand the DEA agents when they spoke to him in Spanish only, and that he always carried a concealed firearm, as he was licensed to do."<sup>85</sup> Rather than assess or reweigh conflicting witness testimony, Sotomayor opted to defer to the *Calhoun* jury, remarking: "It was up to the jurors to decide whom they believed."<sup>86</sup>

Having crystalized the issue of Calhoun's intent, Sotomayor inspected the central elements of the trial itself, especially Calhoun's cross-examination and testimony. The issue of intent, she commented, "came to a head" when the federal prosecutor cross-examined Calhoun at trial.<sup>87</sup> On cross-examination, she noted, "Calhoun related that the night before the arrest, he had detached himself from the group when his friend arrived at their hotel room with a bag of money."<sup>88</sup> Sotomayor recapitulated Calhoun's testimony "that he 'didn't know' what was happening, and that it 'made [him] think . . . [t]hat [he] didn't want to be there.'"<sup>89</sup> She observed that the prosecutor at hand "pressed Calhoun repeatedly to explain why he did not want to be in the hotel room[.]" adding that presiding U.S. District Court Judge Hudspeth "[e]ventually . . . told the prosecutor to move on."<sup>90</sup> At that point, Sotomayor emphasized, the prosecutor brazenly "asked, '*You've got African-Americans, you've got Hispanics, you've got a bag full of money. Does that tell you—a light bulb doesn't go off in your head and say, This is a drug deal?*'"<sup>91</sup>

Without hesitation, Sotomayor defined the prosecutor's question as "racially

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also invited members of the venire to discuss their reservations privately at the bench; reportedly "[n]o one came forward." *Id.* (citing R. 292). The Government's Brief asserted that "eleven of the twelve jurors selected from the venire [sic] had easily-recognizable Spanish names." *Id.* (citing R. 293-94).

83. *Calhoun*, 133 S. Ct. at 1136. Sotomayor added: "Two alleged co-conspirators who had pleaded guilty testified to Calhoun's knowledge." *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* (citing Trans. 125-126 (Mar. 8, 2011)).

90. *Id.*

91. *Id.* (emphasis added).

charged” in content.<sup>92</sup> She also pointedly identified Calhoun as African-American, parsing his claim that “the prosecutor’s racially charged question violated his constitutional rights.”<sup>93</sup> At the same time, she highlighted the fact that Calhoun’s counsel “[i]nexplicably . . . did not object to the question at trial.”<sup>94</sup> As a result, she explained, Calhoun’s petition for writ of certiorari came to the Supreme Court<sup>95</sup> on plain-error review, a standard of review under which he would ordinarily have to “demonstrate that [the error] ‘affected the outcome of the district court proceedings.’”<sup>96</sup> Sotomayor made clear, however, that Calhoun’s petition declined even to “attempt” that showing.<sup>97</sup> Instead, she cited Calhoun’s contention that the prosecutor’s “comment should lead to automatic reversal because it constitutes either structural error or plain error regardless of whether it prejudiced the outcome.”<sup>98</sup> Sotomayor discounted those contentions on the ground that they “were forfeited when Calhoun failed to press them on appeal to the [U.S. Court of Appeals for the] Fifth Circuit.”<sup>99</sup> Referencing that procedural posture as well as the “unusual way” Calhoun’s defense counsel litigated the case, she endorsed the Supreme Court’s decision to deny the petition.<sup>100</sup>

Despite this conclusion, Sotomayor closely scrutinized the conduct of the federal prosecutor at Calhoun’s trial. Roundly condemning that conduct, she stated: “There is no doubt . . . that the prosecutor’s question never should have been posed.”<sup>101</sup> Sotomayor marshaled three grounds in support of her prosecutorial criticism: equal protection, jury impartiality, and professional ethics. First, she asserted that the Constitution’s guarantee of equal protection “prohibits racially biased prosecutorial arguments.”<sup>102</sup> Second, she maintained that “by threatening to cultivate bias in the jury” such prosecutorial conduct “equally offends the defendant’s right to an impartial jury.”<sup>103</sup> Third, she adverted to the “settled professional standard that a ‘prosecutor should not make arguments

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92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 1136-37.

96. *Id.* (citing *Puckett v. United States*, 556 U.S. 129 (2009) (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993))).

97. *Id.* at 1137.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* (citing *McCleskey v. Kemp*, 481 U.S. 279, 309 n.30 (1987)).

103. *Id.* Sotomayor commented: “Judge Frank put the point well: ‘If government counsel in a criminal suit is allowed to inflame the jurors by irrelevantly arousing their deepest prejudices, the jury may become in his hands a lethal weapon directed against defendants who may be innocent.’” *Id.* (quoting *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 659 (2d. Cir. 1946) (Frank, J., dissenting) (footnote omitted)).

calculated to appeal to the prejudices of the jury.”<sup>104</sup>

Enlarging upon these constitutional and professional prohibitions, Sotomayor rebuked the federal prosecutor not only for “suggesting that race should play a role in establishing a defendant’s criminal intent,” but also for “tapp[ing] a deep and sorry vein of racial prejudice that has run through the history of criminal justice in our Nation.”<sup>105</sup> She recollected a criminal justice system at “a time when appeals to race were not uncommon,” recalling cases when prosecutors exploited racial and gender stereotypes to sway jury deliberations<sup>106</sup> or invoked racial epithets to inflame jury passions.<sup>107</sup> Although Sotomayor acknowledged that the prosecutor’s comment in *Calhoun* “was surely less extreme[.]”<sup>108</sup> she underscored that “it too was pernicious in its attempt to substitute racial stereotype for evidence, and racial prejudice for reason.”<sup>109</sup>

Turning more broadly to the criminal justice system, the rule of law, and the duties of federal prosecutors, Sotomayor confessed to her own profound disappointment “to see a representative of the United States resort to this base tactic more than a decade into the 21st century.”<sup>110</sup> That trial tactic, she insisted, “diminishes the dignity of our criminal justice system and undermines respect for the rule of law.”<sup>111</sup> Contrary to long-standing expectations of the U.S. Government to seek justice in its criminal justice prosecutions,<sup>112</sup> she added, such strategic calculations worked “to fan the flames of fear and prejudice.”<sup>113</sup> Instead of properly “discharging the duties of his office in this case,” she lamented, “the Assistant United States Attorney for the Western District of Texas missed the mark.”<sup>114</sup>

For Sotomayor, federal prosecutors in *Calhoun* missed the mark both at trial and on appeal. Amplifying her criticism, she mentioned two notable incidents of “troubling” conduct by the U.S. Attorney’s Office for the Western District of Texas and by the Solicitor General’s Office of the U.S. Department of Justice.<sup>115</sup>

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104. *Id.* (citing ABA STANDARDS FOR CRIMINAL JUSTICE, Prosecution Function and Defense Function, Std. 3-5.8(c), p. 106 (3d ed. 1993)).

105. *Id.* (citing *Holland v. State*, 22 So. 2d 519, 520 (Ala. 1945)).

106. *Id.* (“[A] prosecutor might direct a jury to ‘consider the fact that Mary Sue Rowe is a young white woman and that this defendant is a black man for the purpose of determining his intent at the time he entered Mrs. Rowe’s home[.]’”) (citing *Holland v. State*, 22 So. 2d 519, 520 (Ala. 1945)).

107. *Id.* (“‘I am well enough acquainted with this class of niggers to know that they have got it in for the [white] race in their heart.’”) (quoting *Taylor v. State*, 100 S.W. 393, 393 (Tex. Crim. App. 1907)).

108. *Id.*

109. *Id.*

110. *Id.* at 1138.

111. *Id.*

112. See Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 618 (1998); K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 305-21 (2014).

113. *Calhoun*, 133 S. Ct. at 1138.

