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THE YALE LAW JOURNAL

ANGELA ONWUACHI-WILLIG & ANTHONY V. ALFIERI

(Re)Framing Race in Civil Rights Lawyering

Stony the Road: Reconstruction, White Supremacy, and the Rise of Jim Crow

BY HENRY LOUIS GATES, JR.

PENGUIN PRESS, 2019

ABSTRACT. This Review examines the significance of Henry Louis Gates, Jr.'s new book, *Stony the Road: Reconstruction, White Supremacy, and the Rise of Jim Crow*, for the study of racism in our nation's legal system and for the regulation of race in the legal profession, especially in the everyday labor of civil-rights and poverty lawyers, prosecutors, and public defenders. Surprisingly, few have explored the relevance of the racial narratives distilled by Gates in *Stony the Road*—the images, stereotypes, and tropes that Whites constructed of Blacks to deepen and ensure the life and legacy of white supremacy—to the practice of law inside civil-rights and criminal-justice systems and, more generally, to critical theories of race, the persistence of racism, and race-conscious legal representation. To that end, this Review interrogates and reimagines how race should be situated in the legal representation of clients of color. Building upon Gates's discussion of the images and counternarratives created by Blacks as forms of resistance, it examines how those tools can be a means for galvanizing struggles against antiblack racism in the United States in the past and today.

Read from the intersection of theory and practice, Gates's *Stony the Road* offers several instructive lessons on race and legal representation germane to lawyers, judges, and academics. The first lesson is that the white-supremacist tropes, narratives, and images of the postbellum periods of Redemption and Jim Crow segregation continue to *frame* our legal consciousness of race, effectively shaping the roles, mediating the relationships, and organizing the methods of the lawyering process in civil-rights, poverty-law, and criminal cases. The second lesson is that the trials of these cases provide a forum for lawyers, judges, jurors, and even witnesses to *race-code* the identity of accused and convicted offenders, impoverished clients, and victims of discrimination in ways that reify those tropes and diminish the agency of individuals, groups, and communities of color. The third lesson is that the trial of such cases also affords lawyers and clients meaningful, collaborative opportunities to *reframe* race-coded identity and provide new visions of self, namings, and identities. Such reframing can recover the presence of black agency, enhance the exercise of black power, and contextualize the impact of systemic racism on individuals, groups, and communities as a whole.



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INTRODUCTION

The community at St. Paul's J.J. Hill Montessori School in St. Paul, Minnesota — students, parents, and employees alike — loved Philando Castile, a black cafeteria supervisor who made their days brighter with his warm and welcoming smile, who consistently encouraged the students he nourished every day with lunch to eat their “veggies,” and who affectionately became known to all as “Mr. Phil.”¹ Following Castile's premature and tragic death at the hands of Officer Jeronimo Yanez, J.J. Hill community members remembered the thirty-two-year-old son of Valerie Castile, boyfriend of Diamond Reynolds, and father figure to Dae'Anna, Reynolds's then-four-year-old daughter, with an abundance of memories and praises. They described Castile as nice, caring, smart, patient, quiet, generous, gentle, funny, soft-spoken, kind, respectful, cheerful, and even over-qualified for his position as a cafeteria supervisor.² Indeed, a headline from *Time* magazine communicated that Castile “was a role model to hundreds of kids.”³ Castile's former colleague at J.J. Hill, Joan Edman, a then-sixty-two-year-old retired paraprofessional, told a *Time* reporter that Castile was a hard worker who closely followed the rules. Edman explained that she had “never seen anybody take that kind of role so seriously. . . . He followed directions carefully.”⁴

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1. Maja Beckstrom, *How Parents Are Talking to Their Kids About Philando Castile's Death*, TWINCITIES: PIONEER PRESS (July 14, 2016, 5:16 PM), <https://www.twincities.com/2016/07/14/philando-castile-shooting-parents-talking-kids> [<https://perma.cc/6CR5-X3UK>].
 2. See Melissa Chan, *Philando Castile Was a Role Model to Hundreds of Kids, Colleagues Say*, TIME (July 7, 2016, 2:47 PM EDT), <https://time.com/4397086/minnesota-shooting-philando-castile-role-model-school> [<https://perma.cc/WQ4E-DCRZ>]; Bill Chappell, *Philando Castile Is Remembered by St. Paul Public Schools: 'Kids Loved Him,'* NAT'L PUB. RADIO (July 7, 2016, 1:31 PM EST), <https://www.npr.org/sections/thetwo-way/2016/07/07/485114263/philando-castile-is-remembered-by-st-paul-public-schools-kids-loved-him> [<https://perma.cc/3ULF-FHLE>]. The St. Paul Public School District, where Castile worked for fourteen years (since he was nineteen years old), provided the following statement in relevant part:

Colleagues describe him as a team player who maintained great relationships with staff and students alike. He had a cheerful disposition and his colleagues enjoyed working with him. He was quick to greet former coworkers with a smile and hug.

One coworker said, “Kids loved him. He was smart, over-qualified. He was quiet, respectful, and kind. I knew him as warm and funny; he called me his ‘wing man.’ He wore a shirt and tie to his supervisor interview and said his goal was to one day “sit on the other side of this table.”

Those who worked with him daily said he will be greatly missed.

Chappell, *supra*.

3. Chan, *supra* note 2.
4. *Id.*; see also *id.* (“The shooting death shocked Edman, 62, who said Castile was a dutiful worker who adhered to rules strictly.”).

From all accounts, everyone who had the great fortune of knowing Castile regarded him as an “exceedingly gentle and unfailingly kind man who did everything right.”⁵

Despite the realities of who Castile was as a person, on July 6, 2016, when Officer Jeronimo Yanez pulled Castile over in a traffic stop (for what would be around Castile’s fiftieth police stop in a little over a decade),⁶ Yanez simply could not see Castile as anything more than a racial stereotype. For Yanez, Castile was, as Henry Louis Gates, Jr. would say, “an already read text.”⁷ Although the officer had purportedly stopped Castile only because of a broken tail light,⁸ which by itself should not make any driver suspicious, the officer began his interactions

5. Ariel Scotti, *Philando Castile Left Behind Hundreds of Kids Who Loved Him at the School Where He Worked*, N.Y. DAILY NEWS (June 22, 2017, 12:49 PM), <https://www.nydailynews.com/news/national/philando-castile-left-behind-395-kids-loved-article-1.3269078> [<https://perma.cc/KWD5-5VDY>] (quoting a J.J. Hill parent).
6. Sharon LaFraniere & Mitch Smith, *Philando Castile Was Pulled over 49 Times in 13 Years, Ofien for Minor Infractions*, N.Y. TIMES (July 16, 2016), <https://www.nytimes.com/2016/07/17/us/before-philando-castiles-fatal-encounter-a-costly-trail-of-minor-traffic-stops.html> [<https://perma.cc/QAR8-4RFP>] (“In a 13-year span, Philando Castile was pulled over by the police in the Minneapolis-St. Paul region at least 49 times, an average of about once every three months, often for minor infractions.”); Eyder Peralta & Cheryl Corley, *The Driving Life and Death of Philando Castile*, NAT’L PUB. RADIO (July 15, 2016, 4:51 AM EST), <https://www.npr.org/sections/thetwo-way/2016/07/15/485835272/the-driving-life-and-death-of-philando-castile> [<https://perma.cc/AF8L-UJR2>] (“Of all of the [forty-six] stops, only six of them were things a police officer would notice from outside a car—things like speeding or having a broken muffler. The records show that Castile spent most of his driving life fighting tickets. Three months after that first stop [just before his nineteenth birthday], for example, his license was suspended and he went into his first spiral: Police stopped him on Jan. 8, 2003. They stopped him on Feb. 3 and on Feb. 12 and Feb. 26 and on March 4.” (emphasis added)); *Philando Castile Had Been Stopped 52 Times by Police*, CBS MINN. (July 9, 2016, 9:00 AM), <https://minnesota.cbslocal.com/2016/07/09/philando-stops> [<https://perma.cc/T4ZE-HV4H>] (“[Castile] was assessed at least \$6,588 in fines and fees, although more than half of the total 86 violations were dismissed, court records show.”).
7. HENRY LOUIS GATES, JR., *STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW* 132 (2019) (quoting Barbara Johnson, *The Critical Difference*, 8 *DIACRITICS* 2, 2 (1978) (book review)).
8. Just sixteen hours after the shooting, Officer Yanez offered the broken taillight as his reason for stopping Castile. Mark Berman, *What the Police Officer Who Shot Philando Castile Said About the Shooting*, WASH. POST (June 21, 2017, 5:22 PM EDT), <https://www.washingtonpost.com/news/post-nation/wp/2017/06/21/what-the-police-officer-who-shot-philando-castile-said-about-the-shooting> [<https://perma.cc/9A8J-YHSM>]. Days later, the officer changed his story, asserting that he stopped Castile because he fit the description of a suspect who had committed a robbery days earlier because Castile had a “wide-set nose.” Angela Bronner Helm, *Report: Philando Castile Was Pulled over Because He Matched Description of Suspect with ‘Wide-Set Nose,’* ROOT (July 10, 2016, 9:46 AM), <https://www.theroot.com/report-philando-castile-was-pulled-over-because-he-mat-1790855964> [<https://perma.cc/5XCM-EK4F>] (quoting Castile’s uncle as saying, “It’s kind of hard to see flared nostrils from a car”).

with Castile with deep suspicion of the black man he saw before him. Whether Yanez's racial biases were conscious or nonconscious, he began to feel apprehensive of Castile and read him as dangerous almost from the beginning. When Yanez first described his initial encounter with Castile, Castile's girlfriend Reynolds, and her daughter in the backseat, he explained:

I told them the reason for the traffic stop and then I wasn't going to say anything about the marijuana yet because I didn't want to scare him or have him react in a defensive manner. Um, he didn't make direct eye contact with me and it was very hard to hear him, Uh he was almost mumbling when he was talking to me. And he was directing his voice away from me as he was speaking and as I was asking questions. Uh he kept his hands in view and then I uh I believe I asked for, his license and insurance. And then I believe they told me, they asked for the reason for my traffic stop. And I told 'em the reason was the only, I think I told 'em the only rea, the reason I pulled you over is because the only active brake light working was the rear passenger side brake light.⁹

A close reading of Yanez's words illustrates how racial stereotyping must have shaped his perceptions of Castile, making him unable to see Castile—a dark-skinned black man with locs¹⁰ and, as Yanez would later describe, “a wide-

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9. Berman, *supra* note 8. Yanez “told investigators later that the marijuana smell remained in his mind, saying that because of the odor, he didn't know whether Castile had the gun ‘for protection’ from a drug dealer or people trying to rob him.” *Id.*
 10. See Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079, 1080 n.2 (2010) (asserting that “locs” consist of sections of hair that are “permanently locked together and cannot be unlocked without cutting” (quoting Shauntae Brown White, *Releasing the Pursuit of Bouncin' and Behavin' Hair: Natural Hair as an Afrocentric Feminist Aesthetic for Beauty*, 1 INT'L J. MEDIA & CULTURAL POL. 295, 296 n.3 (2005)); Angela Onwuachi-Willig, *Undercover Other*, 94 CALIF. L. REV. 873, 873 n.3 (2006) (defining locs). According to Shauntae Brown White, the term “loc” or “lock” is preferred to the term “dreadlock,” as “the term dreadful was used by English slave traders to refer to Africans hair, which had probably loc'd naturally on its own during the Middle Passage.” White, *supra*, at 296 n.3.

set nose”¹¹ — as anything other than dangerous and criminal.¹² For instance, the quiet and soft-spoken voice that J.J. Hill community members found to be one of Castile’s endearing qualities was heard by Yanez as the incoherent mumblings of a man with something to hide. Additionally, rather than viewing the actions that Castile — a black man who had been subject to police traffic stops on around fifty different occasions — was clearly engaging in to appear nonthreatening and thus be safe from any police violence as innocuous, Yanez viewed Castile’s conduct with grave distrust and fear. It did not matter that Castile’s actions read like a veritable script of “The Talk,” an intergenerational script of advice and warnings by black parents and nonblack parents of black children that is designed to prepare black kids for surviving the police stops they will encounter in our racist society.¹³ As Yanez explained in the quote above, Castile kept his “hands in

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11. Helm, *supra* note 8. At trial, retired Deputy Police Chief Jeffrey Noble testified on behalf of the prosecution. Describing Noble’s testimony about Yanez’s contention that he pulled Castile over because the “wide-set” nature of his nose marked him as a suspect, a reporter recounted that Noble asserted: “No other ‘reasonable’ officer would have considered Castile the suspect. (Authorities have said he wasn’t.)” Specifically, Noble emphasized: “I mean, hundreds of black men had to have driven by. . . . That’s absurd.” Chao Xiong, *Expert: Jeronimo Yanez’s Actions in Killing Philando Castile Were “Objectively Unreasonable,”* STAR TRIB. (June 8, 2017, 9:28 AM), <https://www.startribune.com/use-of-force-experts-expected-to-take-the-stand-in-jeronimo-yanez-trial-for-philando-castile-shooting/427033361> [<https://perma.cc/BG53-PATZ>].
 12. See Jennifer L. Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns & Sheri Lynn Johnson, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 383 (2006) (finding that, in white-victim cases, the more phenotypically black the defendant appears, the more likely jurors will sentence that person to death).
 13. Castile’s mother, Valerie, had “The Talk” with her son. See Michelle Garcia, *Philando Castile Did What His Mother Told Him to Do Around Police. A Cop Shot Him Anyway*, VOX (July 7, 2016, 1:30 PM EDT), <https://www.vox.com/2016/7/7/12119344/philando-castile-mother-valerie-castile> [<https://perma.cc/JY5B-5E9Q>] (noting that Castile “was given the same lecture so many black people in America hear at one point in their lives”); see also John Blake, *George Floyd. Ahmaud Arbery. Breonna Taylor. What Can Black Parents Possibly Tell Their Kids Now About Staying Safe?*, CNN (May 29, 2020, 12:39 PM ET), <https://www.cnn.com/2020/05/29/us/black-parents-children-safety-talk-blake/index.html> [<https://perma.cc/H8J9-6N9G>] (discussing how futile “The Talk” appears in light of the many recent police murders of innocent Blacks). After George Zimmerman killed Trayvon Martin in Sanford, Florida, Eric Holder, the nation’s first black Attorney General, introduced much of white America to the existence of “The Talk” with a moving speech about the sad tradition he was passing down to his son after Martin’s death. Attorney General Holder declared in relevant part:

Years ago, some of these same issues drove my father to sit down with me to have a conversation — which is no doubt familiar to many of you — about how as a young black man I should interact with the police, what to say, and how to conduct myself if I was ever stopped or confronted in a way I thought was unwarranted. I’m

view,”¹⁴ and Castile did not stare at him or make “direct eye contact” with him.¹⁵ Castile even politely warned the officer about the legally registered gun that he had in his possession,¹⁶ not as a means of alarming the officer (which it did), but

sure my father felt certain—at the time—that my parents’ generation would be the last that had to worry about such things for their children.

Since those days, our country has indeed changed for the better. The fact that I stand before you as the 82nd Attorney General of the United States, serving in the Administration of our first African American president, proves that. Yet, for all the progress we’ve seen, recent events demonstrate that we still have much more work to do—and much further to go. The news of Trayvon Martin’s death last year, and the discussions that have taken place since then, reminded me of my father’s words so many years ago. And they brought me back to a number of experiences I had as a young man—when I was pulled over twice and my car searched on the New Jersey Turnpike when I’m sure I wasn’t speeding, or when I was stopped by a police officer while simply running to a catch a movie, at night in Georgetown, in Washington, D.C. I was at the time of that last incident a federal prosecutor.

Trayvon’s death last spring caused me to sit down to have a conversation with my own 15 year old son, like my dad did with me. This was a father-son tradition I hoped would not need to be handed down. But as a father who loves his son and who is more knowing in the ways of the world, I had to do this to protect my boy. I am his father and it is my responsibility, not to burden him with the baggage of eras long gone, but to make him aware of the world he must still confront. This is a sad reality in a nation that is changing for the better in so many ways.

