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Objecting to Race

Anthony V. Alfieri
University of Miami School of Law, aalfieri@law.miami.edu

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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?’” 1

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* Dean’s Distinguished Scholar, Professor of Law and Director, Center for Ethics and Public Service, University of Miami School of Law, Visiting Scholar, Dartmouth College Ethics Institute, and Visiting Professor, Brown University Department of Africana Studies. For their comments and support, I am grateful to Paul Butler, Tucker Carrington, Greg Cooper, Scott Cummings, Aine Donovan, Zanita Fenton, Michael Frisch, Amelia Hope Grant-Alfieri, Ellen Grant, Bruce Green, Jan Jacobowitz, Catherine Kaiman, Tamara Lave, Abbe Smith, Scott Sundby, and Ellen Yaroshefsky. I also wish to thank Robin Schard, Daniel Butler, Kelly Cox, Adrian Barker Grant-Alfieri, Jennifer Lefebvre, Leslie Pollack, Eryca Schiffman, Josiah Wolfson, and the University of Miami School of Law library staff for their research assistance, as well as Meg Parker, Brittany Brown, and Ariel Bibby of the Georgetown Journal of Legal Ethics for their editorial wisdom and patience. © 2014, Anthony V. Alfieri.

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. For low-income communities of color, and young Black 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 not only in describing its various race-neutral, race-coded, and race-conscious forms, but also in prescribing the scope of its permissible use under legal ethics codes and standards, judicial rules, and statutes. 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.


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.


9. See 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”).


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\(^\text{12}\) and defense\(^\text{13}\) of black and white offenders in the criminal justice system and case studies of individuals and communities of color in civil rights litigation.\(^\text{14}\) The studies have analyzed the meaning of racial identity and narrative,\(^\text{15}\) the trial\(^\text{16}\) and retrial\(^\text{17}\) of race cases, the relationship between race and ethics,\(^\text{18}\) the impact of racial and ethnic differences on civil rights and criminal trials,\(^\text{19}\) and the interconnections of race and community.\(^\text{20}\) 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


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. 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.

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. 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.”

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. In lexical terms, race talk sounds in epithets, colloquial speech,
and coded idioms. In performative and visual terms, it conjures up images and engenders practices which influence behavior, cognition, and interpretation. Rooted in conscious, unconscious, or implicit bias, race talk often intersects with other categories of bias, including ethnicity and gender. The intersection


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).


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

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

\begin{itemize}
\item See State v. Monday, 257 F.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”). \textit{Cf.} United States v. Cannon, 88 F.3d 1495, 1502-03 (8th Cir. 1996); Tannehill v.
“niggeritous,” distinguishing “white” men as witnesses, “white” women, and “white” neighborhoods from their black cohorts, and invoking “nature” and “innate” instinct to rationalize key prosecutorial decisions in pretrial, trial, and appellate proceedings.

Similarly, jurors hear and speak in racial tones. 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.” 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.” 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.”

Like prosecutors, criminal defense lawyers employ race talk. To win acquittal, urge nullification, or mitigate punishment, defenders talk of race, culture, and perceptions of nature.

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.”).


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.”).


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).


group status, and systemic bias. And like prosecutors, their talk pervades both routine public defender cases and prominent death penalty cases. 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 recognizes the presence of race, for example in the area of search and seizure, yet posits claims of neutrality. Bound to anti-classification commitments and apprehensive about race-based segregation and separatism, race-neutral talk offers analytic silence and remedial

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).
57. See Justin Driver, Recognizing Race, 112 Colum. L. Rev. 404, 450-56 (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).
inaction when confronted with racialized conduct in law and society.\textsuperscript{63} Color- or race-coded talk,\textsuperscript{64} by comparison, deals with race through veiled stereotypes\textsuperscript{65} illustrated in drug prosecutions,\textsuperscript{66} party identification\textsuperscript{67} and profiling disputes,\textsuperscript{68} religious affiliation,\textsuperscript{69} and even geographical associations.\textsuperscript{70} Race-conscious talk, in contrast, discerns extant racial consciousness in law\textsuperscript{71} and in the social and political construction of color among individuals, groups, and communities.\textsuperscript{72} To exploit, and at times to thwart, bias in criminal trials, prosecutors,\textsuperscript{73} defenders,\textsuperscript{74} and judges\textsuperscript{75} repeatedly embrace in whole or in part a color-conscious ethic of advocacy and adjudication. However partial, their embrace signals the possible


\textsuperscript{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).


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


\textsuperscript{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).