114. *Id.*

115. *Id.*

On appeal to the U.S. Court of Appeals for the Fifth Circuit, she complained, “the Government failed to recognize the wrongfulness of the prosecutor’s question,” diminishing its import by “calling it only ‘impolitic’” and averring that “it did not prejudice the outcome.”<sup>116</sup> Upon its review of the petition for writ of certiorari, she added, the Office of the Solicitor General only belatedly conceded that the Government “prosecutor’s racial remark was unquestionably improper[,]”<sup>117</sup> and then “only after the Solicitor General waived the Government’s response to the petition at first, leaving the Court to direct a response.”<sup>118</sup>

Sotomayor offered equally robust criticism of Calhoun’s defense counsel, assailing his performance on the grounds of ineffective representation and ethical irresponsibility.<sup>119</sup> She commented, for example, that Calhoun’s defense attorney failed to challenge or attack the prosecutor’s comment until closing argument.<sup>120</sup> This oversight, she remarked, allowed the prosecutor to reprise his earlier cross-examination question on rebuttal at closing.<sup>121</sup> Indeed, at closing argument, the prosecutor stated: “I got accused by [defense counsel] of, I guess, racially, ethnically profiling people when I asked the question of Mr. Calhoun, Okay, you got African–American[s] and Hispanics, do you think it’s a drug deal? But there’s one element that’s missing. The money. So what are they doing in this room with a bag full of money? What does your common sense tell you that these people are doing in a hotel room with a bag full of money, cash?”<sup>122</sup>

Sotomayor’s account of the trial and appellate performance of the Government prosecutors and defense lawyers in *Calhoun* helps elucidate the form and substance of race talk in contemporary advocacy and adjudication. To Sotomayor, race talk takes the form of “racially charged” remarks and questions. Unsurprisingly, the precise form of a racially charged comment varies by individual case and by local context, fluctuating from extreme remarks (e.g., “I am well enough acquainted with this class of niggers to know that they have got it in for the [white] race in their heart.”)<sup>123</sup> to less extreme questions, as here.<sup>124</sup> For Sotomayor, race talk of both kinds cultivates bias, fans fear, and appeals to prejudice inside federal and state courtrooms. Equally harmful, race talk in

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116. *Id.* Sotomayor noted: “This prompted Judge Haynes to ‘clear up any confusion—the question crossed the line.’” *Id.* (citing *United States v. Calhoun*, 478 Fed. App’x 193, 196 (5th Cir. 2012) (Haynes, J., concurring)).

117. *Id.* (citing Brief for the United States in Opposition at \*7–\*8, *Calhoun v. United States*, 133 S. Ct. 1136 (2013) (No. 12-6142)).

118. *Id.*

119. Sotomayor’s criticism carried short of invoking Calhoun’s Sixth Amendment right to counsel or finding that his defense counsel fell below the standard of effective assistance. For further discussion on the standard of effective assistance of counsel, see *Strickland v. Washington*, 104 S. Ct. 2052 (1984).

120. *Calhoun*, 133 S. Ct. at 1137 n.\* (quoting Tr. 167-168 (Mar. 8, 2011)).

121. *Id.*

122. *Id.*

123. *Id.* (citing *Taylor v. State*, 100 S.W. 393 (Tex. Crim. App. 1907)).

124. *Id.*

*Calhoun* and elsewhere unfairly establishes the criminal intent of the accused, harmfully conveys class or group stigma specific to the accused, and baselessly treats stereotypical construction as an innate or natural character trait of the accused.

And yet, however sensitive to the individual and institutional harm of race talk and insistent of lawyers' moral or ethical imperative to object to "racially charged" remarks, Sotomayor's account of the prosecutorial and defense conduct in *Calhoun* offers only vague guidance as to the categorical form and substance of such remarks and as to the exact timing and the precise method of objecting to such remarks. The definitional, temporal, and methodological vagueness of Sotomayor's admittedly limited account reflects the historically contested construction, and the long standing regulatory tolerance, of race talk in the criminal justice system. The end result of that disputed construction and institutionalized tolerance is illustrated by the exploitation of and quarrel over race talk in *Calhoun* and in criminal law cases throughout American federal and state courts.

## II. EXPLOITING RACE TALK

“[S]ummon that thirteenth juror, prejudice.”<sup>125</sup>

This Part considers the prosecutorial exploitation of race talk in *Calhoun* and in criminal law cases more broadly. Both prosecutors and defenders exploit race talk. Defenders, for example, employ race-based defenses, relying on bias and prejudice,<sup>126</sup> diminished capacity,<sup>127</sup> culture,<sup>128</sup> identity,<sup>129</sup> and even “rotten social background”<sup>130</sup> for exculpatory, mitigation, or nullification purposes.

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125. *Id.* (“He should not be permitted to summon that thirteenth juror, prejudice.”) (quoting *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 659 (2d Cir. 1946) (Frank, J., dissenting) (footnote omitted)).

126. See Eva S. Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 GEO. J. LEGAL ETHICS 1, 1-12 (1994).

127. See Olympia Duhart, *A Native Son's Defense: Bigger Thomas and Diminished Capacity*, 49 HOW. L.J. 61, 77-79 (2005).

128. See CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* 96-124 (2003); ALISON DUNDES RENTELN, *THE CULTURAL DEFENSE* 23-182 (2004); Victoria Ajayi, Note, *Violence Against Women: The Ethics of Incorporating the Cultural Defense in Legal Narrative*, 25 GEO. J. LEGAL ETHICS 401, 401-02 (2012); James J. Sing, Note, *Culture as Sameness: Toward a Synthetic View of Provocation and Culture in Criminal Law*, 108 YALE L.J. 1845, 1849-52 (1999).

129. See Peter Margulies, *Identity on Trial: Subordination, Social Science Evidence, and Criminal Defense*, 51 RUTGERS L. REV. 45, 46-52, 60-62 (1998).

130. Cf. Richard Delgado, “Rotten Social Background”: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?, 3 LAW & INEQ. 9, 12-23 (1985) (arguing that criminal law should recognize a defense of “rotten social background”); Andrew E. Taslitz, *The Rule of Criminal Law: Why Courts and Legislatures Ignore Richard Delgado's Rotten Social Background*, 2 ALA. C.R. & C.L. L. REV. 79, 83-86 (2011) (discussing the sole case to address the “rotten social background” defense).



Although vulnerable to censure and disapproval on ethical,<sup>131</sup> communitarian,<sup>132</sup> and narrative<sup>133</sup> grounds, race-based defenses find wide justification in the aggressive advocacy norms of the criminal defense function.<sup>134</sup>

In prior work, I have argued that prosecutors, defenders, and civil rights lawyers alike should avoid strategic narratives and arguments that exploit and publicly disseminate harmful, stereotypical constructions of racial identity. The disparaging portrayal of black or other minority civil rights plaintiffs, criminal defendants, and crime victims to gain an adversarial advantage or to lessen punishment not only demonstrates the paternalism, class bias, and elitism of prosecutors, civil rights advocates, and criminal defense lawyers, but also reinforces the historical markers of racial caste and class.<sup>135</sup> Widespread in trial testimony and appellate briefs, and embedded in well-worn tropes and images, these identity and narrative markers portray racial inferiority, deviance, and functional disability as natural or normal features of clients and communities of color. Inured to their own biases and assumptions, the same lawyer-crafted identity and narrative constructions frequently omit reference to the daily displayed racial dignity of minority clients and the frequently exhibited racial solidarity of minority communities.<sup>136</sup> The *Calhoun* prosecutors, both in the U.S. Attorney's Office for the Western District of Texas and in the Solicitor General's Office, committed this same omission.