Garance Franke-Ruta, *Listening in on ‘the Talk’: What Eric Holder Told His Son About Trayvon*, ATLANTIC (July 16, 2013), <https://www.theatlantic.com/politics/archive/2013/07/listening-in-on-the-talk-what-eric-holder-told-his-son-about-trayvon/277861> [https://perma.cc/FF7C-KUPH] (quoting then-Attorney General Holder).

14. Berman, *supra* note 8 (quoting Yanez); see also Black Culture Connection, *Get Home Safely: 10 Rules of Survival*, PBS, https://www.pbs.org/black-culture/connect/talk-back/10_rules_of_survival_if_stopped_by_police [https://perma.cc/2HYY-TDDL] (“Keep your hands in plain sight and make sure the police can see your hands at all times.”).
15. Berman, *supra* note 8; see also Stacia L. Brown, *Looking While Black: When Eye Contact with Police Is Considered a Crime*, NEW REPUBLIC (Apr. 30, 2015), <https://newrepublic.com/article/121682/freddie-grays-eye-contact-police-led-chase-death> [https://perma.cc/64PB-BH9T] (reminding readers that the events that led to Freddie Gray’s death began with mere “eye contact with the officers” and noting that “no black man is eager to initiate a staring contest with the cops”). At Freddie Gray’s funeral, the reverend who offered the eulogy communicated these words to Gray’s mother about his eye contact with the police:

On April 12 at 8:39 in the morning, four officers on bicycles saw your son. And your son, in a subtlety of revolutionary stance, did something black men were trained to know not to do. He looked police in the eye. And when he looked the police in the eye, they knew that there was a threat, because they’re used to black men with their head bowed down low, with their spirit broken. He was a threat simply because he was man enough to look somebody in authority in the eye. I want to tell this grieving mother . . . you are not burying a boy, you are burying a grown man. He knew that one of the principles of being a man is looking somebody in the eye.

Id. (quoting Reverend Jamal Bryant).

16. Berman, *supra* note 8.

instead as a means of relieving Yanez and assuring him that he was not in danger. After all, what person intending to do harm to an officer by shooting him actually warns the officer, who is armed himself, that he has a gun on him, thereby eliminating the element of surprise and any advantage he could have had in a shootout with the officer?

Still, racism and bias won out over common sense and logic during the approximately fiftieth stop for Castile, pushing Yanez to shoot Castile as Castile sought to comply with Yanez's instruction to provide him with his license and registration. Yanez, however, did not see an effort to comply. Instead, he saw in Castile an image he had deeply internalized of the dangerous, criminal, out-of-control, rule-defying-and-breaking black man.¹⁷ Like so many implicit bias studies have shown, Yanez imagined a gun in the hands of a black man in circumstances where he would not have imagined one in the hands of a white man.¹⁸ As Yanez asserted about Castile,

I, believe I continued to tell him don't do it or don't reach for it and he still continued to move. And, it appeared to me that [h]e had no regard to what I was saying. He didn't care what I was saying. He still reached down. . . . And, at that point I, was scared and I was, in fear for my life and my partner's life. . . . I was telling something as his hand went down I think. And, he put his hand around something. And his hand made like a C shape type um type shape and it appeared to me that he was wrapping something around his fingers and almost like if I were to put my uh hand around my gun like putting my hand up to the butt of the gun.

. . . .

. . . [He] appeared defensive to me

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17. See R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1172-73 (2006) (discussing how blackness has been linked with criminality); Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 881-88 (2004) (finding in a psychological study that police officers not only viewed black faces as more criminal than white faces but also viewed black faces that were more "stereotypically black," for example, those faces with wide noses, thick lips, or dark skin, as more criminal than faces that were less "stereotypically black").
18. See Banks et al., *supra* note 17, at 1174 (indicating that there are studies that show that "images of unarmed Black men were more likely to be 'shot' than were images of unarmed White men"); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2060 (2011) ("[P]olice officers in simulations were more likely to shoot unarmed black suspects than unarmed white suspects, and to misidentify black suspects more readily than white suspects." (footnote omitted)).

As I was giving him direction about what to give me . . . I felt that he had no regard to what I was saying. He didn't care what I was saying. He didn't want to follow what I was saying so he just wanted to do what he wanted to do.¹⁹

In the end, Yanez saw what society had taught him to see in black people and, in this instance, black men: danger. Yanez saw defiance and a disregard for the rules from a man known for his careful attention to instruction and directions. And, in turn, Yanez felt what society had shown him to feel in response: trepidation and fear. At no time during the encounter did Yanez come to see the real Castile, nor did he try to do so. Had Yanez seen Castile as he truly was and as so many around him knew him to be, Yanez might have noticed what Castile's girlfriend Reynolds proclaimed to be true on that fated day of July 6, 2016, that "[n]othing within [Castile's] body language said shoot me."²⁰

Confused by the unnecessary killing of their beloved Mr. Phil, the two children of Kirkja Janson, a white mother who made a point of openly speaking with her white children about the racial stereotypes that she believes motivated Yanez's decision to shoot Castile, posed an important question to their mom. They innocently asked, "How could anyone think Mr. Phil was dangerous?"²¹

In his important new book, *Stony the Road: Reconstruction, White Supremacy, and the Rise of Jim Crow*, Henry Louis Gates, Jr.²² answers this innocent question by presenting the images, stereotypes, and narratives that Whites²³

19. Berman, *supra* note 8.

20. Chan, *supra* note 2.

21. Beckstrom, *supra* note 1; see also Emma Brown, 'He Knew the Kids and They Loved Him': Minn. Shooting Victim Was an Adored School Cafeteria Manager, WASH. POST (July 7, 2016, 6:02 PM EDT), <https://www.washingtonpost.com/news/education/wp/2016/07/07/he-knew-the-kids-and-they-loved-him-minnesota-shooting-victim-was-an-adored-school-cafeteria-manager> [<https://perma.cc/MS2N-UUYZ>] ("Those who knew Castile said it was difficult to imagine how he could appear as threatening or why an officer would have felt he had to react with deadly force.").

22. Henry Louis Gates, Jr. is the Alphonse Fletcher University Professor and Director of the Hutchins Center for African and African American Research at Harvard University.

23. Throughout this Book Review, we capitalize the terms "Black" and "White" only when used as nouns to describe specific racial groups. Here, as elsewhere, we use the term "Blacks," rather than the term "African Americans," when referring to the entire group of people whom identify as part of the black race in the United States because it is more inclusive. However, when referring specifically to black individuals who descend from slaves in the United States, we may use the terms "African American" and "black" or "Black" interchangeably. 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). As Kimberlé Crenshaw has explained, using the uppercase "B" reflects the "view that Blacks, like Asians, Latinos, and

constructed of Blacks to deepen and ensure the life and legacy of white supremacy during the Reconstruction, Redemption, Jim Crow, and Harlem Renaissance eras, plus today. In many ways, Gates's response in *Stony the Road* mirrors the actual response given by mother Kirkja Janson to her children. Janson replied to her kids: "[T]here are stereotypes out there that black people aren't going to follow the rules and that black men, especially, are more dangerous than other men."²⁴ She continued, "It's not based on the individual's behavior. It's based on stereotypes that go back a long time."²⁵

In *Stony the Road*, Gates reveals how this practice of constructing black people as an *other* to be feared,²⁶ the helpless and childlike fool to be controlled and directed,²⁷ the shiftless buffoon to be pushed to work,²⁸ and the vicious and sex-crazed brute to be tamed²⁹ continues to thrive in society today. In so doing, he introduces readers to the "Old Negro" – to the "stereotyped and debased" images of black people that were first defined during slavery and that have been reimagined throughout our nation's history in order to justify the dehumanizing treatment that Blacks have long faced in the United States.³⁰ As Gates declares early on, the "Old

other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) (citing Catherine MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS: J. WOMEN CULTURE & SOC'Y 515, 516 (1982) ("I do not regard Black as merely a color of skin pigmentation, but as a heritage, an experience, a cultural and personal identity, the meaning of which becomes specifically stigmatic and/or glorious and/or ordinary under specific social conditions.")); see also 2 W.E.B. DU BOIS, *THE SEVENTH SON* 12-13 (Julius Lester ed., 1971) (contending that the "N" in the word "Negro" was always capitalized until defenders of slavery began to use the lower case "n" as a marker of Blacks' status as property and as an insult to black people).

24. Beckstrom, *supra* note 1.

25. *Id.*

26. See GATES, *supra* note 7, at 127 (highlighting the "Old Negro" image of black men as "base, barely repressed savages who would, at the first opportunity, run amok and kill every white man in sight").

27. See *id.* at 80-83, 91 (recounting claims that black people were "virtually in the condition of the youth" or were "but grown-up children that needed guardians, like all other children" (citations and quotations omitted)).

28. See *id.* at 11 (also noting the irony in the idea "that an enslaved black person would work and that a free black person would not").

29. See *id.* at 10, 141-57 (discussing, for example, images of "ignorant, unqualified, venal black elected officials whose most ardent desire seems to have been to rape white women" in the movie *The Birth of a Nation* and detailing narratives about black men's purportedly "natural" propensity to rape).

30. *Id.* at xviii, 1, 4, 14; see also 14 ("Charting how white supremacy evolved during Reconstruction and Redemption is crucial to understanding in what forms it continues to manifest today.");

Negro” was “rural, Southern, impoverished, illiterate, premodern, ‘uncivilized,’ [and] even ‘unwashed.’”³¹ At the same time, Gates relays the emergence of the images and counternarratives that were created by Blacks as forms of resistance and as a means of galvanizing struggles against antiblack racism in the United States in the past and today.³² These images and counterstories center on what Gates refers to as the “New Negro.” In depicting the “New Negro,” Gates also critiques the manner in which presentations of the “New Negro” were entrenched in the “politics of respectability” and reified troubling assumptions about class differences among Blacks, including the need for the most “Talented Tenth” of the race to guide the masses.³³

Although widely acclaimed in the media,³⁴ *Stony the Road* has received scant attention in the legal realm. Indeed, neither academics, nor practitioners, nor judges have addressed its significance for the study of racism and its evolution in our nation’s legal system or for the regulation of race in the legal profession, especially in the everyday labor of civil-rights and poverty lawyers, prosecutors, and public defenders. The purpose of this Review is to explore the relevance of the racial narratives distilled by Gates in *Stony the Road* to the practice of law inside this nation’s civil- and criminal-justice systems and, more generally, to critical theories of race, the persistence of racism, and race-conscious legal representation. To that end, this Review fuses a growing body of work on race and the lawyering process in

id. at 94 (identifying numerous stereotypical images of the “Old Negro” that have been passed down from slavery until today).

31. *Id.* at xviii.

32. *Id.* at xiv-xv.

33. *Id.* at 189-96.

34. See, e.g., Adam Gopnik, *How the South Won the Civil War*, NEW YORKER (Apr. 1, 2019), <https://www.newyorker.com/magazine/2019/04/08/how-the-south-won-the-civil-war> [<https://perma.cc/JQ8X-WVTE>]; James Oakes, *An Unfinished Revolution*, N.Y. REV. BOOKS (Dec. 5, 2019), <https://www.nybooks.com/articles/2019/12/05/reconstruction-unfinished-revolution> [<https://perma.cc/G5LJ-LX5M>].

the fields of civil rights,³⁵ criminal justice,³⁶ and poverty law,³⁷ at times culling from the literature of legal ethics³⁸ and legal education.³⁹ The goal of this synthesis is to interrogate and reimagine how race should be situated in the legal representation of individual, group, and community clients of color.⁴⁰

Read from the intersection of theory and practice, Gates's *Stony the Road* offers several instructive lessons on race and legal representation germane to lawyers, judges, and academics. The first lesson is that the white-supremacist tropes, narratives, and images of the postbellum periods of Redemption and Jim Crow segregation continue to *frame* our legal consciousness of race. Much like white supremacist tropes, narratives, and images framed how then-Officer Yanez saw and understood Philando Castile during his approximately fiftieth police stop on July 6, 2016, they also shape the roles, mediate the relationships, and organize the methods of the lawyering process in civil-rights, poverty-law, and criminal cases. The second lesson is that the trials of these cases provide a forum for lawyers, judges, jurors, and even witnesses to *race-code* the identity of accused and convicted offenders, impoverished clients, and victims of discrimination in ways that reify white-supremacist tropes and diminish the agency of individuals, groups, and communities of color. Yanez's defense testimony did this to Castile,

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35. See, e.g., Anthony V. Alfieri, *Black, Poor, and Gone: Civil Rights Law's Inner-City Crisis*, 54 HARV. C.R.-C.L. L. REV. 629 (2019); Anthony V. Alfieri, *Gideon in White/Gideon in Black: Race and Identity in Lawyering*, 114 YALE L.J. 1459 (2005); Angela Onwuachi-Willig, *Reconceptualizing the Harms of Discrimination: How Brown v. Board of Education Helped to Further White Supremacy*, 105 VA. L. REV. 343 (2019).
 36. See, e.g., Anthony V. Alfieri, *Prosecuting the Jena Six*, 93 CORNELL L. REV. 1285 (2008); Anthony V. Alfieri, *Prosecuting Violence/Reconstructing Community*, 52 STAN. L. REV. 809 (2000); Anthony V. Alfieri, *Retrying Race*, 101 MICH. L. REV. 1141 (2003); cf. Anthony V. Alfieri, *Jim Crow Ethics and the Defense of the Jena Six*, 94 IOWA L. REV. 1651 (2009) (discussing the race-coded lawyering methodologies at work in a set of 2006 Louisiana prosecutions).
 37. See, e.g., Anthony V. Alfieri, *Inner-City Anti-Poverty Campaigns*, 64 UCLA L. REV. 1374 (2017); Anthony V. Alfieri, *Practicing Community*, 107 HARV. L. REV. 1747 (1994); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647 (2005).
 38. See, e.g., Anthony V. Alfieri, *Race-ing Legal Ethics*, 96 COLUM. L. REV. 800 (1996).
 39. See, e.g., Anthony V. Alfieri, *(Un)Covering Identity in Civil Rights and Poverty Law*, 121 HARV. L. REV. 805 (2008); Angela Onwuachi-Willig, *The Fire This Time: Reflections on Recent Killings and Protests*, RECORD (June 1, 2020), <https://www.bu.edu/law/record/articles/2020/dean-angela-onwuachi-willig-commentary-the-fire-this-time> [<https://perma.cc/93TD-9T68>].
 40. On the intersectional place of race, gender, and class in legal representation, see Angela Onwuachi-Willig, *From Emmett Till to Trayvon Martin: The Persistence of White Womanhood and the Preservation of White Manhood*, 15 DU BOIS REV. 257, 259-61 (2018) [hereinafter *Onwuachi-Willig, From Emmett Till to Trayvon Martin*]; and Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being "Out of Place" from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113, 1148-51 (2017).

defining Castile as someone he was not while Castile, in death, had no power to tell his own story and marking Reynolds as somehow less trustworthy because she had smoked marijuana that morning.⁴¹ The third lesson is that the trial of such cases also affords lawyers and clients meaningful, collaborative opportunities to *reframe* race-coded identity and provide new visions of self, namings, and identities. Such reframing can recover the presence of black agency, enhance the exercise of black power, and contextualize the impact of systemic racism on individuals, groups, and communities as a whole.

The Review proceeds in four parts. Part I parses Gates's analysis of the rise of white-supremacist ideology and the accompanying concept of the "Old Negro" during the Redemption era and the countervailing emergence of the concept of a "New Negro" culminating in the Harlem Renaissance. This dual analysis recounts the institutionalization of white supremacy in the United States and the articulation of an opposing narrative of black agency, a narrative of civic community and cultural self-defense that is resonant today. By sketching the forms of Jim Crow imagery, and searching for the "Old Negro" and the "New Negro" dichotomies within the discourse of black people, Gates erects a critical backdrop for lawyers to understand the stereotypical beliefs that pervade white-supremacist ideology. In so doing, Gates illuminates how Jim Crow narratives infected (and continue to infect) law and why those narratives are still with us in proceedings ranging from high-profile race discrimination cases to lesser-known criminal trials.