\textsuperscript{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 or a modified vision of racialism. 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. In Calhoun, the Supreme Court denied the petition of Bongani Charles Calhoun, a black convicted felon, for a writ of certiorari. 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.” Unequivocally, she announced: “It should not.”

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.” The primary issue at trial, she explained: “was whether

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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.\textsuperscript{83} 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.”\textsuperscript{84} 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.”\textsuperscript{85} 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.”\textsuperscript{86}

Having crystallized 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.\textsuperscript{87} 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.”\textsuperscript{88} 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.’”\textsuperscript{89} 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.”\textsuperscript{90} 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?’”\textsuperscript{91}

Without hesitation, Sotomayor defined the prosecutor’s question as “racially

\textsuperscript{83} Calhoun, 133 S. Ct. at 1136. Sotomayor added: “Two alleged co-conspirators who had pleaded guilty testified to Calhoun’s knowledge.” \textit{Id.}
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} \textit{Id.}
\textsuperscript{89} \textit{Id. (citing Trans. 125-126 (Mar. 8, 2011)).}
\textsuperscript{90} \textit{Id.}
\textsuperscript{91} \textit{Id. (emphasis added).}
charged” in content. She also pointedly identified Calhoun as African-American, parsing his claim that “the prosecutor’s racially charged question violated his constitutional rights.” At the same time, she highlighted the fact that Calhoun’s counsel “[i]nexplicably . . . did not object to the question at trial.” As a result, she explained, Calhoun’s petition for writ of certiorari came to the Supreme Court 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.’” Sotomayor made clear, however, that Calhoun’s petition declined even to “attempt” that showing. 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.” 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.” 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.

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.” 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.” 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.” Third, she adverted to the “settled professional standard that a ‘prosecutor should not make arguments

92. Id.
93. Id.
94. Id.
95. Id. at 1136-37.
97. Id. at 1137.
98. Id.
99. Id.
100. Id.
101. Id. (citing McCleskey v. Kemp, 481 U.S. 279, 309 n.30 (1987)).
102. Id. (citing 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.”

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.” 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 or invoked racial epithets to inflame jury passions.

Although Sotomayor acknowledged that the prosecutor’s comment in Calhoun “was surely less extreme[,]” she underscored that it too was pernicious in its attempt to substitute racial stereotype for evidence, and racial prejudice for reason.

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.” That trial tactic, she insisted, “diminishes the dignity of our criminal justice system and undermines respect for the rule of law.” Contrary to long-standing expectations of the U.S. Government to seek justice in its criminal justice prosecutions, she added, such strategic calculations worked “to fan the flames of fear and prejudice.” 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.”

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.
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.”116 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[,]”117 and then “only after the Solicitor General waived the Government’s response to the petition at first, leaving the Court to direct a response.”118

Sotomayor offered equally robust criticism of Calhoun’s defense counsel, assailing his performance on the grounds of ineffective representation and ethical irresponsibility.119 She commented, for example, that Calhoun’s defense attorney failed to challenge or attack the prosecutor’s comment until closing argument.120 This oversight, she remarked, allowed the prosecutor to reprise his earlier cross-examination question on rebuttal at closing.121 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?”122

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.”)123 to less extreme questions, as here.124 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

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

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 insistently 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

“This summon that thirteenth juror, prejudice.”125

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,126 diminished capacity,127 culture,128 identity,129 and even “rotten social background”130 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)).
Although vulnerable to censure and disapproval on ethical,\textsuperscript{131} communitarian,\textsuperscript{132} and narrative\textsuperscript{133} grounds, race-based defenses find wide justification in the aggressive advocacy norms of the criminal defense function.\textsuperscript{134}

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.\textsuperscript{135} 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.\textsuperscript{136} 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?”\textsuperscript{137} On the issue of Calhoun’s sentence, the Government dissected the question whether Calhoun’s sentence was presump-


\textsuperscript{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).


\textsuperscript{135} See Alfieri & Onwuachi-Willig, supra note 3, at 1550.

\textsuperscript{136} See id. at 1551-53.