#### A. THE U.S. ATTORNEY'S OFFICE

Taken up on appeal to the U.S. Court of Appeals for the Fifth Circuit, the U.S. Attorney's Office defended its conduct with respect to both Calhoun's trial and his sentence. On the issue of Calhoun's trial, the Government addressed the question whether Calhoun's conviction should be affirmed by the Fifth Circuit "because the prosecutor's question and rebuttal comment, though impolitic, did not prejudice the jury but . . . instead helped reveal [Calhoun]'s knowing participation in the May 19th drug deal?"<sup>137</sup> On the issue of Calhoun's sentence, the Government dissected the question whether Calhoun's sentence was presump-

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131. See John William Clark IV, Comment, *Batson v. Kentucky and the ABA Model Rules of Professional Conduct: Is a Violation of Batson Also an Ethical Violation?*, 29 J. LEGAL PROF. 205, 207-09 (2004).

132. See Bill Ong Hing, *In the Interest of Racial Harmony: Revisiting the Lawyer's Duty to Work for the Common Good*, 47 STAN. L. REV. 901, 922-933 (1995).

133. See Muneer I. Ahmad, *The Ethics of Narrative*, 11 AM. U. J. GENDER SOC. POL'Y & L. 117, 122-23 (2002); Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 GEO. J. LEGAL ETHICS 1, 18-19 (2000).

134. See David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1730-31 (1993); Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 948-61 (2000).

135. See Alfieri & Onwuachi-Willig, *supra* note 3, at 1550.

136. See *id.* at 1551-53.

137. Brief for Appellee, *United States v. Calhoun*, No. 11-50605 (5th Cir. Feb. 2, 2012), 2012 WL 475910 at \*2.

tively reasonable and, thus, should be affirmed.<sup>138</sup>

In its brief, the Government tied its prosecutorial trial conduct to Calhoun's decision to take the stand in his own defense and, more closely, to his testimony on cross-examination.<sup>139</sup> Upon cross-examination, the Government explained, the prosecutor sought to test Calhoun's credibility by questioning "his reaction to seeing the large stash of cash that was unpacked in the hotel room[]" and by challenging his "apparent defense that he was an innocent bystander to the drug deal."<sup>140</sup> To that end, the Government maintained, the prosecutor asked Calhoun "what he thought the 'this bag full of money was for.'"<sup>141</sup> Calhoun briefly replied: "It made me think I didn't want to be [in that room]."<sup>142</sup> Next the prosecutor asked: "Did you think they were going to do something illegal?"<sup>143</sup> Calhoun responded: "I did not know."<sup>144</sup> At this point, the Government continued, when the prosecutor reiterated his line of questioning about the "scene" in the hotel room, Calhoun's defense counsel objected and the following colloquy ensued.<sup>145</sup>

THE COURT: "Well you're starting to argue with the witness. But all he's trying to find out is what was it about the situation that smelled bad to you?"

DEFENDANT CALHOUN: "The money."

THE COURT: "I understand but what—what—why would the sight of money shock you so much?"

DEFENDANT CALHOUN: "The amount of it."

THE COURT: "All right. And why would that scare you?"

DEFENDANT CALHOUN: "Because that's not—why we came down here was to have fun and party, not to bring bags of money to a room—a bag of money to a room."

THE COURT: "Why would somebody bring a bag of money into a room?"

DEFENDANT CALHOUN: "I don't know."

THE COURT: "All right next question."

AUSA PONDER: "I didn't—you're telling this to this jury."

DEFENDANT CALHOUN: "I understand."

Q (By AUSA PONDER): "You've got African-Americans, you've got Hispanics, you've got a full bag of money. Does that tell you—a light bulb doesn't go off in your head and say, This is a drug deal?"

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138. *Id.*

139. *See id.* at \*9-10.

140. *Id.* at \*10-11 (citing R. 615-618).

141. *Id.* at \*11 (citing R. 615).

142. *Id.* (citing R. 616).

143. *Id.* (citing R. 616).

144. *Id.* (citing R. 616).

145. *Id.* (citing R. 616).

A [DEFENDANT CALHOUN]: “No, sir.”

Q (by AUSA PONDER): “Okay. But it did made [sic] you nervous enough that you went and got a room?”

A [DEFENDANT CALHOUN]: “Yes, sir.”<sup>146</sup>

At closing argument Calhoun’s counsel revisited this colloquy, stating: “Government thinks that just because your [sic] African-Americans and Hispanics in a room that you have a drug deal. And I hope that we open our minds a little more than that and don’t consider that.”<sup>147</sup> That statement, the Government asserted, prompted the prosecutor immediately to rebut what he perceived to be unwarranted, race-motivated criticism directed toward the U.S. Attorney’s Office. For purposes of rebuttal, the prosecutor responded:

All right, I got accused by Mr. Moritz of, I guess, racially, ethnically profiling people when I asked the question of Mr. Calhoun, Okay you got African-Americans and Hispanics, do you think it’s a drug deal? But there’s one element that’s missing. The money. So what are they doing in this room with a bag full of money? What does your common sense tell you that these people are doing in a hotel room with a bag full of money, cash? None of these people are Bill Gates or computer [sic] maggots—maggots—magnets—maggots? None of them are real estate investors. You know, in these days of credit lines and credit cards, very few transactions, legitimate business deals, are done in a hotel room with cash. \$400,000 in cash. The only one that I can think of is a drug deal. And Mr. Calhoun says, Oh, I saw that money. I was thinking bad things. Sure he was, if that’s true. You would be too if you suddenly walked in and you saw a bag full of money and these guys hanging around. You’d say, Uh-oh what have I walked into? Assuming you were ignorant of all of this going on in the first place.<sup>148</sup>

Soon after, the Government noted, Judge Hudspeth in charging the jury issued “several limiting instructions including admonitions that statements and argument by counsel were not evidence, that the jury was the sole judge of the credibility of the witnesses.”<sup>149</sup> The instructions, the Government mentioned, included a “mere presence” instruction to the jury<sup>150</sup> and occurred without the

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146. *Id.* at \*11-12.

147. *Id.* at \*12 (citing R. 650).

148. *Id.* at \*12-13 (citing R. 657-58).

149. *Id.* (citing R. 660-63).

150. *Id.* (citing R. 668). On “mere presence” jury instructions, see 16 KEVIN F. O’MALLEY ET AL., 1A FED. JURY PRAC. & INSTR. § 16:09 (6th ed. 2014) (“Merely being present at the scene of a crime or merely knowing that a crime is being committed or is about to be committed is not sufficient conduct to find that Defendant committed that crime. In order to find the defendant guilty, the government must prove, beyond a reasonable doubt, that in addition to being present or knowing about the crime, charged in [*Count of*] the indictment Defendant knowingly [*and deliberately*] associated [*himself*] [*herself*] with the crime charged in some way as a participant—someone who wanted the crime to be committed—not as a mere spectator.”). See also, e.g., *United States v. Allred*, 867 F.2d 856, 859, 869 (5th Cir.1989) (“[T]he trial court specifically instructed the jury on the

objection of defense counsel.<sup>151</sup> Within three hours of deliberation, the Government pointed out, “an unbiased, apparently predominantly Hispanic jury found Calhoun guilty as charged.”<sup>152</sup>

Given the facts and circumstances of the *Calhoun* trial, the Government argued, the Fifth Circuit should reject the claim that “the prosecutor’s cross-examination question and remark on rebuttal closing fatally prejudiced [Calhoun’s] right to a fair trial.”<sup>153</sup> Both the prosecutor’s question and remark, the Government insisted, “were intended to reveal that Calhoun had knowledge of, and participated in, the drug deal that was to take place the next day when he witnessed his co-defendants unload 400,000 odd dollars in a San Antonio hotel room.”<sup>154</sup> Intent, knowledge, and participation, the Government observed, comprised “essential elements of the government’s case against Calhoun.”<sup>155</sup>