Part II examines the lawyering process as a rhetorical site where racialized narratives and racially subordinating visions that trace their origins back to antebellum images of the "Old Negro" are adapted and deployed for use, interpretation, and rulings by lay witnesses, lawyers, experts, jurors, and judges during litigation. For example, Part II explores how lawyers have utilized stock race narratives⁴² linked to "Old Negro" stereotypes by using terms that have generally, and negatively, been associated with racial groups that have been debased in our society, instead of evidence and evidence-based terms of individual actions and contexts, to prove the purported dangerousness of defendants to jurors, who in

41. See Mitch Smith, *In Court, Diamond Reynolds Recounts Moments Before a Police Shooting*, N.Y. TIMES (June 6, 2017), <https://www.nytimes.com/2017/06/06/us/castile-police-shooting-facebook-trial.html> [<https://perma.cc/63RL-UP36>] ("Earl Gray, a lawyer for Officer Yanez, questioned Ms. Reynolds at length about her marijuana use."); see also Learfield Wire Service, *Diamond Reynolds Testifies in Yanez Trial*, LAKELAND BROADCASTING (June 7, 2017), https://www.willmarradio.com/news/diamond-reynolds-testifies-in-janez-trial/article_47d38e56-4b7b-11e7-8730-6b9fcd8f43ec.html [<https://perma.cc/C5YQ-U5K6>] (noting that the defense focused on the marijuana use of Castile and Reynolds).

42. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2421 (1989) (noting that a "stock story" is "an account that justifies the world as it is").

turn rely on the harmful associations in the narratives they are told to read individual defendants and judge them in ways that comport with stereotype. Similarly, Part II analyzes how this same set of courtroom characters have employed racially subordinating visions that find their roots in the visual rhetoric of post-bellum-Jim Crow laws and practices, as recorded by Gates in *Stony the Road*, to cast individuals, groups, and entire communities in terms of demeaning racial caricatures.

Part III evaluates the omnipresence, and the almost inescapability, of racialized narratives and racially subordinating visions under dominant legal regimes, namely under the race-neutral lawyering-process traditions and legal-ethics conventions that are integral to the profession. In many ways, racialized and racially subordinating visuals and narratives have become so deeply embedded and entrenched in our society that one need not speak or acknowledge race to racially frame and race-code any particular individuals or have the listeners or readers of those stories understand those individuals as linked to a particular race – in these cases, Blacks. A wide span of lawyers – criminal prosecutors and public defenders as well as civil-rights and poverty lawyers – routinely craft seemingly race-neutral, but very much racialized narratives and images in their work and thus implicitly justify these narratives as either natural or necessary to the legal process.⁴³ The logic of these racist tropes can be traced to the science, literature, and symbolism of Jim Crow segregation as excavated by Gates in *Stony the Road*. Such naturalistic rationales appeal to an immutable social order of race-based hierarchy, one that assumes the natural superiority of whiteness, the natural inferiority of blackness, and the accuracy of the racialized narratives and racially subordinating visions as a result. Further, necessitarian rationales invoke the adversary-system-derived duty of aggressive advocacy and the paternalistic obligation of means-oriented intervention to justify the use of race-infected narratives and visions.

Part IV puts forward an alternative set of race-conscious advocacy practices and ethics precepts infused with antisubordination norms of racial dignity and equality. It garners these norms from the early black-resistance movements documented by Gates and adapts them for use in contemporary legal cases attacking systems of structural inequality. Although the search for such alternative race-conscious practices and precepts reveals the continuities linking past resistance movements, such as the New Negro Renaissance, to the present Black Lives Matter movement, it also exposes the common tensions dividing those movements, especially intraracial class conflict and the politics of respectability.

43. See *id.* at 2416-17 (noting that “[n]arrative habits, patterns of seeing, shape what we see and that to which we aspire” and that “[t]hese patterns of perception become habitual, tempting us to believe that the way things are is inevitable”).

I. RACE AND RACISM IN LAW, CULTURE, AND SOCIETY

Gates teaches the sociolegal lessons of *Stony the Road*—the *framing* effect of white-supremacist tropes and images, the stereotypical *coding* of racial identity, and the *reframing* of black agency—by inspecting two stock figures from the cultural and social history of Reconstruction, Redemption, and Jim Crow segregation. The first, personified by the “Old Negro” of the rural South, envisions freedmen and freedwomen as “impoverished, illiterate, premodern, ‘uncivilized,’ even ‘unwashed.’”⁴⁴ The second, symbolized by the “New Negro” of the Harlem Renaissance, imagines an “increasingly urban and urbane, modern, educated, cultured, international, professional, well attired and well appointed, ‘clean’” black vanguard.⁴⁵ To Gates, the competing visions of race embedded in the “Old Negro”/“New Negro” dichotomy proved over time to be dynamic and malleable, susceptible not only to invention and improvisation but also to reappropriation and reconfiguration. The centuries-long struggle to appropriate and refashion the meaning of race embodied in the figures of the “Old Negro” and the “New Negro” signals a continuous effort to enforce and, conversely, to combat successive iterations of the ideology of white supremacy. That ongoing struggle implicates the daily practices of civil-rights, criminal-justice, and poverty-law advocacy.

A. Framing Blackness: White-Supremacist Tropes and Images

Gates locates the status-framing tropes and images of white supremacy in the pivotal eras of Reconstruction and Redemption.⁴⁶ To Gates, Reconstruction, the period from 1865 to 1877, carried a “*double meaning*” gained from “readmitting the conquered Confederate states to the Union” and, simultaneously, “granting freedom, citizenship, and a bundle of political, civil, and economic rights to African Americans—both those free *before* the war and those freed *by* it.”⁴⁷ Saturated by deep-seated antiblack racism, that “*double meaning*” quickly skewed toward redemptive white supremacy, acquiring its own discourse, imagery, mythology, and scientific logic, all tailored to debase the status of the “Negro.” Gates views the Redemption era and the ascendance of the New South, roughly from 1877 to 1915, as a period marked by the imposition of a white-supremacist, hierarchical system of “neo-enslavement” on earlier-freed black agricultural workers.⁴⁸ Under the Redemption-era ideology of white supremacy informing

44. GATES, *supra* note 7, at xviii.

45. *Id.*

46. *Id.* at 4-7, 10-13.

47. *Id.* at 6-7 (first emphasis added).

48. *Id.* at 3-4.

the content of Southern Black Codes and Jim Crow laws,⁴⁹ Gates shows that the subordinate status of black people became entrenched in the rigid socioeconomic hierarchies of labor peonage,⁵⁰ convict leasing,⁵¹ and sharecropping.⁵²

For Gates, the redeemed South enacted this regime of neoenslavement through a “terrorist” campaign of violence as well as a “propaganda” campaign that sought permanently to devalue the humanity of freedmen and freedwomen.⁵³ That “propaganda war,”⁵⁴ he laments, worked to define the nature of the black people as a “subhuman” species outside of the human community altogether.⁵⁵ This white-supremacist propaganda scheme encompassed numerous discourses to enable the infiltration of its messages, including racial science, journalism, political rhetoric, and popular fiction and folklore, all of which lent the appearance of objectivity and moral legitimacy to Jim Crow hierarchies.⁵⁶ Those “ideologically tainted” images and discourses symbolically denigrated freedmen and freedwomen, depicting them as “inherently inferior” and thereby rationalizing their disenfranchisement and second-class citizenship.⁵⁷

Among the myriad white-supremacist signifying discourses collected by Gates, racial science stands out for its virulent antiblack racism. Gates denotes nineteenth-century racial science by its use of professedly “objective ‘measurements’” summarily “to ‘prove’ fundamental, ‘natural,’ biologically based essential differences between black people and white people.”⁵⁸ Later amplified by the twentieth-century eugenics movement,⁵⁹ proof of such race-based differences

49. On the Black Codes and Jim Crow laws, see DAVID M. OSHINSKY, “WORSE THAN SLAVERY”: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 20-22 (1996).

50. On labor peonage laws and practices, see DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II* 53-57 (2008).

51. On convict leasing, see ALEX LICHTENSTEIN, *TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH* 3-4, 14-16 (1996).

52. On sharecropping and debt peonage, see PETE DANIEL, *THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH, 1901-1969*, at 19-25 (1972). See also GATES, *supra* note 7, at 187 (noting that “the most vivid example” of the “economic suppression” instrumental to the birth of Jim Crow was “seen in two forms of what has been called neo-slavery: sharecropping and convict leasing”).

53. GATES, *supra* note 7, at 4.

54. *Id.*

55. *Id.* at 56.

56. *Id.*

57. *Id.*

58. *Id.*

59. For useful studies of the eugenics movement, see generally ADAM COHEN, *IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK* (2016);

included evidence of a nature-inscribed, black “bestial” character.⁶⁰ Scientific proof of this kind served to confirm black inferiority, justify racial slavery, excuse Jim Crow segregation, and prohibit interracial marriage.⁶¹ The framing of blackness in terms of the white-supremacist tropes of subhuman inferiority and bestial violence supposedly provided theoretical legitimacy for the stereotypical coding bound up in the constructed image of the Old Negro.

B. Coding Blackness: Stereotype and Subordination

Gates assembles the Jim Crow vision of the Old Negro from the white-supremacist narratives permeating the writings of natural and social scientists, journalists, politicians, and academics. Within the Redeemer imagination, that stereotypical vision oscillated between two figurative poles of subjugation. At one rhetorical pole, Gates pinpoints, the Old Negro appeared as a “fanciful creature of plantation literature and proslavery propaganda who thrived under slavery, and then, once slavery ended, pined for its return.”⁶² At the other rhetorical pole, by contrast, the Old Negro epitomized “the uneducated, landless former slaves who, through no fault of their own, had failed to thrive under freedom, had failed to ‘rise,’ as the black middle class would put it.”⁶³

Building on the subjugating Old South folklore myths of the “degraded” and “degenerate” plantation Negro,⁶⁴ the popular vision of New South Redeemers “portray[ed] black people in a chronic state of childlike dependence.”⁶⁵ For apologists of the New South, Gates observes, the *natural* state of black dependence, rather than government-sanctioned racial discrimination or Ku Klux Klan-incited antiblack vigilante violence, produced the main source of the post-Civil War “Negro Problem.”⁶⁶ Viewed as beyond the curative reach of “black leadership” and “black self-determination,” the “Negro Problem” gave rise to the mutated ideology of white-supremacist paternalism.⁶⁷ The paternalism of white

GREGORY MICHAEL DORR, *SEGREGATION’S SCIENCE: EUGENICS AND SOCIETY IN VIRGINIA* (2008); and VICTORIA F. NOURSE, *IN RECKLESS HANDS: SKINNER V. OKLAHOMA AND THE NEAR TRIUMPH OF AMERICAN EUGENICS* (2008).

60. GATES, *supra* note 7, at 59.

61. *See id.* at 56-79.

62. *Id.* at 187.

63. *Id.*

64. *Id.* at 80.

65. *Id.* at 91.

66. *Id.* at 80.

67. *Id.*

supremacism,⁶⁸ Gates remarks, “morally obligated” white Americans to intervene in the private and semipublic spheres of the black family and the black community to *save* the race, “to step in and solve the so-called Negro Problem *for* the Negro, not *with* him.”⁶⁹ Put simply, New South Redeemers and their northern counterparts believed “African Americans were unequipped to be the masters of their own destiny.”⁷⁰

For Gates, the Redemption-era genre of plantation literature imprinted the tropes, narratives, and images of the Old Negro in American popular culture. Inspecting the archival material of advertisements, postcards, trade cards, the blackface minstrelsy of theater and vaudeville, and the stereotyped identity of black characters in early films,⁷¹ Gates documents the fabrication of an “infantile, easily led, insensate, yet dangerously brutal” black cultural figure.⁷² Depicted as “biologically inferior at best, a separate species at worst,”⁷³ that iconic figure in plantation folklore fueled the myth of the Negro’s “nostalgia for her or his own enslavement.”⁷⁴ Gates’s meticulous documentation of the status denigration of the black community through mass-produced representations of freedmen and freedwomen as *children* to be “led, nurtured, [and] controlled”⁷⁵ elucidates the historical projection of the nineteenth-century “antebellum past” onto the twentieth-century “Redemptionist present,”⁷⁶ creating a “*double vision*” crucial to the restoration of racial hierarchy.⁷⁷

Extending his examination of the Old Negro figure, Gates scrutinizes and maligns an assemblage of Southern Redeemer-manufactured stereotypes that were employed during the post-Reconstruction era to transform freed black people from “speaking *citizen-subject[s]*” into “muzzled *subcitizen-object[s]*” reduced to a condition of “nominal freedom,” a state of “virtual neo-slavery.”⁷⁸ Propelled by multifarious white-supremacist discourses, that transformation “unfolded”

68. On racial paternalism in civil-rights and poverty law, see generally 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)).

69. GATES, *supra* note 7, at 80.

70. *Id.*

71. See *id.* at 106-07.

72. *Id.* at 91.

73. *Id.* at 95.

74. *Id.* at 97.

75. *Id.* at 101.

76. *Id.* at 103.

77. *Id.* at 104 (emphasis added).

78. *Id.* at 126 (emphasis added).

for Gates in “paired or binary constructs, fused, Janus-faced opposites: power and helplessness, fantasy and repugnance, desire and rejection, attraction and repulsion, seduction and violation, beauty and the bestial, the sublime and the grotesque.”⁷⁹ This false, objectifying dialectic converged “within the larger, convoluted frame of the monstrous depravity and licentiousness of slavery.”⁸⁰ The upshot of this transformative, cultural construction took the form of Sambo art, a fixed set of popular signs and symbolic representations of black men and women embodying “all that was the reverse of Truth and Beauty, the Good and the Civilized.”⁸¹

To Gates, the stereotypical images of Sambo art generated “everyday numbingly repeatable tropes of white supremacy that could be readily consumed and digested, processed and internalized,” both consciously and unconsciously.⁸² The debased nineteenth-century byproduct of this offensive genre of racial caricature was “an imaginary ‘Negro,’” a single, unchangeable black image stripped of “humanity.”⁸³ Gates ties this culturally denigrating image to the status portrayal of newly freed slaves, especially black males, as gluttons, thieves, sexual predators, and rapists—in sum, as “ruthless, homicidal black savage[s].”⁸⁴ The sheer mass of Sambo art, and its negative racist imagery, worked to “naturalize the visual image of the black person as subhuman,” and, at the same time, “subliminally reinforce the perverted logic of the separate and unequal system of Jim Crow itself.”⁸⁵ Gates describes the meaning-making, cultural practice of Sambo art as a kind of “xenophobic masking,”⁸⁶ a practice that sparked the counterposing effort of the Harlem Renaissance to reimagine the American Negro’s “mask of blackness”⁸⁷ in the figure of the New Negro.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 128.

83. *Id.* at 128-29.

84. *Id.* at 145. Gates describes that “the creation of the white racist fiction of the unbridled, incorrigible, depraved heterosexuality of the black male” later “refigured as the congenitally inveterate rapist, projected onto black male human beings, trapped by their ‘nature’ in a permanent state of lust, poised to violate, unpredictably and spontaneously, the purity and sanctity of white virginal womanhood.” *Id.* at 146.

85. *Id.* at 130.

86. *Id.* at 132.

87. *Id.* at 133; see *infra* Section I.C.