\textsuperscript{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.\textsuperscript{138}

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.\textsuperscript{139} 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.”\textsuperscript{140} To that end, the Government maintained, the prosecutor asked Calhoun
“what he thought the ‘this bag full of money was for.’”\textsuperscript{141} Calhoun briefly
replied: “It made me think I didn’t want to be [in that room].”\textsuperscript{142} Next the
prosecutor asked: “Did you think they were going to do something illegal?”\textsuperscript{143}
Calhoun responded: “I did not know.”\textsuperscript{144} 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:\textsuperscript{145}

\begin{quote}
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 Hispa-
nicos, 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?”
\end{quote}

\textsuperscript{138} Id.
\textsuperscript{139} See id. at *9-10.
\textsuperscript{140} Id. at *10-11 (citing R. 615-618).
\textsuperscript{141} Id. at *11 (citing R. 615).
\textsuperscript{142} Id. (citing R. 616).
\textsuperscript{143} Id. (citing R. 616).
\textsuperscript{144} Id. (citing R. 616).
\textsuperscript{145} Id. (citing R. 616).
A [DEFENDANT CALHOUN]: “No, sir.”

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

A [DEFENDANT CALHOUN]: “Yes, sir.”

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.” 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.”

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.” The instructions, the Government mentioned, included a “mere presence” instruction to the jury 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. 151 Within three hours of deliberation, the Government pointed out, “an unbiased, apparently predominantly Hispanic jury found Calhoun guilty as charged.” 152

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.” 153 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.” 154 Intent, knowledge, and participation, the Government observed, comprised “essential elements of the government’s case against Calhoun.” 155

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.” 156 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.” 157 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” 158 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.” 159 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 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.”).

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."\textsuperscript{160} The Government also noted that, “the prosecutor quickly moved to another line of questioning, and Calhoun’s negative response itself helped to dispel any \emph{theoretically prejudicial effect}.\textsuperscript{161}

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.”\textsuperscript{162} 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.”\textsuperscript{163} That effort, the Government contended, “le[]d the jury to conclude that Calhoun’s testimony was not credible and that he was a knowing participant in the drug conspiracy.”\textsuperscript{164}

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”\textsuperscript{165} and, accordingly, did not exceed the range of response necessary to “‘right the scale’ and “counteract the defense’s closing argument.”\textsuperscript{166} 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

\textsuperscript{160} Id. at *19-20.
\textsuperscript{161} Id. at *20 (emphasis added) (citing United States v. Fields, 483 F.3d 313, 358 (5th Cir. 2007)).
\textsuperscript{162} Id. at *16.
\textsuperscript{163} Id. at *21 (citing R. 657-58).
\textsuperscript{164} Id.
\textsuperscript{165} Id. at *20 (citing R. 657-58).
\textsuperscript{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.”

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.”

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 nor seriously affected the fairness, integrity, or public reputation of the trial, and therefore did not constitute reversible plain error.

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.

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.

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, 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-

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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.
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.175 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.”176

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.”177 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.178 Further, the Solicitor General claimed that Calhoun blundered in asserting that the “prosecutor’s improper racially tinged remarks constituted structural error requiring automatic reversal.”179

In its analysis of structural error,180 the Solicitor General’s Office conceded that the Supreme Court’s jurisprudence under Federal Rule of Criminal Procedure 52(b)181 “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.”182 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.183 By confining structural errors to “‘a very limited class of cases’” and “‘a handful of defects,’”184 and by erecting a strong evidentiary

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.”).
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," 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." 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. 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. 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.” 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.”

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 courtrooms.”

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

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.
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.\textsuperscript{192} 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.\textsuperscript{193} 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,\textsuperscript{194} 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.\textsuperscript{195} 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,\textsuperscript{196} at best the guidelines operate inconsistently and govern unreliably, affecting only a limited portion of the trial process.\textsuperscript{197} 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

\textsuperscript{192} Alfieri & Onwuachi-Willig, supra note 3, at 1544.

\textsuperscript{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).

\textsuperscript{194} Alfieri & Onwuachi-Willig, supra note 3, at 1545-46.

\textsuperscript{195} Id.


school-to-prison pipeline, but also in expansive fields like environmental justice. 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.

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 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.

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?” Both questions arise out of the prosecutor’s
remarks on cross-examination and in closing argument. 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. 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[.]”

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. 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 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.”

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.”

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.
ON APPEAL TO 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.” 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. 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.” 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.”

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.” 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.”

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.” 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..."
the scene of their planned drug purchase."

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.” 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.”

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.” 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.” The higher obligation and title of “prosecutor,” she exclaimed, “demands better.” 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.” 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.”

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

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.
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 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.” 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. 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.

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 Callhoun 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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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.

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, 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. 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.” Under this clear-cut, reflexive approach, a “decisionmaker” includes prosecutors, defense lawyers, jurors, and judges, though not witnesses. 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

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 and to survive in an embattled professional culture of racial privilege prevalent in the bar and bench.

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. 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.


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.