More specifically, the Government reasoned, the prosecutor’s question standing alone “was not so pronounced and persistent that it permeated the entire atmosphere of the trial.”<sup>156</sup> The Government described the question as a “single” and “completely isolated” inquiry pursued “toward the end of an extended period of cross-examination of what Calhoun knew, or did not know, about the impending drug deal.”<sup>157</sup> However “impolitic” that inquiry, the Government conceded, its “intended effect” aimed “to undercut Calhoun’s claim that he found himself in that hotel room merely as part of a weekend of partying in San Antonio”<sup>158</sup> and to bolster “the knowledge element of the Government’s case against Calhoun, and its theory that he was willing and knowledgeable participant in the drug trafficking conspiracy.”<sup>159</sup> In fact, the Government asserted, “by the time the question was asked, the jury had already heard extensive testimony during the government’s case-in-chief that Calhoun had

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essential elements of the crime of conspiracy, that mere presence or similarity of conduct does not establish membership, that the indictment charged a conspiracy to defraud the Government, that each appellant could be convicted only if he ‘knew that some co-conspirators sought to defraud the Government and that with knowledge of this unlawful purpose the Defendant willfully agreed to join a co-conspirator’s scheme to defraud the Government.’”); *United States v. Natel*, 812 F.2d 937, 940-941 (5th Cir. 1987) (finding the evidence that defendant was present at the scene insufficient to prove defendant’s guilt for the crime); *United States v. Vergara*, 687 F.2d 57, 60-61 (5th Cir. 1982) (“No showing of an overt act is necessary in a drug conspiracy prosecution, but knowledge, intent and participation, the essential elements of the crime, must be proved beyond a reasonable doubt.”).

151. Brief for Appellee, *United States v. Calhoun*, No. 11-50605 (5th Cir. Feb. 2, 2012), 2012 WL 475910 at \*13.

152. *Id.* (citing R. 673, 682).

153. *Id.* at \*15.

154. *Id.* at \*16.

155. *Id.*

156. *Id.*

157. *Id.* at \*19 (citing R. 617).

158. *Id.*

159. *Id.*

actual knowledge his reason for being in San Antonio was the drug deal.”<sup>160</sup> The Government also noted that, “the prosecutor quickly moved to another line of questioning, and Calhoun’s negative response itself helped to dispel any *theoretically prejudicial effect*.”<sup>161</sup>

Likewise, the Government claimed, the prosecutor “properly framed” his rebuttal remark “to defuse the defense’s inflammatory closing argument,” and in doing so, “refocused the jury’s attention on the credibility of Calhoun’s testimony and the substantial evidence of his guilty knowledge which included testimony from his co-conspirators and government agents that Calhoun knew he was going to San Antonio to complete a drug deal.”<sup>162</sup> In this way, the Government maintained, the prosecutor’s remark was part of a calibrated “effort to urge the jury to conclude that Calhoun knew criminal activity was afoot because the presence of \$400,000, not the ethnic or racial characteristics of his co-conspirators, in the room was beyond the pale of normal legal activity.”<sup>163</sup> That effort, the Government contended, “[e]d the jury to conclude that Calhoun’s testimony was not credible and that he was a knowing participant in the drug conspiracy.”<sup>164</sup>

In sum, from the Government’s standpoint, the rebuttal remark offered by the federal prosecutor at trial was actually “prompted” by Calhoun’s attorney’s own cunning “attempt on closing to cloak the prosecutor with a mantle of racial prejudice”<sup>165</sup> and, accordingly, did not exceed the range of response necessary to “right the scale” and “counteract the defense’s closing argument.”<sup>166</sup> Perversely, this argument permitted the federal prosecutor at issue to protest the defense team’s weak interposition of race talk at closing argument and, at the same time, to exploit the Government’s stereotypical vision of Calhoun’s racial identity. On its face, the defense team’s oblique, passing reference to race talk at closing appears to have been intended to negate the prosecutor’s earlier racially-charged question on cross-examination, and thus, ensure a fair and impartial process of jury deliberation. In this respect, the defense team’s conduct comported with its obligation to furnish Calhoun effective assistance of counsel.

Taken separately or together, the Government declared, the federal prosecutor’s cross-examination question and rebuttal remark could not be characterized as improper or prejudicial, especially given the “wide latitude” traditionally granted counsel in closing argument, the absence of timely defense objections, the strong corroborating evidence of Calhoun’s guilt, and the district court’s

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160. *Id.* at \*19-20.

161. *Id.* at \*20 (emphasis added) (citing *United States v. Fields*, 483 F.3d 313, 358 (5th Cir. 2007)).

162. *Id.* at \*16.

163. *Id.* at \*21 (citing R. 657-58).

164. *Id.*

165. *Id.* at \*20 (citing R. 657-58).

166. *Id.* at \*21 (citing *United States v. Ramirez-Velasquez*, 322 F.3d 868, 875 (5th Cir. 2003)).

“accurate and thoroughgoing limiting instructions with regard to the evidence and the jury’s role as the sole judge of the facts and credibility of the witnesses.”<sup>167</sup> The Government added that the district court’s cautionary, “detailed instructions to the jury that they were to decide the case based on the evidence rather than the statements of the lawyers, also followed quickly after the prosecutor’s rebuttal.”<sup>168</sup> For these reasons, in its appellate brief the Government concluded that the prosecutor’s cross-examination question and remark on rebuttal closing neither violated Calhoun’s right to a fair trial<sup>169</sup> nor seriously affected the fairness, integrity, or public reputation of the trial,<sup>170</sup> and therefore did not constitute reversible plain error.<sup>171</sup>

## B. THE OFFICE OF THE SOLICITOR GENERAL

Subsequently, in the Supreme Court, the Office of the Solicitor General submitted a brief for the Government in opposition to Calhoun’s petition for a writ of certiorari. The brief cast the question presented to the Court narrowly, conceding the Government’s racially improper question at Calhoun’s jury trial in the U.S. District Court for the Western District of Texas.<sup>172</sup> The question (i.e., “Whether the court of appeals erred in concluding that the prosecutor’s racially improper question did not warrant reversal of petitioner’s conviction under the third prong of plain-error review.”) construed the Court’s inquiry chiefly in terms of appellate court application of the plain-error standard of review.<sup>173</sup>

To establish the backdrop for the Court’s analysis, the Solicitor General’s brief once again recounted the circumstances of the federal prosecutor’s racially improper question during the examination of Calhoun at trial. In rebuttal to the closing argument of Calhoun’s defense counsel,<sup>174</sup> the Solicitor General’s brief pointed out, the prosecutor addressed opposing counsel’s suggestion that the Government had “racially, ethnically profil[ed] people” in questioning Cal-

167. *Id.* at \*16.

168. *Id.* at \*21. The Government speculated that “there is every indication that the instant jury did properly follow the district court’s instructions.” *Id.*

169. *Id.* at \*20 (citing *United States v. Fields*, 483 F.3d 313, 360 (5th Cir. 2007)).

170. *Id.* at \*22 (quoting *United States v. Gracia*, 522 F.3d 597, 600 (5th Cir. 2008)).

171. *Id.* at \*22 (citing *United States v. Holmes*, 406 F.3d 337, 356 (5th Cir. 2005)).

172. Brief for the United States in Opposition, *supra* note 117.

173. *Id.* at \*1. On the plain-error standard of review, see Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1173-85 (1995); Thomas M. Hoskinson, Note, *Criminal Procedure: Trial Integrity and the Defendant’s Rights Under the Plain Error Rule* 52(b), 37 SUFFOLK U. L. REV. 1129, 1131-38 (2004); Norman L. Reimer, *Lawyers Are Not Unicorns, But a Race-Baiting Prosecutor Proves that a Failure to Object Can Be Fatal*, 37 THE CHAMPION 7, 7-8 (2013).