C. *Reframing Blackness: Agency and Power*

From the outset of *Stony the Road*, Gates maintains that the concept or metaphor of a New Negro – a cultural and aesthetic representation of a “different kind of black person” mounted in response to the debasing depictions of the Old Negro during the Redemption era – stood on unsteady ideological ground and “embedded its own critique.”⁸⁸ More vexing for Gates, despite multiple iterations over a thirty-year period ranging from 1894 to 1925, the images of the New Negro failed to spur the formulation of a politics of black progress and equal rights.⁸⁹ Bemoaning this failure, Gates asserts that “Black America” did not in fact *need* “a New Negro.”⁹⁰ Instead, he emphasizes, Black America “needed the legal and political means to curtail the institutionalization of antiblack racism perpetuated against the Old Negro at every level in post-Reconstruction American society through . . . the ideology of white supremacy.”⁹¹

Gates treats the invention of the concept of the New Negro as an identity-based form of *reconstruction*.⁹² Admittedly more cultural and aesthetic than political, that style of reconstruction ignited a vibrant movement in the arts. Yet Gates discerns an inexorable futility in the “metaphor[ical]” reconstruction of a “‘new’ kind of black person” and freedom,⁹³ the futility of attempting to “transform the [cultural] image of the upper classes of race” persistently denigrated, and violently suppressed, across the Redeemer South and the segregated North.⁹⁴ For Gates, this “leadership class” of New Negroes – “young, educated, post-slavery, modern, culturally sophisticated, and thoroughly middle class” – coalesced around the need to defend the race against redemptionist attack in the aftermath of Reconstruction.⁹⁵

Gates explains that the leadership at the forefront of the New Negro “movement of black self-(re)invention” renewed “age-old class divisions within the black community.”⁹⁶ Crosscutting the lines of class, caste, and color,⁹⁷ he points

88. *Id.* at 190, 248.

89. *Id.* at 250-53.

90. *Id.* at 253.

91. *Id.*

92. *Id.* at 186.

93. *Id.* at 3-5, 190.

94. *Id.* at 186.

95. *Id.*

96. *Id.* at 190.

97. On the continuing lines of caste-based racial hierarchy in American society, see Isabel Wilkerson, *America's Enduring Caste System*, N.Y. TIMES MAG. (July 1, 2020),

out, those divisions arose out of “distinctions within the slave community between house and field, between enslaved people by occupation, and between mixed-race descendants of white fathers (and, to a much lesser extent, white mothers) and those without white ancestry.”⁹⁸ The sharpening line dividing descendent classes of Negro slavery, Gates mentions, indicated the mounting perception that “all black people weren’t exactly alike.”⁹⁹ Increasingly, he concedes, “class mattered within the race.”¹⁰⁰

Gates charts the evolving notion of a differentiated and privileged black elite – W.E.B. Du Bois’s borrowed trope of “The Talented Tenth”¹⁰¹ – openly and volubly committed to the “valorization of ‘respectability.’”¹⁰² For Gates, the New Negro cultural discourse of respectability, publicly enunciated in black women’s clubs, church sermons, and black-press editorials, strived to show that black elites “were superior to the mass of black people and equal to the best of white America.”¹⁰³ On this yardstick of social mobility, the black elite argued that, insofar as they outwardly “embodied the same middle-class social and moral Victorian values and aspirations” of the white middle class, they deserved “equal treatment in every way.”¹⁰⁴ This New Negro-era “politics of respectability,” Gates comments, twisted “the embrace of white Victorian middle-class social and moral values” toward the promotion of conservative values of racial “progress” and “elevation,” values deliberately propagated by “college-educated black upper class” leaders to counter racist caricatures and stereotypes of “genetically immoral, licentious, and degenerate” black people.¹⁰⁵

The intraracial tensions roiling the cultural politics of respectability, Gates suggests, inhibited the ability of the New Negro movement to develop a full-blown, antiracist politics of militant resistance, thereby perpetuating the very narratives of the Old Negro that initially spurred the movement.¹⁰⁶ More restrained, he remarks, the New Negro “black establishment” practiced the

<https://www.nytimes.com/2020/07/01/magazine/isabel-wilkerson-caste.html> [https://perma.cc/27RX-VM48], which synthesizes arguments made in ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* (2020).

98. GATES, *supra* note 7, at 188.

99. *Id.* at 190.

100. *Id.*

101. *Id.* at 191 (quoting W.E.B. Du Bois, *The Talented Tenth*, *TEACHING AM. HIST.* (Sept. 1903), <https://teachingamericanhistory.org/library/document/the-talented-tenth> [https://perma.cc/EWZ5-WPK2]).

102. *Id.* at 193.

103. *Id.* at 194.

104. *Id.*

105. *Id.* at 194–95.

106. *Id.* at 205–14.

political efficacy of institution building, civil protest, and law reform.¹⁰⁷ The establishment politics of the New Negro movement and its animating theory of incremental social reform contrasts with the more interventionist politics of the Black Lives Matter movement and its theories of grassroots community power, mass protest, and carceral-state violence.¹⁰⁸ In lieu of an explicit theory of anti-racist politics, Gates observes, the New Negro movement veered toward the creation of art and literature as a “strategic weapon” in the pursuit of civil rights, albeit an art devoid of the disavowed folklore and spirituals of the Old Negro.¹⁰⁹ Despite the cultural importance of the Harlem Renaissance and the subsequent Black Arts Movement, Gates notes that the resulting separation of arts and politics condemned Old Negroes, New Negroes, and their successor-class figurations to a form of “racial survival” typified by creative, collective self-definition and reinvention, rather than economic or social equality.¹¹⁰ For white supremacists, this legacy ensured that “before the law at all times, there was never an Old Negro and a New Negro; there were only Negroes.”¹¹¹

To Gates, cultural constructions like the New Negro, though itself a form of black agency, falter when “not built on or allied with political agency,”¹¹² even when put forward as “an act of self-defense and psychic resilience.”¹¹³ Without the steadying ground of political agency expressed in black resistance to white supremacy and black activism for equal rights, Gates warns, such constructions are “destined to remain exactly what they’d started as: *empty signifiers*.”¹¹⁴ Rather than attempt to imbue the concept of the New Negro with stable, essentialist meaning, Gates endorses *actual* political agency and engagement—captured by the foundational act of voting and democratic participation—as a more productive means of enhancing civil rights than “declaring the birth of a ‘new’ sort of black person” or manipulating “the image of ‘the race.’”¹¹⁵ However important to the early twentieth-century African American canon of art and literature, the short-lived history of the Harlem Renaissance illustrates the strategic error of overreliance on alternative racial

107. *Id.* at 213.

108. See Shanelle Matthews & Miski Noor, *Celebrating Four Years of Black Lives Matter*, BLACK LIVES MATTER 4-8 (2017), <https://drive.google.com/file/d/oBopJEXffvSouOHdJREJnZ2JJYTA/view> [<https://perma.cc/K994-QRQ4>].

109. GATES, *supra* note 7, at 214-18.

110. *Id.* at 231.

111. *Id.* at 232.

112. *Id.* at 253.

113. *Id.* at 256.

114. *Id.* at 253 (emphasis added).

115. *Id.* at 257; see also EDDIE S. GLAUDE, JR., BEGIN AGAIN: JAMES BALDWIN’S AMERICA AND ITS URGENT LESSONS FOR OUR OWN 145 (2020) (“Voting was not, by any stretch of the imagination, freedom. But [James] Baldwin understood the instrumental value of the vote.”).

symbols without the bolstering weight of political agency, institution building, and movement power.

For lawyers working in judicial, legislative, and neighborhood forums where civil-rights, criminal-justice, and poverty-law advocacy intersect, Gates's account of the New Negro and the Harlem Renaissance shows how the cultural and social construction of racial signifiers can affect political agency and group identity, hampering individual and collective action. At the same time, his account demonstrates that cultural and social tropes and images can also provide a means of reframing racial identity by asserting a counternarrative of black agency informed by, rather than emptied of, political engagement. This counternarrative traces its origins to the freedom petitions of the antebellum era,¹¹⁶ the citizenship battles of the Reconstruction era,¹¹⁷ and the political power struggles of the civil-rights and Black Lives Matter movements.¹¹⁸ Many of us who collaborate with communities of color in our teaching and research regularly witness sustained, forceful expressions of civic self-defense, institution building, and political power in the advocacy and organizing work of neighborhood civic associations, church congregations, and tenant-and-homeowner groups. By witness, we do not mean the sometimes-despairing witness of James Baldwin and others expressed in literature and the arts.¹¹⁹ Instead, we mean bearing witness as advocacy partners to the political resistance marshalled by neighborhood clergy and congregations, tenants and homeowners, and civic associations and nonprofit groups. Witnessing black-led local advocacy campaigns counters the dehumanizing framing effect of white-supremacist tropes, recasts the stereotypical coding of racial identity, and reframes black agency and power, enabling communities – rather than their lawyers – to define who they are.

116. See Anthony V. Alfieri, *Resistance Songs: Mobilizing the Law and Politics of Community*, 93 TEX. L. REV. 1459 *passim* (2015) (reviewing LEA VANDERVELDE, *REDEMPTION SONGS: SUING FOR FREEDOM BEFORE DRED SCOTT* (2014)); see also MARTHA S. JONES, *BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA* 108-45 (2018) (researching the birthright-citizenship claims of black Baltimoreans during the antebellum nineteenth century).

117. Gates discerns the “hallmarks of citizenship” in private and public behavior that confirmed Blacks “were capable of organizing for elections, cultivating land, forming stable social and cultural institutions, marrying, functioning as members of families, raising children, and suing in court to defend their rights.” GATES, *supra* note 7, at 130.

118. For more on community power in Black social movements and political organizing, see generally KEEANGA-YAMAHTTA TAYLOR, *FROM #BLACKLIVESMATTER TO BLACK LIBERATION* (2016).

119. GLAUDE, *supra* note 115, at 148; see also James Baldwin, *Letter from a Region in My Mind*, NEW YORKER (Nov. 17, 1962), <https://www.newyorker.com/magazine/1962/11/17/letter-from-a-region-in-my-mind> [<https://perma.cc/PX7Q-5TB5>] (exemplifying Baldwin's approach).

II. LAWYERING RACIALIZED NARRATIVES AND RACIALLY SUBORDINATING VISIONS

Gates's historical lessons—of *framing*, *coding*, and *reframing*—are instructive for civil-rights and criminal-justice lawyers. Unsurprisingly, lawyers working in these fields see, hear, and use the racialized narratives and racially subordinating visions of the Redemption and Jim Crow eras across the American sociolegal landscape. When truncated, these narrative and visions take the form of spoken tropes (black “looters”¹²⁰ or “the drug-crazed Negro”¹²¹) and visual images (criminal mugshots¹²² and courthouse murals¹²³). When expanded, they occupy the longer, thicker form of stories and storytelling—of familiar and replayed stories, stories of the “Old Negro” retold and repurposed to fit the storyteller's aim. Regardless of intent, they have the same result: they reinscribe the frames that Whites used to justify slavery and sharecropping and Jim Crow segregation to cement black subordination. Whether it is civil-rights and poverty lawyers telling stories of racial *inferiority* and chronic *dependence* or prosecutors and public defenders telling stories of racial *pathology* and *dangerousness*, the stories stigmatize and silence.¹²⁴ From these identity-inscribing narratives, offenders become threats, and clients become voiceless. For criminal-justice storytellers, the courtroom imagery of offender-posed danger or threat carries a natural logic. For civil-justice storytellers, the imagery of indigent, caste-based silence acquires a necessary logic. That natural and necessary logic shapes the reasoning and role of lawyers, the relationship between lawyers and clients, and the process of lawyering itself.

120. Robin D.G. Kelley, Opinion, *What Kind of Society Values Property over Black Lives?*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/opinion/george-floyd-protests-looting.html> [<https://perma.cc/4H9V-RZDK>].

121. Carl L. Hart, Opinion, *We Know How George Floyd Died. It Wasn't from Drugs.*, N.Y. TIMES (June 25, 2020), <https://www.nytimes.com/2020/06/25/opinion/george-floyd-toxicology-report-drugs.html> [<https://perma.cc/MHL3-JCZ3>].

122. See SHAWN MICHELLE SMITH, PHOTOGRAPHY ON THE COLOR LINE: W.E.B. DU BOIS, RACE, AND VISUAL CULTURE 89-90 (2004); Maurice O. Wallace & Shawn Michelle Smith, *Introduction to PICTURES AND PROGRESS: EARLY PHOTOGRAPHY AND THE MAKING OF AFRICAN AMERICAN IDENTITY* 1, 13 (Maurice O. Wallace & Shawn Michelle Smith eds., 2012).

123. See A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 132 (1996).

124. For examples of the stereotypical tropes of black dangerousness and criminal pathology in current American politics, see Maggie Haberman & Jonathan Martin, *With Tweets, Videos and Rhetoric, Trump Pushes Anew to Divide Americans by Race*, N.Y. TIMES (June 23, 2020), <https://www.nytimes.com/2020/06/23/us/politics/trump-race-racism-protests.html> [<https://perma.cc/US6Z-LP38>]. “Trailing in national polls and surveys of crucial battleground states, and stricken by a disappointing return to the campaign trail, Mr. Trump has leaned hard into his decades-long habit of falsely portraying some black Americans as *dangerous or lawless*.” *Id.* (emphasis added).

A. *Racial Construction in the Lawyering Process*

In civil-rights, poverty-law, and criminal cases, the lawyering process serves as a rhetorical site for constructing racialized narratives and racially subordinating visions of client, group, and community identity. Narrative construction in the familiar tropes and images of race, often coupled with class, gender, and sexuality, occurs in both client-centered practices, such as interviewing, and court-centered practices, which include pleadings, evidentiary submissions, and brief writing.¹²⁵

Representing people of color in civil-rights, poverty-law, and criminal cases exposes the racialized roots of routine advocacy practices. Examples of these practices are *audible* in oral communications and *visible* in written submissions describing alleged black offenders and victims of discrimination as subhuman, inferior, bestial, uneducated, childlike, infantile, helpless, immoral, licentious, and lazy or as thieves, predators, and savages.

Consider, for example, longstanding fears of miscegenation and stereotypes about black-male sexual predators who uncontrollably desire white women and must be tamed by lynchings.¹²⁶ Those fears and stereotypes audibly inflected the District Attorney's Office in Colorado Springs in its case against defendant Marcus Robinson for sexual assault and unlawful sexual contact in *People v. Robinson*.¹²⁷ During opening statements, the prosecutor in *Robinson* made a point of the fact that the defendant and his alleged victim were of two different races — black and white, dark and pale — purportedly as a preview of the testimony that was to come from a witness. The prosecutor specifically proclaimed:

You're going to hear that [A.M.] is white. And she's actually pretty pasty. She's pasty white. And you obviously have seen Mr. Robinson is dark. He is an African American of dark complexion. [E.G.] looks over and she can see a dark penis going into a white body. That's how graphic she could see [sic].¹²⁸

The promised testimony, however, never came from E.G. When E.G. took the stand, she explained that she could tell that A.M. was naked from the waist down

125. Typically, client-centered practices include interviewing, fact investigation, and counseling, while court-centered practices encompass pretrial (pleadings, discovery, and motions), trial (opening statements, closing arguments, and witness examinations), and appellate (brief writing and oral argument) advocacy.

126. GATES, *supra* note 7, at 136-57; see also Onwuachi-Willig, *From Emmett Till to Trayvon Martin*, *supra* note 40, at 262-66 (2019).

127. 454 P.3d 229 (Colo. 2019).

128. *Id.* at 231. "Defense counsel did not object to these comments, and the trial court did not intervene sua sponte." *Id.*

because “she’s really, really white,” but she never testified about the defendant’s color or complexion until she was prompted several times by the prosecutor, who asked not only what race the defendant was but also whether he was “‘dark complected [sic]’ at that location of his body,” meaning his penis in addition to his butt, which E.G. had described as “dark” in response to the prosecutor’s earlier prompt. As the Supreme Court of Colorado noted, despite the prosecutor’s follow-up questions, even then E.G. “did not testify to seeing ‘a dark penis going into a white body.’”¹²⁹

On appeal, the Supreme Court of Colorado held, while noting that the prosecutor “never directly explained the possible relevance of [her] race-based statements to the jury,”¹³⁰ any potential probative value of the prosecutor’s comments were far outweighed by the risk of unfair prejudice to the defendant “and the perception of an appeal to racial prejudice and stereotypes,”¹³¹ though it ultimately found that the error was not so obvious and substantial as to cast doubt on the convictions.¹³² In explaining its holding on the danger of prejudice caused by the prosecutor’s comments, the Supreme Court of Colorado asserted, “[T]he fact that racial considerations were introduced here, in the context of alleged sex crimes, made the risk of prejudice particularly acute, given the history of racial prejudice in this country.”¹³³

Just as the racialized tropes that Gates described in *Stony the Road* can appear in litigation through oral retellings, they also arise in written submissions. Consider, for example, how the Fort Bend County District Attorney’s Office featured the Redemption-era lexicon of immorality and violence in its 2019 brief filed in opposition to the petition of defendant Terence Tramaine Andrus for a writ of certiorari from the U.S. Supreme Court in *Andrus v. Texas*.¹³⁴ Summarizing the evidence presented by prosecutors during the penalty phase of Andrus’s 2012 capital trial, the brief stated that Andrus’s “aggressive and assaultive behavior”

129. *Id.* After hearing the sexual-assault nurse who examined A.M. testify that “she found no injuries to A.M.’s genitalia” while also making clear that the absence of any such injuries did not mean A.M. was not assaulted and the DNA analyst who examined samples from the defendant, A.M., and the scene of the alleged assault testify that he “did not detect any seminal fluid” on the couch and that the small amount of male DNA founded on A.M.’s genitalia was not enough to draw conclusions, the jury acquitted the defendant of “all of the counts that required proof of penetration” but convicted him of attempted sexual assault and two counts of unlawful sexual contact. *Id.* at 232.