174. At closing argument, Calhoun’s defense counsel stated: “Government thinks that just because [there are] African-Americans and Hispanics in a room that you have a drug deal. And I hope that we open our minds a little more than that and don’t consider that.” Brief for the United States in Opposition, *supra* note 117, at \*4. Defense counsel raised no objection to the Government’s questions either during Calhoun’s examination at trial or at closing argument. *Id.*

houn.<sup>175</sup> Here again, according to the brief, the prosecutor stated: “But there’s one element that’s missing. The money. So what are they doing in this room with a bag full of money? What does your common sense tell you that these people are doing in a hotel room with a bag full of money, cash? None of these people are Bill Gates or computer [magnates]. None of them are real estate investors.”<sup>176</sup>

Against this background, the Solicitor General, though acknowledging that the federal “prosecutor’s racial remark was unquestionably improper,” nevertheless argued that the Fifth Circuit “correctly held that the error did not require reversal because it did not affect petitioner’s substantial rights, i.e., it did not cast doubt on the outcome of the trial.”<sup>177</sup> Moreover, the Solicitor General contended that Supreme Court review was unwarranted because the Fifth Circuit’s decision was correct and because it did not squarely conflict with any Supreme Court precedent or any other court of appeals’ decision.<sup>178</sup> Further, the Solicitor General claimed that Calhoun blundered in asserting that the “prosecutor’s improper racially tinged remarks constituted structural error requiring automatic reversal.”<sup>179</sup>

In its analysis of structural error,<sup>180</sup> the Solicitor General’s Office conceded that the Supreme Court’s jurisprudence under Federal Rule of Criminal Procedure 52(b)<sup>181</sup> “never conclusively resolved how structural errors would be analyzed under the ‘substantial rights’ prong of plain-error review,” and thus never eliminated the possibility that “certain errors, termed ‘structural errors,’ might ‘affect substantial rights’ regardless of their actual impact on an appellant’s trial.”<sup>182</sup> Nonetheless, the Solicitor General denied that the federal prosecutor committed structural error in *Calhoun*, insisting that a structural error related to “a ‘defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself[,]” for example, in the presentation of evidence to the jury.<sup>183</sup> By confining structural errors to “‘a very limited class of cases’” and “a handful of defects,”<sup>184</sup> and by erecting a strong evidentiary

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175. *Id.* at 4-5.

176. *Id.* at 5.

177. *Id.* at 7-8.

178. *Id.* at 8.

179. *Id.*

180. For debate over structural error and reversal, see Amy Knight Burns, Note, *Insurmountable Obstacles: Structural Errors, Procedural Default, and Ineffective Assistance*, 64 STAN. L. REV. 727 (2012) (arguing that structural errors merit reversal even without proof of actual prejudice); Steven M. Shepard, Note, *The Case Against Automatic Reversal of Structural Errors*, 117 YALE L.J. 1180 (2008) (contending that an error should only be labeled structural and reversed automatically if it never contributes to a verdict).

181. FED. R. CRIM. P. 52(b) (“A plain error that affects substantial rights may be considered even though it was not brought to the [district] court’s attention.”).

182. Brief for the United States in Opposition, *supra* note 173, at \*9 (quoting *United States v. Marcus*, 560 U.S. 258, 258-59 (2010)).

183. *Id.* (citations omitted).

184. The Solicitor General acknowledged evidence of structural errors in the following circumstances: (1) a total deprivation of counsel; (2) a biased trial judge; (3) the denial of a defendant’s right to represent himself at

presumption against finding “structural errors” where “‘the defendant had counsel and was tried by an impartial adjudicator,’”<sup>185</sup> the Solicitor General effectively ruled out ascertaining structural errors even when “very serious constitutional errors in the presentation of the case to the jury” occurred at trial, provided at least that the errors stood “amenable to case-specific analysis for prejudice.”<sup>186</sup>

In *Calhoun*, the Solicitor General treated the prosecutor’s admittedly “improper suggestion that African-American and Hispanic persons gathered together in a room with a large amount of cash would likely be engaged in a drug deal” as a case-specific error related to the “presentation of the case to the jury,” but unrelated to the “overall framework” of the trial.<sup>187</sup> This overarching framework, the Solicitor General stressed, situated the prosecutor’s “plain” error in the context of the trial as a whole in order to determine whether it had a “sufficiently adverse effect” on Calhoun’s substantial rights actually to “cast serious doubt on the correctness of the jury’s verdict” and, hence, warrant reversal.<sup>188</sup> Notwithstanding the prosecutor’s admittedly “egregious” misjudgment, the Solicitor General concluded that the error proved “amenable to analysis in light of the nature and effect of the improper comment in the context of the entire evidentiary presentation.”<sup>189</sup> To conclude otherwise, according to the Solicitor General, would create “a broad new category of structural-error cases that would require automatic reversal when a prosecutor makes improper racial remarks without a showing that such remarks affected a defendant’s substantial rights.”<sup>190</sup>

### III. OBJECTIONS TO RACE TALK

“This Court should send a message to all prosecutors in the United States that such foul, racial stereotypes have absolutely no place in American court-rooms.”<sup>191</sup>

Previously, in studying the contemporary use and misuse of race talk in

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trial; (4) a violation of a defendant’s right to a public trial; (5) racial discrimination in the selection of the grand jury; (6) an erroneous instruction on reasonable doubt that affected all of a jury’s findings; and (7) the denial of the right to be represented by retained counsel of choice. *Id.*; see, e.g., *Chapman v. California*, 386 U.S. 18, 23-24, n.8 (1967); *Wash. v. Recuenco*, 548 U.S. 212, 219 (2006); *Neder v. United States*, 527 U.S. 1, 7 (1999); *Greenway v. Schriro*, 653 F.3d 790, 805 (9th Cir. 2011); *Rosencrantz v. Lafler*, 568 F.3d 577, 589 (6th Cir. 2009).

185. Brief for the United States in Opposition, *supra* note 173, at \*9 (quoting *United States v. Marcus*, 560 U.S. 258, 258-59 (2010)).

186. *Id.* at \*10 (citation omitted).

187. *Id.*

188. *Id.* at \*15-16. The Solicitor General reasoned that “the prosecutor’s statements were ‘isolated,’ the effect of the statements was ‘mitigated’ by the court’s instructions to the jury, and the totality of the evidence against petitioner was ‘strong.’” *Id.* at \*15-17.

189. *Id.* at \*11.

190. *Id.* at \*13.

191. Petition for Writ of Certiorari at 4, *Calhoun v. United States*, 133 S. Ct. 1136 (2013) (No. 12-6142).



advocacy, I have argued that both prosecutors and defenders should work to develop a primer or toolkit to challenge explicit and implicit courtroom expressions of racism without impairing or risking the best interests of their individual and organizational clients.<sup>192</sup> A useful starting point for the development of a toolkit of color- and race-conscious courtroom objections, coupled with an alternative law school classroom and clinical pedagogy, is to investigate the culture, language, social setting, and spatial geography of the courtroom itself.<sup>193</sup> A fair investigation raises numerous questions. For example, does the courtroom or courthouse mark people of color as inferior? Are explicit or oblique forms of race talk voiced in court by lawyers, judges, litigants, or courtroom personnel? Do lawyers or judges object to race talk in confronting arrests, searches and seizures,<sup>194</sup> and prosecutorial charging decisions, in conducting jury selection and witness examination, or in making statements at trial and arguments on appeal? Paradoxically, race-conscious questions of this sort entangle lawyers in doctrinal, procedural, and evidentiary rules as well as in strategic and ethical considerations fashioned initially to channel criminal justice advocacy towards colorblind or race-neutral forms of representation and adjudication.<sup>195</sup> Those guiding rules and considerations function to identify incidents, and to frame claims, of discrimination. Well-illustrated by the frequently stymied regulation of peremptory challenges during civil and criminal jury selection,<sup>196</sup> at best the guidelines operate inconsistently and govern unreliably, affecting only a limited portion of the trial process.<sup>197</sup> Blinkered by race-neutral conventions, trial-based incidents of bias and discrimination consequently tend to be treated as isolated occurrences (i.e., stray remarks) and resulting race-based claims tend to be framed narrowly (i.e., case rather than class specific). The literature of criminal justice defense, civil rights litigation, clinical education, trial advocacy, and Critical Race Theory has been slow to develop methods of aggregating and generalizing incidents of discrimination not only in bounded arenas like the

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192. Alfieri & Onwuachi-Willig, *supra* note 3, at 1544.

193. *See id.* at 1544-45. *See generally* JUDITH RESNIK & DENNIS E. CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 25, 91-105, 134-92 (2011).

194. Alfieri & Onwuachi-Willig, *supra* note 3, at 1545-46.

195. *Id.*

196. *See* *Batson v. Kentucky*, 476 U.S. 79, 83-84 (1986) (criminal trials); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616-17 (1991) (civil trials); *see also* Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 LAW & HUM. BEHAV. 261, 263 (2007).

197. *See* Leonard L. Cavise, *The Batson Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 504-05 (1999); Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1830 (1993); Sheri L. Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 59 (1993).

school-to-prison pipeline,<sup>198</sup> but also in expansive fields like environmental justice.<sup>199</sup> The same literature has been halting in its attempts to widen the scope of bias and discrimination claims to include fuller accounts of client and community identity encompassing race, gender, class, and sexuality, for example, in the field of marriage equality.<sup>200</sup>

Forging innovative methods of identifying and framing discrimination claims requires a collaborative or integrative client- and community-based practice of lodging objections that differentiates affirmative, race-conscious objections from both colorblind, race-neutral objections and veiled, race-coded objections. Differentiation hinges on recognizing the tendency of race-neutral objections to deny the legitimacy and utility of racial analysis and the tendency of race-coded objections<sup>201</sup> to rely covertly on, and even to reproduce, racial stereotypes. The overt denial of the socio-legal relevance of race and the covert reliance on the socio-legal stigma of racial stereotype in opposing civil rights claims and in making criminal guilt/innocence determinations contrast sharply with the open embrace of changing racial conceptions revealed in law, culture, and society under an alternative professional regime of race-conscious objections. Predicated on the cognitive and interpretive relevance of race to the advocacy process and to the culture and sociology of law, that shifting embrace affects majority and minority lawyers in different and unpredictable ways.<sup>202</sup>

#### A. THE *CALHOUN* DEFENSE TEAM

For the *Calhoun* legal defense team on appeal, race-conscious categories framed each of the two questions presented to the Supreme Court. First, “[w]hether it is fundamental or structural error not amenable to meaningful review for the Government to resort to racial prejudice or stereotypes as an indicia of guilt[.]” And second, “[i]f it is not structural error, is it always plain error for the Government to interject racial stereotypes into a trial in order to show the defendant’s guilt?”<sup>203</sup> Both questions arise out of the prosecutor’s

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198. Progress in combating the school-to-prison pipeline in public education comes out of traditional social reform movements. See, e.g., CATHERINE Y. KIM, DANIEL J. LOSEN, & DAMON T. HEWITT, *THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM* 34-50 (2010) (laying groundwork for asserting school-to-prison pipeline discrimination claims).

199. In the field of environmental justice, important work is emerging across disciplines. See, e.g., ROB NIXON, *SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR* 233-62 (2011) (linking environmentalism to postcolonialism); Sarah Lashley & Dorceta E. Taylor, *Why Can't They Work Together? A Framework for Understanding Conflict and Collaboration in Two Environmental Disputes in Southeast Michigan*, in *ENVIRONMENT AND SOCIAL JUSTICE: AN INTERNATIONAL PERSPECTIVE* 409-49 (Dorceta E. Taylor ed., 2010) (studying racially and geographically discrete communities).

200. For a fuller account of client and community identity in the field of marriage equality, see Russell K. Robinson, *Marriage Equality and Postracialism*, 61 *UCLA L. REV.* 1010, 1035-67 (2014).

201. Alfieri & Onwuachi-Willig, *supra* note 3, at 1547-48.

202. See *id.* at 1548-50.

203. Petition for Writ of Certiorari, *supra* note 191, at \*7.

remarks on cross-examination and in closing argument.<sup>204</sup> Together the remarks provided a springboard for Calhoun's defense team to argue that racial and ethnic stereotypes, and race and ethnicity more generally, "have no place in criminal trials" except in "limited" cases.<sup>205</sup> For the *Calhoun* defense lawyers, the prosecutorial use of such racial stereotypes in judicial forums, here embodied in the Government's assertion "that when you have African-Americans around Hispanics in the presence of large sums of money, it must be a drug deal[.]" in fact "*always* violates the defendant's rights under the Due Process Clause and the Equal Protection Component of the Fifth Amendment[.]"<sup>206</sup>

The *Calhoun* defense team's race-conscious reasoning shaped its factual claim that federal prosecutors acted deliberately to inject racial prejudice and stereotype as indicia of Bongani Calhoun's guilt at trial. That claim, in turn, informed its legal contention that the trial prosecutor's racialized injection constituted structural error not amenable to meaningful review, warranting automatic reversal and prosecutorial misconduct review for the use of unconstitutional racial tactics.<sup>207</sup> The same reasoning animated the defense team's contention that it is always plain error for prosecutors to interject racial stereotypes into a criminal trial in order to show the defendant's guilt<sup>208</sup> not merely because the error affects the substantial right of the accused to be tried fairly on the merits of adduced evidence, but further because the "injection of racial stereotypes into criminal trials affects the integrity or public reputation of judicial proceedings."<sup>209</sup>

Although Justice Sotomayor and Fifth Circuit Judge Catharina Haynes diverged from the defense team's explicit racial reading of the record in *Calhoun* and reached similar results in voting to uphold Judge Hudspeth's district court decision, their reasoning converged in significant part with the defense team's race-conscious explication of Calhoun's experience of discrimination at trial, particularly what others have described as the "isolation and humiliation" and "feeling of hopelessness incited by [the trial prosecutor's] racially prejudiced comment."<sup>210</sup>

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204. *Id.* at \*3.

205. *Id.* at \*4 ("For example, it goes without saying that a description of a perpetrator or victim would include race. Race would be relevant for an African-American to rebut allegations he was a member of the Aryan Brotherhood.").

206. *Id.* (emphasis in original) (citation omitted).

207. *See id.* at \*4-5 (citations omitted).

208. *Id.* at 7-8.

209. *Id.* ("Petitioner asserts that racial or ethnic stereotypes have no place in the American criminal justice system. He further asserts that this Court should take this opportunity to make that perfectly clear to everyone in the Department of Justice.").

210. Veronica Couzo, *Sotomayor's Empathy Moves the Court a Step Closer to Equitable Adjudication*, 89 NOTRE DAME L. REV. 403, 420 (2013) ("The influence of her experience living as a minority allowed her to easily assume the viewpoint of those in Calhoun's situation."). On empathy and emotion in judging, see Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997 (2010); Susan A.

## B. THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

On appeal to the Fifth Circuit, Judge Haynes joined the panel's majority *per curiam* opinion affirming the trial court judgment of Calhoun's conviction and sentence, yet added her own concurring opinion "to express deep concern about [the prosecutor's] conduct."<sup>211</sup> The Fifth Circuit's *per curiam* opinion held that Calhoun failed to demonstrate that the prosecutor's remarks "cast serious doubt on the correctness of the jury's verdict[.]" and, therefore, failed to satisfy his burden under the plain error standard of review.<sup>212</sup> The Fifth Circuit opinion enumerated three ostensibly race-neutral reasons for its assessment of Calhoun's failure to discharge his plain error burden: the form and content of the prosecutor's remarks, their prejudicial effect, and the presence of strong, countervailing evidence of guilt.