130. *Id.* at 233.

131. *Id.* at 234.

132. *Id.* at 234-35.

133. *Id.* at 234.

134. 140 S. Ct. 1875, 1881-87 (2020) (granting the petition for a writ of certiorari, vacating the judgment of the Texas Court of Criminal Appeals, and remanding the case for further proceedings).

as a teenager in a youth facility caused him to be transferred to an adult prison “because he did not progress in rehabilitation and because he was so violent and disruptive.”¹³⁵

Examples of these same types of practices are *audible* in lay- and expert-witness testimony elicited in pretrial and trial proceedings. In such cases, testimony succumbs to racialized narratives when it describes behavior, character, or credibility in race-based anecdotal or scientific terms associated with debased group cultural and social histories. Consider below the racial science-infected testimony of the defendant’s expert in *Buck v. Davis*,¹³⁶ who in purportedly testifying on behalf of the defendant, an African American man, described black people as prone to violence,¹³⁷ thereby conjuring up imagery of what Gates describes as the “Brute Negro” in *Stony the Road*.¹³⁸

B. Racial Science in Criminal-Defense Practice: *Buck v. Davis*

In *Stony the Road*, Gates catalogues the discourses of racial science as a white supremacist storehouse that supplied legitimacy to past and present racialized narratives and racially subordinating visions. For Gates, the objective, essentialist claims of nineteenth-century racial science positing innate, biological differences between black and white populations furnished the hard evidence required to validate the judgment of black inferiority, the linchpin upholding antebellum slavery and postbellum Jim Crow segregation. To illustrate the modern-lawyer deployment of racialized scientific discourse in the criminal-defense context, specifically in the routine trial practices of witness direct examination and evidentiary admission, consider the U.S. Supreme Court’s description of the actions of the defense team’s expert witness in the capital case of *Buck v. Davis*.¹³⁹

In a 2017 majority opinion delivered by Chief Justice Roberts and joined by Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan, the Supreme Court in *Buck v. Davis* announced that Texas federal and state trial and appellate courts committed reversible error in allowing a court-appointed capital-defense attorney to use expert testimony to portray his black client,¹⁴⁰ Duane Buck, and “black

135. Opposition to Petition for a Writ of Certiorari at 8, 140 S. Ct. 1875 (No. 18-9674) (emphasis added).

136. See *infra* Section II.B.

137. 137 S. Ct. 759, 776 (2017).

138. GATES, *supra* note 7, at 94.

139. 137 S. Ct. 759.

140. *Buck v. Stephens*, 623 F. App’x. 668 (5th Cir. 2015), *rev’d sub nom.* *Buck v. Davis*, 137 S. Ct. 759 (2017); *Buck v. Dretke*, No. H-04-3965, 2006 WL 8411481, at *7 (S.D. Tex. July 24, 2006) (“Buck is African-American.”).

men” in general, “as ‘violence prone.’”¹⁴¹ Addressing Buck’s 1995 state trial, Chief Justice Roberts found that defense counsel called a court-appointed expert, Dr. Walter Quijano, to the witness stand to elicit prejudicial testimony linking Buck’s race to an increased probability or likelihood of future violence.¹⁴² Defense counsel put into evidence Dr. Quijano’s expert report alleging that “Buck’s race disproportionately predisposed him to violent conduct,” which Roberts wrote supported the inference that “the color of Buck’s skin made him more deserving of execution.”¹⁴³ Following Dr. Quijano’s testimony, a Texas jury convicted Buck of capital murder and sentenced him to death.¹⁴⁴

Based on these trial conduct findings, Chief Justice Roberts concluded that defense counsel’s introduction of Dr. Quijano’s expert opinion correlating race with an increased propensity for violence violated Buck’s Sixth Amendment right to effective assistance of counsel under the standards of *Strickland v. Washington*¹⁴⁵ as well as Buck’s entitlement to relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure governing final judgments.¹⁴⁶ Chief Justice Roberts reasoned that Dr. Quijano’s expert testimony and the jury’s response to that testimony, evidenced by its request and receipt of the admitted “psychology reports” at issue,¹⁴⁷ made “clear that Buck may have been sentenced to death in part because of his race.”¹⁴⁸ Chief Justice Roberts further explained that “when a jury hears expert testimony that expressly makes a defendant’s race directly pertinent on the question of life or death, the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record.”¹⁴⁹ On matters of race, he declared: “Some toxins can be deadly in small doses.”¹⁵⁰

As a consequence, Chief Justice Roberts admonished the federal and state courts below that the submission of Dr. Quijano’s “offending evidence” by Buck’s own lawyer was tantamount to “an admission against interest,” and, as such, “more likely to be taken at face value” by a jury.¹⁵¹ At Buck’s trial, he added, the adverse “effect was heightened due to the source of the testimony” — a medical

141. 137 S. Ct. at 776 (quoting *Turner v. Murray*, 476 U.S. 28, 35 (1986) (plurality opinion)).

142. *Id.* at 768–69.

143. *Id.* at 775.

144. *Id.* at 767–69.

145. *Id.* at 775–77, 780 (applying *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

146. *Id.* at 777–80.

147. *Id.* at 769.

148. *Id.* at 778.

149. *Id.* at 777.

150. *Id.*

151. *Id.*

expert who “held a doctorate in clinical psychology, had conducted evaluations in some seventy capital murder cases, and had been appointed by the trial judge (at public expense) to evaluate Buck.”¹⁵² For Chief Justice Roberts, “[n]o competent defense attorney would introduce such evidence about his own client.”¹⁵³

Chief Justice Roberts’s insistence that federal and state courts purge Buck’s trial of race-contaminated scientific evidence, and consequent attorney-induced prejudice, in many ways echoes Gates’s description of the dangers of white-supremacist-tainted racial science. Chief Justice Roberts denounced defense counsel’s introduction of “hard statistical evidence” to show that Buck’s immutable characteristic—the color of his skin—increased the probability of “future violence.”¹⁵⁴ In language resonant of Gates, the Chief Justice protested that the proffer of scientific evidence rekindled a “powerful racial stereotype” of black-male bestial violence, reviving “a particularly noxious strain of racial prejudice” in United States legal history.¹⁵⁵

That Chief Justice Roberts was able to see the harms caused by such explicitly racialized scientific evidence in *Buck v. Davis* is not surprising. After all, the Chief Justice who famously proclaimed in *Parents Involved*¹⁵⁶ that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,” embraces colorblindness, an almost-complete disregard of the realities of unspoken racism, as the ideal. Had Dr. Quijano invoked the exact same familiar tropes and racial narratives without ever explicitly mentioning race, the Chief Justice may have seen no harm at all. In the eyes of the Chief Justice, once the prejudicial stain of openly racialized evidence was erased from the penalty phase of Buck’s capital trial, its witness-tainted source removed, and its harm procedurally rectified, federal and state courts automatically recovered their race-neutral equilibrium and factfinders preternaturally regained their colorblind posture.¹⁵⁷ On this analysis, the racialized narratives and racially subordinating visions of the Redemption and Jim Crow eras documented by Gates exert no lingering hold on contemporary judges or lawyers outside of anomalous incidents marked by unanticipated errors of advocacy or adjudicative judgment. In

152. *Id.*

153. *Id.* at 775.

154. *Id.* at 776.

155. *Id.*

156. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion).

157. For a discussion of jurisprudential efforts by Chief Justice Roberts to “denormalize race consciousness” elsewhere, for example in the context of school integration, see Michelle Adams & Derek W. Black, *Equality of Opportunity and the Schoolhouse Gate*, 128 *YALE L.J.* 2302, 2340 (2019), which reviews JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* (2018).

this way, for Chief Justice Roberts, *Buck v. Davis* presents an aberrational, rather than a typical, example of criminal advocacy and adjudication – its trial conduct unusual, its procedural errors uncharacteristic, and its lawyering exceptional for its ineffectiveness. Implicit here is the claim that federal and state courts normally and ably manage colorblind impartial processes, seldom tainted by discrete instances of racial prejudice or larger patterns and practices of systemic racism.¹⁵⁸ Indeed, Chief Justice Roberts’s words in *Buck v. Davis* assert as much, declaring that the effect that race may have played in Buck’s sentencing was “a disturbing departure from a basic premise of our criminal justice system.”¹⁵⁹ He continued:

Our law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle. As petitioner correctly puts it, “[i]t stretches credulity to characterize Mr. Buck’s [ineffective assistance of counsel] claim as run-of-the-mill.” . . . This departure from basic principle was exacerbated because it concerned race. “Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.”¹⁶⁰

However, as David Baldus, Charles Pulaski, and George Woodworth revealed in their study of over 2,000 death penalty cases for use in the well-known case *McCleskey v. Kemp*,¹⁶¹ the effect that race and racism have in the prosecution of crimes and, more specifically, in death-penalty sentencing is anything but aberrational.¹⁶² Not only is the race of the defendant and the race of the victim

158. On patterns and practices of systemic racism in federal courts, *Bloomberg Law* recently reported that only “one of [President] Trump’s 53 confirmed [federal] appeals court judges is Hispanic and none are Black.” Madison Alder & Jasmine Ye Han, *Trump Nears Post-Nixon First: No Black Circuit Judges (Corrected)*, BLOOMBERG L. (June 25, 2020, 1:44 PM), <https://news.bloomberglaw.com/us-law-week/no-black-judges-among-trumps-appeals-court-confirmations> [<https://perma.cc/BC5E-46ZF>].

159. *Buck*, 137 S. Ct. at 778.

160. *Id.* (emphasis added).

161. 481 U.S. 279 (1987).

162. *Id.* at 286-87; see also Mario L. Barnes & Erwin Chemerinsky, *What Can Brown Do for You?: Addressing McCleskey v. Kemp as a Flawed Standard for Measuring the Constitutionally Significant Risk of Racial Bias*, 112 NW. U. L. REV. 1293, 1315 (2018) (stating that the Baldus studies showed that the racial “disparity could not be explained on nonracial grounds by either the 230 variables originally considered or the smaller subset of 39 particularly pertinent variables that were later considered”); Catherine M. Grosso, Jeffrey Fagan, Michael Laurence, David Baldus, George Woodworth & Richard Newell, *Death by Stereotype: Race, Ethnicity, and California’s Failure to Implement Furman’s Narrowing Requirement*, 66 UCLA L. REV. 1394, 1441

likely to shape how frequently prosecutors seek the death penalty in criminal cases, but it also is highly likely to shape the actual sentencing in criminal cases.¹⁶³ Indeed, Baldus, Pulaski, and Woodworth found through one of their models “that, even after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks. According to this model, black defendants were 1.1 times as likely to receive a death sentence as other defendants.”¹⁶⁴

In *Stony the Road*, Gates lays bare the reality that there are no race-neutral spaces or raceless stances in law, culture, and society in the United States, nor are there colorblind remedial commands or race-neutral safe harbors. Enmeshed in centuries of racialized narratives, and likewise entangled in long-standing economic and social relations of racial hierarchy, judges, juries, witnesses, and lawyers themselves *always* interpret the world through the cognitive prism of race, caste, and color.¹⁶⁵ To that end, for Gates-trained lawyers, *Buck v. Davis* presents a commonplace, rather than an unusual, fact-finding inquiry — namely, the criminal inquiry of *black future dangerousness*, a freighted space rife with the hazard of racial character inference. That inquiry is central to the white supremacist construction of the black male as a “ruthless, homicidal black savage.”¹⁶⁶ Although Chief Justice Roberts classified the jury determination of Buck’s future dangerousness as a “predictive judgment inevitably entailing a degree of speculation”¹⁶⁷ but securely cabined by judicial supervision and adversary truth-seeking competition, Gates’s account of Reconstruction treats that determination as a recurrent historical judgment compelled by the Southern Redeemer mythology of the

(2019) (stating that California’s death penalty statute, which fails to narrow application of the death penalty to only the most severe crimes and instead allows for discretion to apply the punishment in “special circumstances,” “appears to codify rather than ameliorate the harmful racial stereotypes that are endemic to our criminal justice system”).

163. *McCleskey*, 481 U.S. at 286–87; see also Barnes & Chemerinsky, *supra* note 162, at 1307–08 (noting the “huge racially discriminatory impact” that stems from differences in sentencing related to whether a defendant has been convicted of a crime related to crack or cocaine).

164. *McCleskey*, 481 U.S. at 287.

165. Consider, for example, the recent suspension of Allegheny County, Pennsylvania, Court of Common Pleas Judge Mark V. Tranquilli “after being accused of referring to a black female juror as ‘Aunt Jemima’ repeatedly in comments he made in his chambers following the acquittal of a drug suspect” in January, 2020. Associated Press, *Judge Accused of Calling Juror ‘Aunt Jemima’ Suspended*, ABC NEWS (Feb. 6, 2020, 7:41 PM), <https://abcnews.go.com/US/wireStory/judge-accused-calling-juror-aunt-jemima-suspended-68812693> [<https://perma.cc/W2RH-UUDW>]; see also *Flowers v. Mississippi*, 139 S. Ct. 2228, 2250 (2019) (finding a state prosecutorial “pattern of factually inaccurate statements about black prospective jurors”).

166. GATES, *supra* note 7, at 145.

167. *Buck v. Davis*, 137 S. Ct. 759, 765 (2017).

biologically inferior, dangerously brutal black-male cultural figure and the immutable color of Buck's skin.

On Gates's historical account, and contrary to that of Chief Justice Roberts, the trope of *black future dangerousness* stands cabined only by the bounds of the white-supremacist imagination and the counterweight of black ideological resistance in law and politics. Normally unbounded, the narratives and images of *black future dangerousness* typically spatter across law, culture, and society. Widespread, the end results from consistent narratives of *black future dangerousness* range from police surveillance and prosecutorial charging to bail hearings and judicial sentencing.¹⁶⁸ Chief Justice Roberts's failure to grasp the enduring racialized meaning of future dangerousness, in this case, *black-male future dangerousness*, and the sully effect that it has on even the most mundane criminal proceedings demonstrates the limits of his colorblind jurisprudence. That failure is aggravated by the Chief Justice's unwillingness to connect the ineffective trial assistance of Buck's defense counsel¹⁶⁹ to systemic funding, staffing, and training deficiencies in state access to justice programs designed to aid accused and convicted criminal offenders, as it is also these racially disparate structural deficiencies that undermine the constitutional integrity of capital-punishment proceedings. Additionally, the failure to comprehend the impact of racialized narratives of *black future dangerousness* is compounded by Chief Justice Roberts's refusal to acknowledge the existence of other racist practices that are routinely employed by judges, prosecutors, public defenders, and private attorneys who are operating in state criminal-justice systems, such as the race-blind code that Nicole Van Cleve describes in her book *Crook County: Racism and Injustice in America's Largest Criminal Court*.¹⁷⁰ Taken together, this collection of failures betrays a deliberate indifference to structural racism and its systemic impact. The next Part evaluates the conduct of Buck's trial attorney and the conduct of prosecutors, public defenders, and civil-rights lawyers more broadly, against the

168. On determinations of *black-male future dangerousness* in police surveillance, prosecutorial charging, bail hearings, and judicial sentencing, see Angela J. Davis, *The Prosecution of Black Men*, in *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* 178-208 (Angela J. Davis ed., 2017); Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 U.C. DAVIS L. REV. 745, 773-95 (2018); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 129 (2017); and Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 492-551 (2018).