First, as to form, the Fifth Circuit opinion noted that the "improper racial overtone" of the prosecutor's question stood "isolated" from the bulk of the cross-examination and, furthermore, pointed out that "the prosecutor moved on to another line of questioning after Calhoun responded negatively to the question."<sup>213</sup> As to content, the opinion observed that the prosecutor's rebuttal remarks at closing argument "were made in response to defense counsel's reference of the question and focused on the presence of the large sum of money rather than the race of the participants."<sup>214</sup>

Second, as to the prejudicial effect of the prosecutor's remarks, the Fifth Circuit opinion found that any adverse or harmful impact "was mitigated by the district court's instruction to the jury that the statements and arguments of the attorneys were not evidence and that the verdict must be based only on the evidence."<sup>215</sup> The opinion added that, "the district court had also ensured during jury selection that no juror felt that he or she would be influenced by the fact that Calhoun was African-American."<sup>216</sup>

Third, as to evidence of guilt, the Fifth Circuit opinion commented that "the evidence against Calhoun was strong," citing the testimony of several witnesses that "indicated" Calhoun "was a knowing participant in the drug transaction."<sup>217</sup> Moreover, the opinion cited Calhoun's own testimony "that the other participants knowingly displayed over \$400,000 in cash in front of him and brought him to

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Bandes, *Moral Imagination in Judging*, 51 WASHBURN L.J. 1, 24 (2011); Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944 (2012); Robin West, *The Anti-Empathic Turn*, in PASSIONS AND EMOTIONS 243, 244, 246 (James E. Fleming ed., 2012).

211. *Calhoun*, 478 Fed. App'x at 194, 196.

212. *Id.* at 194-95.

213. *Id.* at 195.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

the scene of their planned drug purchase.”<sup>218</sup>

Despite her endorsement of the Fifth Circuit’s three-tiered reasoning in Calhoun, Judge Haynes’ concurring opinion advanced a discernibly race-conscious analysis of the prosecutor’s trial conduct and its prejudicial impact. Predictably, as a starting point, she reiterated a traditional tenet of race-neutrality, stating: “it should be very clear (certainly to a lawyer licensed thirty-seven years in Texas) that such racially-charged comments are completely inappropriate for any lawyer.”<sup>219</sup> However, she quickly departed from a strictly race-neutral critique to establish that race and the injury of racial stigma were relevant categories of legal analysis in criminal cases, as here. She observed: “It is hard to think of a more foul blow than implying that the race or national origin of a group of people has anything to do with whether Calhoun should have known they were involved in dealing drugs.”<sup>220</sup> Next, Haynes reverted back to a traditional race-neutral stance, asserting that, “it is particularly inappropriate for an Assistant United States Attorney—a prosecutor—to behave this way.”<sup>221</sup> Widening her criticism, she complained that “it should trouble the Assistant United States Attorney in question and all those in his office not just that he said such a thing, but that he thought it.”<sup>222</sup> The higher obligation and title of “prosecutor,” she exclaimed, “demands better.”<sup>223</sup> Last, extending her critique to the organizational setting of the federal prosecution function, Haynes returned to a forceful, race-conscious articulation of the injury of racial stigma in criminal cases, decrying “how the United States Attorney’s Office has handled this matter,” denouncing its “cavalier approach to this situation,” its lack of “[a]n apology . . . in the briefing,” and its expressed “doubt” that the question at stake “crossed the line.”<sup>224</sup> Deliberately mixing race-neutral and race-conscious norms, Haynes declared: “Let me clear up any confusion—the question crossed the line. I hope I will not have to say this again.”<sup>225</sup> Notwithstanding the sharp reproof dispensed by Justice Sotomayor and Judge Haynes, their concordant reasoning imposes a heavy burden on race-conscious advocates and defenders seeking to demonstrate

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218. *Id.*

219. *Id.* at 196 (citing TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 5.08).

220. *Id.*

221. *Id.* (citing *Berger v. United States*, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done . . . . He may prosecute with earnestness . . . [b]ut, while he may strike hard blows, *he is not at liberty to strike foul ones.*”) (emphasis in original); TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 3.09, cmt. 1 (“A prosecutor has the responsibility to see that justice is done, and not simply to be an advocate.”)). Judge Haynes added: “Prosecutors are held to a higher standard than even the high professional standards applicable to all attorneys.” *Calhoun*, 478 Fed. App’x at 196.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

plain or structural error.<sup>226</sup> Discharging that burden requires a commitment to race-conscious norms and an integration of race-conscious advocacy strategies at trial and on appeal.

### C. INTEGRATING RACE-CONSCIOUSNESS

Drawing on both race-neutral and race-conscious lines of inquiry and categories of description, Haynes' shifting legal and ethical analysis demonstrates the pervasive hold of race-neutrality on the judicial imagination<sup>227</sup> and the difficulty of integrating openly race-conscious reasoning into the traditional discourse of civil rights and criminal law advocacy and adjudication. The integration of race-conscious reasoning into civil rights and criminal law advocacy entails "the recognition of difference in the racial content, performance, and presentation of cases, clients, and communities of color."<sup>228</sup> Such recognition requires confronting and naming race in the lawyering and criminal justice process, and recasting racial identity and narrative in the defense of clients and communities of color.<sup>229</sup> The purpose of naming and renaming race is not only to negate damaging stereotypes, but also to intervene in order to safeguard equal justice through unambiguously race-conscious legal-political practices.<sup>230</sup>

To a limited extent, Haynes' concurring opinion coupled with Sotomayor's statement respecting the denial of the instant petition for writ of certiorari and the *Calhoun* defense team's trial arguments and appellate briefs afford the opportunity to sketch the outline of a race-conscious primer or toolkit for civil rights advocates and criminal defense lawyers, and equally so, for civil rights and criminal law faculty in law school classrooms and community clinics. The toolkit enables advocates and defenders seeking to challenge harmful adversarial race talk, without compromising the best interests of their clients, to pursue

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226. On the evidentiary burdens and doctrinal frameworks of harmless and structural error analysis, see ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 37-51 (1970); David McCord, *The "Trial"/"Structural" Error Dichotomy: Erroneous, and Not Harmless*, 45 U. KAN. L. REV. 1401, 1403-16 (1997); Charles J. Ogletree, Jr., *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 157-58 (1991); Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 82-83 (1988).

227. *Cf. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787-88 (2007) (Kennedy, J., concurring in part and concurring in the judgment) ("The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. The plurality's postulate that '[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race' is not sufficient to decide these cases." (alteration in original) (citation omitted)).

228. Alfieri & Onwuachi-Willig, *supra* note 3, at 1553.

229. *Id.*

230. *See id.* at 1554-56; *cf. Ariela J. Gross, From the Streets to the Courts: Doing Grassroots Legal History of the Civil Rights Era*, 90 TEX. L. REV. 1233, 1239-49 (2012) (reviewing TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* (2010) (commenting on the relationship among law, politics, and social change from the 1940s through the 1970s, and the complex negotiations and confrontations among different segments of the black community and the white community).

race-conscious strategies of advocacy and ethics. Unconstrained by the race-neutral and race-coded conventions of traditional trial and appellate practice, the strategies view racial bias and discrimination as deep-seated, structural conditions entrenched in law, culture, and society rather than as isolated, haphazard occurrences linked to unintentional stray remarks or misdirected organizational behavior. On this view, the trial or appellate interjection of racial stereotypes disparaging of parties, witnesses, and victims for the purpose of swaying determinations of credibility or guilt *always* violates the due process guarantees and the equal protection components of the Fifth and Fourteenth Amendments to the U.S. Constitution,<sup>231</sup> and moreover, *always* taints the integrity and public reputation of judicial proceedings.