169. See Adam Liptak, *A Lawyer Known Best for Losing Capital Cases*, N.Y. TIMES (May 17, 2010), <http://www.nytimes.com/2010/05/18/us/18bar.html> [<https://perma.cc/EVH3-MMAN>].

170. See L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862, 869-72 (2017) (reviewing NICOLE VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT* (2016)).

backdrop of purportedly race-neutral lawyering processes and legal-ethics traditions.

III. COLORBLIND LAWYERING-PROCESS TRADITIONS AND LEGAL-ETHICS REGIMES

Colorblind lawyering-process traditions and legal-ethics regimes create the conditions under which criminal prosecutors and public defenders as well as civil-rights and poverty lawyers unknowingly borrow from or grudgingly reiterate the white-supremacist tropes, narratives, and images of the postbellum periods of Redemption and Jim Crow segregation in crafting their litigation strategies and trial tactics. Due to the demands in colorblind lawyering-process traditions to overlook race, and thus ignore racism, these legal actors frequently fail to see how their own framing of case narratives and client stories regularly reifies racialized tropes and images that have become so deeply entrenched in our society that they become invisible to those not directly impacted by them. In other cases, these legal actors feel compelled to restate and recite the familiar narratives and tropes that can free their clients or obtain other desired legal outcomes precisely because such narratives are required by those in power to obtain the desired outcomes. As a result, these lawyers often end up, either unwittingly or involuntarily, *race-coding* or stereotyping the identity of clients, offenders, and victims.

Although such race-coding may, in many instances, end up advancing a client's immediate objectives, it often results in the diminution of the agency, dignity, and power of that client, whether that client is an individual, group, or community of color. Predicated on the logic of a *natural* social order of race-based hierarchy or, alternatively, on the allegedly race-neutral *necessity* of aggressive advocacy and paternalistic intervention, colorblind lawyering-process and legal-ethics conventions actually both facilitate and tolerate the use of racially subordinating narratives and images in civil- and criminal-justice advocacy.

To be sure, neither the managerial tolerance of courts nor the regulatory tolerance of bar associations is without limits in matters of race and advocacy. Courts condemn the explicit racially charged remarks, questions, and arguments of counsel at trial¹⁷¹ and ban racial discrimination from the civil¹⁷² and

171. *Calhoun v. United States*, 568 U.S. 1206, 1207-09 (2013) (denying petition for writ of certiorari); *People v. Robinson*, 459 P.3d 605, 607-10 (Colo. App. 2017) (criticizing the prosecutor's opening-statement reference to the accused black male offender's "dark penis going into a white body"), *rev'd*, 454 P.3d 229 (Colo. 2019).

172. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991).

criminal¹⁷³ jury-selection process, much like Chief Justice Roberts did with defense counsel's use of Dr. Quijano's racial-science expert testimony in *Buck v. Davis*. Moreover, in 2016, the American Bar Association (ABA) amended Rule 8.4 of the Model Rules of Professional Conduct to prohibit "conduct that the lawyer knows or reasonably should know is harassment or *discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.*"¹⁷⁴ The comment accompanying Rule 8.4 defines discrimination to include "harmful verbal or physical conduct that *manifests bias or prejudice* towards others."¹⁷⁵ More recently, in July 2020, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 493 to clarify the purpose, scope, and application of amended Rule 8.4.¹⁷⁶ The opinion explains that "events in the legal profession and in the broader community influenced the development" of the rule, specifically "[t]he police-involved killing of George Floyd and the unprecedented social awareness generated by it and other similar tragedies."¹⁷⁷ To bring "the subject of racial justice to the forefront,"¹⁷⁸ the opinion makes clear that the "[u]se of a racist or sexist epithet with the intent to disparage an individual or group of individuals" perforce "demonstrates bias or prejudice" within the meaning of discrimination under Rule 8.4.¹⁷⁹ Significantly, the amendment to Rule 8.4 "does not preclude legitimate advice or advocacy" otherwise "consistent" with the Model Rules¹⁸⁰ and does not call for lawyer discipline unless the conduct at issue is found to be harmful *and* intentional.¹⁸¹

Despite the ABA's denunciation of lawyer conduct known to or reasonably known to constitute harassment or discrimination on the basis of race and other identity factors in newly adopted Rule 8.4, the language of lawyering-process

173. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2251 (2019) (noting the state prosecutorial pattern of striking black prospective jurors, and dramatically disparate questioning and treatment of black and white prospective jurors).

174. MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2017) (emphasis added). For legislative history, see Veronica Root Martinez, *Combating Silence in the Profession*, 105 VA. L. REV. 805, 810-11 (2019).

175. MODEL RULES OF PROF'L CONDUCT r. 8.4(g) cmt. 3 (AM. BAR ASS'N 2017) (emphasis added).

176. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 493, at 14 (2020) [hereinafter ABA Op. 493] ("Model Rule 8.4(g) prohibits a lawyer from engaging in conduct related to the practice of law that the lawyer knows or reasonably should know is harassing or discriminatory.").

177. *Id.* at 1 n.3.

178. *Id.*

179. *Id.* at 8.

180. MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2020).

181. ABA Op. 493, *supra* note 176, at 6.

traditions¹⁸² and legal-ethics regimes, including the ABA's Canons of Professional Ethics,¹⁸³ Model Code of Professional Responsibility,¹⁸⁴ and earlier versions of the Model Rules of Professional Conduct, leaves no room for understanding the harms of racism and other harms beyond explicit and intentional manifestations of prejudice.¹⁸⁵ The Canons, for example, make no reference to color, race, bias, or discrimination and address prejudice solely in terms of "popular prejudice against lawyers as a class" engendered by "winning" a client's cause through a "false claim."¹⁸⁶ Likewise, the Model Code makes no mention of color, race, or discrimination and relates bias only to the representation of an "unpopular cause"¹⁸⁷ and to the "judgment" of a trial judge.¹⁸⁸ The Model Code connects prejudice to the right of a client¹⁸⁹ and to the appeal to jury passion that oversteps the bounds of "legitimate argument."¹⁹⁰ Similarly, the Model Rules make no reference to color, race, bias, or discrimination but for the amended language of Rule 8.4.¹⁹¹ Apart from the comment to Rule 8.4, the Model Rules address prejudice in terms of the effect of trial publicity, the protection of client

182. See AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 138-207, 217 (1992) (citing racial bias within the profession but omitting race-conscious reasoning from fundamental lawyering skills); WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 69 (2007) (connecting race to larger issues of ethics, professional identity, and the nature of legal work but overlooking skill- and value-based race-conscious reasoning).

183. CANONS OF PROF'L ETHICS (AM. BAR ASS'N 1908).

184. MODEL CODE OF PROF'L RESPONSIBILITY (1969) (AM. BAR ASS'N, amended 1980).

185. MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 1983).

186. CANONS OF PROF'L ETHICS, *supra* note 183, at Canon 15 (discussing how far a lawyer may go in supporting a client's cause).

187. MODEL CODE OF PROF'L RESPONSIBILITY, at EC 7-1 n.5 (1969) (AM. BAR ASS'N, amended 1980) (quoting *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1216 (1958)).

188. *Id.* at EC 7-33 n.54 (quoting ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 199 (1940)).

189. *Id.* at EC 2-32, DR 2-110(A)(2), (C)(3), (C)(4), DR 7-101(A)(3).

190. *Id.* at DR 7-106 n.82 (quoting *Cherry Creek Nat'l Bank v. Fid. & Cas. Co.*, 202 N.Y.S. 611, 614 (Sup. Ct. 1924)).

191. MODEL RULES OF PROF'L CONDUCT, at r. 8.4 cmt. [3] (AM. BAR ASS'N 1983) ("The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).").

interests, and the impartiality of proceedings before a tribunal yet decouple it from race and bias.¹⁹²

Spoken in courthouses, classrooms, and clinics, the colorblind language of the ABA Canons, Model Code, and Model Rules still suffuses the curricular texts of experiential-skills courses and continuing-legal-education seminars even while they increasingly integrate cross-cultural habits of seeing, hearing, and speaking into lawyering-process training regimens.¹⁹³ Consider the canonic texts of clinical education and their reproduction of a sociological vision of inner-city populations of color in ways that individualize the trauma of poverty; de-contextualize the cultural, socioeconomic, and political determinants of collective action; and ignore the centrality of historical pain.¹⁹⁴ As one of us has previously argued, for decades, those foundational texts overlooked the client-marginalizing narratives of culture and society, “isolat[ed] clients from others [of differing identity backgrounds] laboring in similar situations of vulnerability,” and “overlook[ed]” opportunities “for client resistance and collective

192. *Id.* at r. 1.3 (diligence); *id.* at r. 1.6 (confidentiality of information); *id.* at r. 1.7 (conflicts of interest); *id.* at r. 1.8 (conflicts of interest); *id.* at r. 1.16 (declining or terminating representation); *id.* at r. 3.6 (trial publicity); *id.* at r. 3.7 (lawyer as witness); *id.* at r. 8.3 (reporting professional misconduct); *id.* at r. 8.4 (misconduct).

193. See Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 38-48 (2001); Ascanio Piomelli, *Cross-Cultural Lawyering by the Book: The Latest Clinical Texts and a Sketch of a Future Agenda*, 4 HASTINGS RACE & POVERTY L.J. 131, 161-66 (2006); Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 384-87 (2002); Carwina Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*, 11 CLINICAL L. REV. 369, 372-75 (2005).

194. Anthony V. Alfieri, *The Poverty of Clinical Canonic Texts*, 26 CLINICAL L. REV. 53, 78-79 (2019) (assailing the thin, foundational conception of poverty informing the social construction of poor clients and impoverished neighborhoods in clinical pedagogy embedded in the widely adopted canonic texts on interviewing and counseling produced over five decades by David Binder and his coauthors under the titles *Legal Interviewing and Counseling: A Client-Centered Approach* and *Lawyers as Counselors: A Client-Centered Approach*); cf. Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 4 S. CAL. REV. L. & WOMEN'S STUD. 33, 35-36 (1994) (“While it seems relatively straightforward that objects, issues, and other phenomena are interpreted from the vantage point of the observer, many law classes are conducted as though it is possible to create, weigh, and evaluate rules and arguments in ways that neither reflect nor privilege any particular perspective or world view. . . . When this expectation is combined with the fact that what is understood as objective or neutral is often the embodiment of a white middle-class world view, minority students are placed in a difficult situation. To assume the air of perspectivelessness that is expected in the classroom, minority students must participate in the discussion as though they were not African-American or Latino, but colorless legal analysts. The consequence of adopting this colorless mode is that when the discussion involves racial minorities, minority students are expected to stand apart from their history, their identity, and sometimes their own immediate circumstances and discuss issues without making reference to the reality that the ‘they’ or ‘them’ being discussed is from their perspective ‘we’ or ‘us.’”).

mobilization” around class-wide experiences of discrimination.¹⁹⁵ Those same texts imposed contested categories of race-infected behavioral analysis to evaluate client character and credibility, and disregarded the impact of structural racism and inequality in assessing community capacity for legal-political action.¹⁹⁶ And yet in legal education, the bleached-out, perspectiveless stance of colorblind lawyering and ethics persists.¹⁹⁷

A. Colorblind Lawyering-Process Traditions

Colorblind lawyering-process traditions define both client- and court-centered practices in terms of neutral skills and mechanical techniques that seemingly vary based on calculations of tactical advantage rather than intrinsic, normative considerations of client and community identity. Upon this definition, the practices of advising, advocating, negotiating, and evaluating a client’s legal affairs are considered to be race-free, quasi-scientific methodologies. With this understanding, those skill-based methodologies are frequently taught in classrooms and clinical field placements, systematized in texts, and reproduced in simulation exercises without regard to how considerations of the race, gender, socioeconomic class, national origin, or other identities of involved clients, lawyers, judges, juries, and witnesses may and should shape their utilization. Instead, it is assumed that these methodologies, when rigorously applied and finely honed, can obtain effective results across both litigation and transactional contexts and in ways that transcend context. The end point is often the retelling of familiar racialized, gendered, or classed tropes and narratives that, even as they may result in a good legal outcome for a client, may strip the client of full agency and dignity, reinforce damaging frames that have routinely been imposed upon the client because of the client’s identities, and further solidify the broader dynamics that may have kept the client on the lower end of our society’s status hierarchy.

Consider, for example, the racially and ethnically subordinating narratives that immigration attorneys must relay to judges to ensure that their clients are able to obtain asylum in the United States. Such narratives reinscribe simplistic notions of the superiority, innocence, and the forward-thinking nature of the

195. Alfieri, *supra* note 194, at 67.

196. *Id.*

197. See Anthony V. Alfieri, *Against Practice*, 107 MICH. L. REV. 1073, 1083-85 (2009) (reviewing WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007)); Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 346-48 (1997); David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1511-17 (1998).

United States as the nation standing high on a mountain alongside the deviance, the backwardness, and the “shithole”-ness¹⁹⁸ of the countries from which the asylum seekers are fleeing.¹⁹⁹ Beginning with her own account about representing a Muslim lesbian client who came from a religious family and was seeking asylum in the United States, former immigration attorney Jawziya Zaman described the painful storytelling process of immigration lawyering that ultimately pushed her to leave her job, stating:

She tells me three things about herself. She’s from a Muslim country, her family is religious, and she’s a lesbian. I immediately relax into my chair. “You just won your case,” I want to say but don’t. . . .

. . . I’m silently whittling her story to the shape I know will lead to the desired outcome. I’ll frame her experiences within readily available descriptions of a regressive religion and a society steeped in patriarchy. I’ll paint a picture of yet another oppressed Muslim woman whom the United States must save from her backward culture. I’ll draw on media articles and the State Department’s annual country reports on human rights practices to support my argument that the experiences of sexual minorities in her country can be easily reduced to one truth: suffering, persecution, or death. . . .

. . . .

My frustration with the job, I learned, had to do with how I felt implicated in the flawed premises of immigration law, including its reductionist narratives about other countries and its dehumanization of foreigners. In virtually every case involving defense against deportation, the law insisted that I reinforce tired stereotypes about the global South and force clients to undergo a ritual flagellation before they could be granted the privilege of remaining in the country.²⁰⁰

198. In a meeting in the Oval Office in 2018, President Trump referred to countries mentioned during that meeting such as Haiti and El Salvador as “shithole” countries and wondered why the United States did not encourage or get more immigrants from countries like “Norway.” Josh Dawsey, *Trump Derides Protections for Immigrants from ‘Shithole’ Countries*, WASH. POST (Jan. 12, 2018, 7:52 A.M. EST), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfco725c-f711-11e7-91af-31ac729add94_story.html [<https://perma.cc/BN3G-X6M5>].

199. See Jawziya F. Zaman, *Why I Left Immigration Law*, DISSENT MAG. (July 12, 2017), https://www.dissentmagazine.org/online_articles/left-immigration-law [<https://perma.cc/B4PL-Z3YQ>].

200. *Id.*

What made the narratives worse, Zaman explained, was the fact that her clients, unlike in other areas of the law, had to start their cases with an admission of guilt, making “[c]onfession and penance . . . sacraments in immigration law.”²⁰¹ Yet, in spite of the harms that the retelling of these stereotyped and raced asylum-seeking tropes in immigration law have on the home countries of asylum seekers and on the asylum seekers themselves, including through individual traumatic harms and dignity harms, there are no rules of conduct or legal ethics codes that would find their construction to be violative of professional norms. The storytellers—here, the lawyers—are not engaged in verbal or physical conduct that is intentionally prejudicial. Rather, under our colorblind lawyering-process norms and legal-ethics regimes, they are merely telling neutral stories that lawyers must invoke on behalf of their clients.

Lawyer-crafted arguments that similarly present familiarized and expected scripts of client stories as a means of producing certain outcomes in our legal system also pervade in the criminal-law arena. Consider, for instance, the lawyering methodologies of interviewing, investigation, and drafting that capital defense counsel put to work in the appellate representation of Terence Tramaine Andrus in *Andrus v. Texas*,²⁰² in particular, the defense counsel’s preparation of Andrus’s petition for a writ of certiorari from the Supreme Court.²⁰³ Maneuvering between colorblind and color-coded rhetorical styles of advocacy, capital appellate counsel omitted direct mention of Andrus’s race or ethnicity in his petition, instead choosing to reference the fact that Andrus “was born in ‘Jefferson Davis Hospital’ in the historically *African-American* Third Ward neighborhood of Houston in 1988” and, moreover, the fact that the “State had struck virtually all *African-Americans* and Hispanics from the qualified venire pool.”²⁰⁴ These deft references navigated colorblind and color-coded convention to provide a useful, possibly sympathetic cultural and social narrative to better situate Andrus’s family history and the trial proceeding below. Nothing in the Model Rules, however, required capitulation to the colorblind or, more accurately, color-coded tropes used by counsel to locate Andrus in the segregated racial

201. *Id.* (“We concede that our clients entered the country illegally, or stayed longer than they were supposed to, or lied to the government about their marital status, or whatever else. . . . There are forms, exhibit lists, and piles of evidence to prove our client is a good person even though he broke the law. Being good is a prosaic business that translates to paying taxes, having a steady paycheck, and going to church. The client narrates his good deeds in a written statement that should explain in some detail why he did wrong, how he’s learnt his lesson, and why he shouldn’t be deported. . . . In the many hours I spent preparing clients for their public confession—in legal terms, testifying in court—I emphasized the importance of *appearing* sorry in addition to *being* sorry.”).

202. 140 S. Ct. 1875 (2020) (per curiam).

203. Petition for Writ of Certiorari, *Andrus*, 140 S. Ct. 1875 (No. 18-9674).

204. *Id.* at 2, 7 (emphasis added).

space of inner-city Houston through geographic allusions to *Jefferson Davis Hospital*, a municipal hospital for low-income patients,²⁰⁵ and the *Third Ward*, a historically black neighborhood.²⁰⁶ Unsurprisingly, both capital appellate counsel and the Supreme Court construed the familiar tropes of racial geography—a municipal charity hospital and a Jim Crow neighborhood—to be *harmless* acts of *legitimate* advocacy free of bias and prejudice and, thus, consistent with the Model Rules. By design, Rule 8.4 merely prohibits discrimination in the form of harmful verbal conduct that manifests bias or prejudice, such as the intentional use of a racist epithet to disparage an individual or a group.

By avoiding blatant, intentionally disparaging racist epithets in drafting Andrus's Supreme Court petition, capital appellate counsel escaped the prohibition against discrimination newly mandated by Rule 8.4. This narrative evasion occurred repeatedly. For example, in the petition, counsel reiterated the trope of the *Third Ward* and added the tropes of criminal recidivism, prison, and black household instability, noting that Andrus, upon his release from prison at the age of eighteen, "was taken in by a couple from the old Third Ward neighborhood who (unlike his mother) was willing to help him. He followed their rules, helped around the house, and diligently looked for work. But when the father of the house was sent back to prison, Andrus was turned out."²⁰⁷ Although once again adhering to a mixed colorblind and color-coded advocacy tradition, this second, more troubling narrative veered toward the New South Redeemer trope of black *chronic childlike dependence*. For Redeemers, the narrative of the *infantile* yet *dangerously brutal* black figure framed the "Negro Problem" and gave rise to the white paternalistic obligation of leading, nurturing, and controlling unequipped freedpeople. Capital appellate counsel's entanglement with white-supremacist Redeemer narratives in defending Andrus demonstrates the lawyer tendency to treat a black offender, even if a victim of discrimination or violence, as an imaginary "Negro"—Gates's subcitizen-object—constructed for the purposes of effective advocacy rather than as a citizen-subject allied for the purposes of political agency.²⁰⁸ Entrenched in the founding canonical texts of client-centered lawyering in clinical legal education, this tendency favors the construction

205. See Carolina Gonzales, *The Haunted Jefferson Davis Hospital*, HOUS. CHRON. (Oct. 27, 2015, 9:33 AM), <https://www.chron.com/this-forgotten-day-in-houston/article/The-Haunted-Jefferson-Davis-Hospital-6592987.php> [<https://perma.cc/T6N8-6JBY>].

206. See Elizabeth Trovall, *As Gentrification Looms, New Research Shows What's at Stake for Houston's Third Ward*, HOUS. PUB. MEDIA (Nov. 20, 2019, 4:26 PM), <https://www.houstonpublicmedia.org/articles/news/2019/11/12/351078/as-gentrification-looms-new-research-shows-whats-at-stake-for-houstons-third-ward> [<https://perma.cc/EP8X-SCS9>].

207. Petition for Writ of Certiorari, *supra* note 203, at 4.

208. GATES, *supra* note 7, at 126.

of primitivist racial stereotypes that place black clients “out at the margin”²⁰⁹ of advocacy over the construction of an alternative client culture of racial assertiveness and self-determination. Such primitivist constructions discount the cultural, social, and political import of racial identity and deform our understanding of impoverished clients and communities of color.

Within the colorblind, skill-centered framework of legal education, our understanding is further distorted by the belief that client racial identity is *either* something easily discoverable through a race-neutral alchemy of clinical training and experiential intuition *or*, more disturbing, something pathologically absent and, hence, instrumentally adaptable for purposes of advocacy. If discoverable as a naturally ingrained or structurally determined quality of personhood, then client racial identity lacks full agency. If absent or stunted in its quality of personhood and, therefore, situationally adaptable, then client racial identity falls subject to lawyer paternalistic control and manipulation, once again lessening full agency. In each of these senses, racial identity is expedient, its pragmatic form and content dictated by the tactical and strategic calculus of lawyer advocacy. For Gates and for us, however, racial identity is *not* easily discoverable, *not* pathologically absent or subhuman, and *not* simply a self-invented empty signifier. Racial identity is a quality of personhood at the core of what it means to be a citizen-subject.

B. Colorblind Legal-Ethics Regimes

Bracketed to the foundational notions of specialized professional knowledge, technical skill, and paternalistic discretion, colorblind legal-ethics regimes permit lawyers largely to dictate the means and tactics used to accomplish a client’s objectives.²¹⁰ In civil and criminal-justice cases marked by race, colorblind ethics regimes, chiefly Rule 8.4 of the ABA Model Rules, constrain this strategic discretion. Two conduct-regulating provisions of the rule provide primary constraints: first, paragraph (d), applicable if the lawyer’s conduct proves “prejudicial to the administration of justice;”²¹¹ and second, paragraph (g), applicable if the lawyer “knows or reasonably should know” that the conduct constitutes

209. Jacobs, *supra* note 197, at 348; see also Nicole Smith Futrell, *Vulnerable, Not Voiceless: Outsider Narrative in Advocacy Against Discriminatory Policing*, 93 N.C. L. REV. 1597, 1612 (2015); Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807, 1808 (1992) (“In teaching about good community lawyering, I stress that lawyers need to be conscious of the class, race, ethnicity, gender, sexual orientation, possible physical disability, and age of the attorney, the client, their allies, their enemies, and other institutional players.”).

210. See MODEL RULES OF PROF’L CONDUCT r. 1.2 cmt. 2 (AM. BAR ASS’N 2020).

211. *Id.* r. 8.4(d).

“discrimination on the basis of race” and arises in a matter “related to the practice of law.”²¹² Race case-specific verbal conduct, both tropes and narratives, rises to the level of discriminatory harm when it manifests bias or prejudice towards others, for example, in the use of intentionally disparaging racist epithets.²¹³ Again, these narrowly tailored constraints do not preclude “legitimate” advocacy.²¹⁴ Legitimate advocacy extends to the trial lawyer’s use of peremptory challenges in jury selection, even when exercised on a discriminatory basis.²¹⁵

The colorblind rhetoric of lawyering-process traditions and legal-ethics regimes veils the white-supremacist tropes that frame the legal consciousness of lawyers. Trials provide the chief forum for the introduction of such tropes, narratives, and images under the guise of *race-coding*. At trial, lawyer race-coding employs stereotypes in ways that adversely affect the agency and dignity of both individuals and their communities.

Recall the penalty phase of the capital trial in *Buck*, when Buck’s trial attorney called Dr. Walter Quijano to the stand as an expert witness to testify regarding the “statistical factors” he had “looked at in regard to this case.”²¹⁶ Consonant with his admitted expert report, Dr. Quijano testified that race was “know[n] to predict future dangerousness.”²¹⁷ On cross-examination, the Harris County prosecutor questioned Dr. Quijano about the role of race referenced in his report.²¹⁸ Specifically, the prosecutor asked: “You have determined . . . that the race factor, black, increases the future dangerousness[,] . . . is that correct?”²¹⁹ Dr. Quijano answered: “Yes.”²²⁰ Later in closing argument, recounting expert testimony on Buck’s future dangerousness, the prosecutor stated: “You heard from Dr. Quijano, . . . who told you that . . . the probability did exist that [Buck] would be a continuing threat to society.”²²¹

The prosecution and defense strategies in *Buck* illustrate the routine crafting of race-coded tropes—*future dangerousness* and *continuing threat to society*—to

212. *Id.* r. 8.4(g). Under the ABA Model Rules, “[a] trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g).” *Id.* r. 8.4(g) cmt. 5.

213. *Id.* r. 8.4 (g) cmt. 3; ABA Op. 493, *supra* note 176.

214. MODEL RULES OF PROF’L CONDUCT r. 8.4(g) (AM. BAR ASS’N 2020).

215. *See id.* r. 8.4 cmt. 5.

216. *Buck v. Davis*, 137 S. Ct. 759, 769 (2017).

217. *Id.* Additionally, Dr. Quijano testified: “It’s a sad commentary [that] minorities, Hispanics and black people, are over represented in the Criminal Justice System.” *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

describe accused black offenders under the aegis of colorblind lawyering-process traditions and legal-ethics conventions.²²² Notably, in *Andrus v. Texas*, Justice Alito highlighted, through the language he used in articulating his arguments, the race-coded tropes introduced by prosecutors in the form of aggravating evidence during the penalty phase of Andrus's 2012 capital trial in Fort Bend County, Texas.²²³ In his dissenting opinion, joined by Justices Thomas and Gorsuch, Justice Alito pointed to Andrus's "violent record" and the "volume of evidence that Andrus is prone to brutal and senseless violence and presents a serious danger to those he encounters whether in or out of prison."²²⁴ Remarking that Andrus "carried out a reign of terror in jail," Justice Alito credited lower-court findings that Andrus "has a violent, dangerous, and unstable character; and that he is a threat to those he encounters."²²⁵ Strikingly, neither the *Andrus* Court's per curiam opinion nor Justice Alito's dissenting opinion mentions that Andrus is black. Despite this silent, colorblind pretense, the race-coded character tropes recapitulated by Alito in his description of Andrus distinctly echo the antebellum and postbellum tropes of an innately *bestial* and *dangerously brutal* black character well documented by Gates in *Stony the Road*.²²⁶

Broadly in criminal cases, both prosecutors and defense attorneys justify their use of white-supremacist tropes, narratives, and images under naturalistic and necessitarian rationales. The protection afforded the strategic discretion of "legitimate advice or advocacy" under ABA Model Rule 8.4 contemplates both rationales.²²⁷ Naturalistic rationales appeal to an immutable social order, a chain of being, of race-based hierarchy. According to this hierarchical order, Buck and Andrus, like other young black, male offenders, are by nature inherently dangerous, violent, and a future threat to society. For the prosecutors *and* defense trial

222. This habitual race-coding is also illustrated by the conduct of a Texas federal prosecutor at the 2011 federal drug-conspiracy trial of an accused black offender, Bongani Charles Calhoun, in *Calhoun v. United States*. Nos. SA-14-CA-155, SA-08-CR-351, 2014 WL 2723188 (W.D. Tex. June 16, 2014). In his cross-examination of Calhoun, the prosecutor declaimed: "You've got African-Americans, you've got Hispanics, you've got a bag full of money. Doesn't that tell you—a light bulb doesn't go off in your head and say, *this is a drug deal?* . . . So what are they doing in this room with a bag full of money?" *Id.* at *3 (emphasis added). See also *United States v. Cruz-Romero*, No. 1:13cr28-MHT, 2013 WL 4008669, at *5 (M.D. Ala. Aug. 5, 2013) (criticizing witness testimony referencing "fleeing" Hispanics).

223. *Andrus v. Texas*, 140 S. Ct. 1875, 1887-91 (2020) (Alito, J., dissenting).

224. *Id.* at 1889.

225. *Id.* at 1891. The crimes that Andrus was convicted of committing were brutal and heinous. Our focus is on the narrative aspects of the dissent.

226. GATES, *supra* note 7, at 59, 91.

227. MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2020). Again, under the ABA Model Rules, "[a] trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g)." *Id.* r. 8.4(g) cmt. n.5.

attorneys in *Buck* and *Andrus*, the vision of a natural racial order steering their race-coded trial conduct offers a legitimate form of advocacy. For prosecutors and defense attorneys operating under a naturalistic rationale of this sort, casting Buck and Andrus as ruthless, homicidal black savages signals neither bias nor prejudice, and instead reflects a colorblind, objective truth.

Necessitarian rationales, by contrast, invoke the adversary system-derived duty of aggressive advocacy and the paternalism-deduced obligation of means-oriented intervention. Strongly backed by liberty-interest norms, the duty of aggressive advocacy justifies starkly race-coded lawyer conduct in criminal cases, overriding client and third-party dignity norms. Chronically paternalistic, the obligation of means-oriented intervention justifies ceding tactical and strategic decision making to lawyer discretion, overriding client participatory norms. In *Buck*, the race-coded conduct of Buck's trial attorney goes too far for the colorblind dogma of Chief Justice Roberts in evoking Gates's Redeemer trope of the *ruthless, homicidal black savage*. Decrying such egregious race-coding, the Chief Justice complained: "It would be patently unconstitutional for a state to argue that a defendant is liable to be a future danger because of his race."²²⁸ Yet, even though Buck's defense attorney's race-coded trial conduct could not be saved by necessitarian rationales of aggressive advocacy and strategic intervention common to the criminal defense function in race cases, it arguably could have been recognized as a legitimate form of advocacy under the standard colorblind lawyering processes and legal-ethics regimes. Despite the very real harms caused by defense counsel's use of explicitly racist "science" to "defend" Buck with Dr. Quijano's expert testimony, defense counsel could still find himself shielded from disciplinary prosecution for violation of the Model Rules of Professional Conduct because the form of advocacy he employed (verbal conduct through Dr. Quijano's testimony) could be read as not exhibiting intentional bias or prejudice towards Buck himself. Under the colorblind formalism of lawyering-process traditions and legal-ethics regimes, only evidence of actual or fairly inferred bias or prejudice,²²⁹ coupled with evidence of intentional racial harm,²³⁰ would render a lawyer's conduct illegitimate. This discretionary latitude is precisely what permits race-coded, natural, and necessitarian appeals framed in antebellum and postbellum tropes, narratives, and images to pass as legitimate forms of advocacy. Notwithstanding the strong language in its opinion, the Supreme Court in *Buck* leaves both the ineffectiveness of that advocacy and its strained ethical legitimacy intact.

228. *Buck v. Davis*, 137 S. Ct. 759, 775 (2017).

229. MODEL RULES OF PROF'L CONDUCT r. 1.0(f) (AM. BAR ASS'N 2020) ("'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.").

230. *Id.* r. 8.4(g) cmt. 3.