Struggling to fashion vehicles for remedying and deterring the use of racial epithets (i.e., “slurs”) in the adjacent criminal context of capital punishment, Sheri Lynn Johnson, John Blume, and Patrick Wilson, urge the wholesale eradication of such epithets from the criminal process through the adoption of a *per se* approach to trial and appellate court regulation.<sup>232</sup> According to their multi-step approach, “[w]hen a (1) decisionmaker in a (2) criminal case uses a (3) racial epithet to address, describe, or refer to (4) the defendant, or in the case of a lawyer, other defendants he or she contemporaneously represented or prosecuted, and the defendant raises the resulting claim at (5) the first opportunity after he discovers the use of the epithet, the defendant’s (6) conviction should be reversed.”<sup>233</sup> Under this clear-cut, reflexive approach, a “decisionmaker” includes prosecutors, defense lawyers, jurors, and judges, though not witnesses.<sup>234</sup>

Like Johnson, Blume, and Wilson, race-conscious advocates and defenders seeking to cast serious doubt on the correctness of jury verdicts contaminated by racial stereotypes and to meet the *Calhoun* burden of demonstrating plain or structural error on appeal must direct their timely objections to the form and content of prejudicial remarks. Unlike Johnson, Blume, and Wilson, however, those advocates and defenders also must carefully explicate the adverse effect of such remarks on the accused and the trier of fact, especially in the case of a jury. And they must marshal the evidentiary record as a whole in weighing the full import of those remarks.

Despite efforts to meet the heavy burden in *Calhoun*, to lodge timely objection, and to adduce full and fair evidence of harm, race-conscious advocates and defenders will make slow progress in casting an alternative canon or vision of the prosecution and defense function in civil rights and criminal cases from the procedural and substantive elements wrought by *Sotomayor*. For *Sotomayor*, the question is not *whether lawyers should object to race*, rather the question is *when*

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231. See U.S. CONST. amends. V, XIV, § 1.

232. See Johnson, Blume, & Wilson, *supra* note 26, at 782.

233. *Id.*

234. *Id.* at 782-83.

to *object* and, moreover, *how to object*. On the timing of the objection, Sotomayor points to the presence of a “racially charged” remark as the trigger for lawyer intervention, yet she furnishes only vague categorical guidance on spotting the mutable form and grasping the variable substance of such remarks. When is a remark “racially charged”? Sotomayor offers no answer beyond implicit references to common sense, institutional history, and professional intuition. On the manner of objection, Sotomayor supplies even less guidance presuming a race neutral, mechanically facile trial and appellate lawyering process belied by the racialized, adversarial inequality of the criminal justice system and, oftentimes, by the hard fought struggle of civil rights advocates and criminal defenders of color to rise to a professional station in the courtroom<sup>235</sup> and to survive in an embattled professional culture of racial privilege prevalent in the bar and bench.<sup>236</sup> How then best to time and to summons an objection to a “racially charged” remark? Sotomayor again provides no answer. Moreover, she makes no mention at all of legal education and training, no extensive citation to professional regulation, and no explanatory reference to the culture, sociology, and politics of the legal profession.

Because of the limitations of Sotomayor’s account, race-conscious advocates and defenders must search broadly in an attempt to resituate discrete incidents of prosecutorial race talk in their larger institutional contexts where they may prove more susceptible to systemic regulation, oversight, and enforcement. Within these contexts stands the “managerial authority” of courts, governmental entities (e.g., the Office of the Solicitor General and the U.S. Department of Justice), and bar associations charged by statute or enabling legislation with the institutional responsibility of supervising line prosecutors and ensuring conformity with state and federal rules of professional conduct.<sup>237</sup> Multi-pronged in design, this enlarged institutional focus enables lawyer, judicial, and legislative alliances as well as community group coalitions to remedy prosecutorial race talk not only by urging judicial sanctions, disciplinary referrals, and court- or institution-wide monitoring, but also by engaging in outreach directed towards prosecutors, judges, and legislators of color in order to forge affirmative grassroots, equal justice campaigns. The task of internal and external institutional monitoring provides abundant opportunities for anecdotal or empirical data collection on the pervasiveness of courtroom race talk ideal for law school classroom field studies

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235. See SUSAN D. CARLE, *DEFINING THE STRUGGLE: NATIONAL ORGANIZING FOR RACIAL JUSTICE, 1880-1915* (2013); KENNETH W. MACK, *REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER* (2012).

236. See DEVON W. CARBADO & MITU GULATI, *ACTING WHITE? RETHINKING RACE IN POST-RACIAL AMERICA* (2012); DOROTHY H. EVENSEN & CARLA D. PRAIT, *THE END OF THE PIPELINE: A JOURNEY OF RECOGNITION FOR AFRICAN AMERICANS ENTERING THE LEGAL PROFESSION* (2012).

237. See MODEL RULES OF PROF’L CONDUCT R. 5.1(a) cmt. 1 (2013) (defining the responsibility of partners, managers, and supervisory lawyers in law firms and government agencies); ABA Standing Comm. on Ethics & Prof’l Responsibility, Formal Op. 467 (2014) (describing the managerial and supervisory obligations of prosecutors under Model Rules 5.1 and 5.3).



and clinical or externship research projects.

Absent these efforts, too often, as in *Calhoun*, the prosecutorial question or remark at issue will be judged isolated, peripheral or even provoked. Likewise, as in *Calhoun*, too often the harmful impact of the remark will be deemed mitigated by the district court's jury selection methods or charging instructions. Similarly, as in *Calhoun*, too often the gravity of the remark will be considered overshadowed by larger, compelling evidence of the accused guilt. As the outcome in *Calhoun* demonstrates, long-delayed predominantly race-neutral denunciations of racially charged prosecutorial comments will neither prevent nor cure the damage of racial stigma suffered by defendants and victims in criminal cases. Once the "foul blow" of discrimination is struck at trial, its repercussions for the accused, for the victim, and for their affiliated communities will not be rectified or saved by a prosecutorial apology. Lines crossed will never be uncrossed.

### CONCLUSION

As America's inner-city streets and criminal courts await the new post-racial century of equal justice, low-income communities of color, particularly their vulnerable young men, continue to suffer the discrimination, indignity, and curtailed liberty that accompany stigmatizing images and narratives of racial identity. These racialized cultural and social constructions are seen, heard, and spoken by prosecutors, criminal defense lawyers, and judges in run-of-the-mill and high profile cases across the nation. Their institutionally shared race talk molds part of the daily socio-legal discourse typical of contemporary civil rights and criminal trials in federal and state courts.

For more than half a century, bar associations, courts, and legislatures have labored to regulate the use of race talk in civil rights and criminal cases only to falter in describing its varied race-neutral, race-coded, and race-conscious forms, and to flounder in prescribing the scope of its permissible use consonant with professedly colorblind governing legal ethics rules and standards. The continuing descriptive and prescriptive inability, or perhaps unwillingness, to fully define and to effectively regulate race talk in the courtroom and in advocacy more generally presents significant normative and strategic challenges for prosecutors, defenders, and judges committed to racial justice values and race-conscious professional ethics.

In my own work over two decades, I have investigated those challenges through case studies of the prosecution and defense of black and white offenders in the criminal justice system, and case studies of individuals and communities of color in civil rights litigation and in allied grassroots, political action campaigns. Carving out a common pathway, the studies have examined the meaning of racial identity and narrative, the trial and retrial of race cases, the relationship between race and ethics, the impact of racial and ethnic differences on civil rights and

criminal trials, and the interrelationship between race and community. Albeit limited in scope, this Essay extends that pathway, revisiting core civil rights and criminal justice issues in light of Justice Sotomayor's surprising recent pronouncements in *Calhoun v. United States*. Here, as before, the purpose of the project is to transform the pedagogy and practice of civil rights and criminal law inside American courtrooms and law school classrooms, as well as outside in the offices of prosecutors, public defenders, and law school community clinics. Like Bongani Charles Calhoun, that transformation too awaits the post-racial century.