IV. RACE-CONSCIOUS ADVOCACY AND ETHICS PRACTICES

Gates's *Stony the Road* charges us with the task of melding race-conscious advocacy and ethics practices into the trial of civil-rights, poverty-law, and criminal cases. Diligently discharged, that task provides lawyers and clients meaningful, collaborative opportunities to *reframe* and unmask race-coded identity. Reframing, in turn, helps recover the presence of black agency; enhance the exercise of black power; and contextualize the public and private impact of systemic racism on individuals, groups, and communities. When infused by the antisubordination norms of racial dignity and equality garnered from the black resistance movements chronicled by Gates, alternative race-conscious advocacy and ethics practices may prove useful in attacking legal, political, and economic systems of structural inequality. This is especially true where they connect us to past (New Negro Renaissance) and present (Black Lives Matter) resistance movements.

The starting point of race-conscious advocacy and ethics practices is the recognition that *race matters*. Exclaimed by Justice Sotomayor in her dissenting opinion on the political-process doctrine in *Schuette v. Coalition to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality by Any Means Necessary (BAMN)*,²³¹ race matters because of the long history of racial disenfranchisement and persistent racial inequality exposed by Gates.²³² Like Justice Sotomayor, Gates in *Stony the Road* openly and candidly recognizes the glaring reality of race and centuries of racial discrimination.²³³ Elsewhere, recently for instance in the fields of housing²³⁴ and jury selection,²³⁵ the Supreme Court has addressed racial discrimination in the forms of both institutional disparate treatment and structural disparate impact. Race-conscious advocacy and ethics practices enable civil-rights, criminal-defense, and poverty lawyers to challenge institutional and structural forms of racism in community-based campaigns that amplify black agency, enlarge black power, and promote institution building.

A. Structural Racism

Gates adduces evidence of white-supremacist ideology in the cultural and social history of race and race relations during the late-nineteenth and early-twentieth centuries. That history clarifies the daily, overt and covert machinations of racial hierarchy. Founded on racial hierarchy, structural racism often

231. 572 U.S. 291, 337 (2014) (Sotomayor, J., dissenting).

232. *Id.* at 380.

233. *Id.*

234. *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519 (2015).

235. *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019).

clothes discriminatory practices in mundane state-law rules of procedure. Consider, for example, the Louisiana and Oregon state nonunanimous jury-verdict rules struck down this Term by the Supreme Court in *Ramos v. Louisiana*.²³⁶ In April, the *Ramos* Court held that the Sixth Amendment right to a jury trial, incorporated against the States via the Fourteenth Amendment, required a unanimous verdict to convict a criminal defendant of a serious offense.²³⁷ Delivering the opinion of the Court, Justice Gorsuch noted that the State of Louisiana convicted and sentenced the accused, Evangelisto Ramos, to life in prison without the possibility of parole based on a nonunanimous 10-to-2 jury verdict in which two jurors voted to acquit. In reversing the Louisiana Court of Appeal's affirmance of Ramos's conviction and sentence, Justice Gorsuch reasoned that "if the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court."²³⁸

In support of the *Ramos* Court's Sixth Amendment jurisprudence, Justice Gorsuch traced the origins of Louisiana's nonunanimous jury verdict rule to its 1898 state constitutional convention, finding that the "avowed purpose" of the convention "was to 'establish the supremacy of the white race,'" and adding that "the resulting document included many of the trappings of the Jim Crow era: a poll tax, a combined literacy and property ownership test, and a grandfather clause that in practice exempted white residents from the most onerous of these requirements."²³⁹ Pointing to the "racial demographics" of the period, Justice Gorsuch explained that convention "delegates sought to undermine African-American participation on juries" by "sculpt[ing] a 'facially race-neutral' rule permitting 10-to-2 verdicts in order 'to ensure that African-American juror service would be meaningless.'"²⁴⁰ Justice Gorsuch attributed Oregon's subsequent 1930s adoption of a similar nonunanimous verdict rule "to the rise of the Ku Klux Klan and efforts to dilute 'the influence of racial, ethnic, and religious minorities on Oregon juries.'"²⁴¹ Although he mentioned that Louisiana and Oregon courts "frankly acknowledged that race was a motivating factor" in their states' adoption of nonunanimity rules, he insisted that "it's hard to say why these laws persist, their origins are clear."²⁴²

236. *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).

237. *Id.* at 1394.

238. *Id.* at 1397.

239. *Id.* at 1394 (footnote omitted).

240. *Id.*

241. *Id.*

242. *Id.*

In concurring opinions, both Justices Sotomayor and Kavanaugh alluded to “the legacy of racism that generated Louisiana’s and Oregon’s laws.”²⁴³ Justice Kavanaugh reiterated that Louisiana, at its 1898 state constitutional convention, “enshrined non-unanimous juries into the state constitution . . . to diminish the influence of black jurors, who had won the right to serve on juries through the Fourteenth Amendment in 1868 and the Civil Rights Act of 1875.”²⁴⁴ He also stressed that “the 1898 constitutional convention expressly sought to ‘establish the supremacy of the white race.’”²⁴⁵ More broadly, he remarked that “the convention approved non-unanimous juries as one pillar of a comprehensive and brutal program of racist Jim Crow measures against African-Americans, especially in voting and jury service.”²⁴⁶ Unearthing “the racist origins of the non-unanimous jury,” Justice Kavanaugh commented that “it is no surprise that non-unanimous juries can make a difference in practice, especially in cases involving black defendants, victims, or jurors.”²⁴⁷ Indeed, he declared: “that was the whole point of adopting the non-unanimous jury requirement in the first place.”²⁴⁸ According to Justice Kavanaugh, “[T]he math has not changed. Then and now, non-unanimous juries can silence the voices and negate the votes of black jurors, especially in cases with black defendants or black victims, and only one or two black jurors.”²⁴⁹

The basis for the *Ramos* Court’s acute description of the antiblack racist history underpinning the Louisiana and Oregon state nonunanimous jury-verdict rules comes from the appellate defense team brief filed by the Stanford Law School Supreme Court Litigation Clinic and others on behalf of Ramos. In its brief, the defense team confirmed that Louisiana’s jury verdict rule “originated in a concerted effort to maintain ‘white political supremacy’ in the wake of Reconstruction.”²⁵⁰ From these origins, the team explained, Louisiana’s nonunanimity rule “continued over the years to allow de facto suppression of minority viewpoints,” effectively nullifying the voting power of Blacks in the state jury

243. *Id.* at 1410 (Sotomayor, J., concurring) (citation omitted).

244. *Id.* at 1417 (Kavanaugh, J., concurring) (citations omitted).

245. *Id.*

246. *Id.* (citations and footnote omitted).

247. *Id.* (citation omitted).

248. *Id.* at 1418.

249. *Id.*

250. Brief for Petitioner at 31, *Ramos*, 140 S. Ct. 2228 (No. 18–5924), 2019 WL 2451204, at *31; *cf.* Reply Brief for Petitioner at 15, *Ramos*, 140 S. Ct. 2228 (No. 18–5924), 2019 WL 4256219, at *15 (arguing that in addition to the rule likely being “the product of racial animus,” “what matters most” is the rule’s effects, which are to undermine “the objective of securing a verdict from a ‘representative cross-section of the community’”).

pool.²⁵¹ Because “[r]acial minorities tend to be under-represented in jury pools,” the team added, minorities “are usually outnumbered on petit juries.”²⁵² These racial “realities,” it pointed out, “dictate that minority voices can often be discounted or even ignored when unanimity is not needed” in the jury room.²⁵³

By exposing the current *racial realities* of state jury representation in *Ramos*, the Stanford Law Clinic-staffed appellate defense team revealed a larger, race-contaminated structural inequity pervading state criminal-justice systems, namely the underrepresentation of people of color in jury pools and, by extension, on voter registration lists. In this way, the defense team moved beyond the Supreme Court’s constricted focus on past racial *legacy* and white-supremacist *origin* to confront the present racial *realities* of continuing systemic inequities in jury representation and voting registration. This move opened up a potential dialogue on the structural barriers to voter access and participation that disproportionately affect low-income communities of color. For Ramos and his clinic appellate defense team, it is not hard to say why such inequities persist; they persist because of the lasting antiblack racism bound up in the white-supremacist discourse, imagery, mythology, and scientific logic of the criminal-justice and voting-registration systems—a logic that is reinforced by widespread political disenfranchisement.

B. Black Agency

The Stanford Law School Supreme Court Litigation Clinic’s structural framing of race and racial discrimination in *Ramos* models a race-conscious, systemic approach to civil- and criminal-justice advocacy. As powerful as the work and brief from the Stanford Law Clinic was, the brief from the NAACP Legal Defense & Educational Fund, Inc. (LDF), which brought to life the disempowering effects of Louisiana’s nonunanimous jury-verdict rule on black jurors through the actual words of two black state residents who had recently served as jurors and felt the sting of having their votes not count due to Louisiana’s nonunanimous jury-verdict rule, reverberated more deeply. In this way, LDF opened a venue through which community members affected by the jury rule could directly speak their truth to the United States Supreme Court about the harms to their rights and their dignity that Louisiana’s racism-inspired jury-verdict rule had forced them to endure.

251. Brief for Petitioner, *supra* note 250, at *32.

252. *Id.*

253. *Id.* at *33; see also Reply Brief for Petitioner, *supra* note 250, at *15 (arguing that Louisiana had not contested that unanimity rules “ensure that the voices of racial minorities are not discounted or ignored in the jury room” unlike its nonunanimity rule).

As the LDF brief revealed, under Louisiana’s nonunanimous jury-verdict rule, not only had black defendants been “overrepresented in the pool of defendants who were convicted non-unanimously” and white defendants been both overrepresented “among unanimous convictions and underrepresented . . . among nonunanimous convictions,” black jurors were 2.5 times more likely than white jurors to be in the dissent when guilty jury verdicts had been 11-1 or 10-2.²⁵⁴ Among the many black jurors who had been harmed by Louisiana’s rule were Willie Newton, a seventy-two year-old man who ran a family business selling burial vaults, and Bobbie Howard, a sixty-three year-old man who had his own accounting practice; both men were born and raised in the town of Houma, the town where Ramos worked, and both had served on a second-degree murder trial for Matthew Allen, a black defendant who had claimed during his trial that he had killed his victim in self-defense, but to no avail.²⁵⁵

Importantly, LDF began this section of its brief with a focus on Mr. Newton and Mr. Howard and the manner in which Louisiana’s jury-verdict rule had left both men feeling disempowered from the very moment they began their service on the jury. For instance, the brief quoted Mr. Newton’s description of his thoughts after he first saw the jury’s composition in the Allen trial, stating: “Bobby and I saw from the beginning that our vote wasn’t going to matter. We were outnumbered.’ ‘I could have just stayed home.’”²⁵⁶ Thereafter, the brief demonstrated the difference that black jurors could bring to the evaluation of any particular case, due to how their life experiences differed from those of white people in Louisiana. Highlighting some of the differences in how Mr. Newton and Mr. Howard viewed the defendant Matthew Allen, the LDF brief provided:

Mr. Newton and Mr. Howard looked at Mr. Allen differently. They saw a young man who may have made a mistake, but who still had a life ahead of him. Mr. Howard thought these differing perspectives could be due to the fact “their life experiences were different.”

After listening intently to the evidence, both Mr. Howard and Newton favored finding Mr. Allen guilty of manslaughter. “I thought about his age. I thought he deserved a second chance,” Mr. Howard said quietly. Mr. Newton confirmed that he “never thought it was second-degree

254. Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. in Support of Petitioner at 17-18, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2019) (No. 18-5924).

255. *Id.* at 18-19.

256. *Id.* at 19.

murder” and proposed to his fellow jurors that Mr. Allen should be convicted of manslaughter, not murder.²⁵⁷

Furthermore, the LDF brief showed how even the everyday racial social segregation in Louisiana could shape jury outcomes, detailing how one white juror had sympathies similar to Mr. Newton and Mr. Howard before lunch on the day of deliberations, how the white jurors ate lunch separately from Mr. Howard and Mr. Newton, and how the one sympathetic white juror returned from lunch with her mind and her vote locked in with the other white jurors. Specifically, LDF wrote:

Deliberations gave both men hope that at least some of the white jurors would see the evidence their way and would find Mr. Allen guilty of manslaughter, not murder. Mr. Howard recalled that one juror, a white woman, seemed to be leaning in favor of manslaughter going into lunch. Mr. Newton remembered there being two or three white jurors who seemed to think manslaughter was the just conviction.

Things took a turn after lunch, however. Mr. Howard recounted that he and Mr. Newton had lunch together, while the white jurors ate together. When they returned from lunch, all ten white jurors wanted to vote for second-degree murder; there was no convincing them otherwise, “everyone was set in their ways.”

Mr. Newton’s prediction that his vote wouldn’t matter proved prescient. The jury convicted Mr. Allen of second-degree murder by a vote of 10-2. All ten white jurors voted for guilt. Mr. Newton and Mr. Howard voted not guilty.²⁵⁸

The most gripping parts of the brief’s narratives, however, were the parts that shared how the experience on the Allen trial jury left Mr. Howard and Mr. Newton with little faith in their state’s legal system. For instance, while describing how his jury service had made him feel like a “second class citizen” whose “voice didn’t matter,” Mr. Newton stated that his jury service continued to sting him weeks after his service was done.²⁵⁹ He asserted, “When I left that jury, it took me a couple of weeks to get myself together. Serving on that jury took

257. *Id.* at 20.

258. *Id.* at 20-21.

259. *Id.* at 21-22.

something out of me.”²⁶⁰ After the trial, Mr. Newton was certain he “couldn’t sit there and think [he’d] get a fair trial.”²⁶¹

As the LDF brief in *Ramos* reveals, for legal-political reform campaigns to succeed, black agency, power, and institution building must be integrated into the framework of legal advocacy.²⁶² Without this antistatutory framework, and a buttressing normative commitment to racial dignity and resistance, reform campaigns will stand as empty signifiers of equality. Troublingly, contextual framing in individual and group representation that *overdetermines* the structural nature of racial injury and inequality sometimes can undercut black agency and power.

Again, recall *Andrus v. Texas*. In her Supreme Court petition for a writ of certiorari to the Texas Court of Criminal Appeals, capital appellate counsel adroitly framed the cultural and social context of Andrus’s life “story” in terms of the poverty and violence of the historically African American Third Ward neighborhood of Houston where Andrus was born in 1988.²⁶³ Erecting a kind of structural self-defense, counsel winnowed contextualizing tropes, narratives, and images of systemic racism, neighborhood disadvantage, social disorganization, and juvenile abuse and mass incarceration from forty-one volumes of testimony and documentary evidence generated from the habeas proceeding below.²⁶⁴ Despite this voluminous record and the risk of naturalistic or necessitarian overreliance on the historically subordinating tropes, narratives, and images of young black-male violence, counsel’s empathy-evoking petition racially humanized Andrus in a sense reminiscent of Gates’s account of the culturally transformative humanization of freedmen and freedwomen during the Reconstruction Era. At the same time, in a noteworthy strategic hedge, counsel hewed instrumentally to the colorblind jurisprudence of the Roberts Court majority,²⁶⁵ nowhere mentioning Andrus’s race.

The contextualizing tropes, narratives, and images woven into appellate counsel’s petition portrayed Andrus growing up in the midst of an inner-city

260. *Id.* at 21.

261. *Id.* at 22.

262. Cf. Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 850 (2021) (arguing that shifting the power lens in police reform efforts “brings a different view of expertise, and promotes a different kind of expert”); Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. REV. (forthcoming 2021) (arguing in favor of giving black defendants agency in choosing black lawyers, who may be able to mitigate antiblack bias because of their intimate understanding of the social meaning assigned to black people in the United States, to represent them).

263. Petition for Writ of Certiorari, *supra* note 203v, at 2, 4.

264. *Id.* at 5.

265. Steadfastly colorblind, both the *Andrus* Court’s per curiam opinion and Justice Alito’s dissenting opinion omitted mention of Andrus’s race.

“crack epidemic” parented by a seventeen-year-old mother in a family of “five children by five different men, none of whom ever assumed the role of father” but all of whom “had extensive entanglements with the criminal justice system – including convictions for family violence, injury to a child, sexual assault of a child, and numerous drug-related offenses.”²⁶⁶ On this in-depth portrait, Andrus’s mother “supported herself and her kids through prostitution and selling drugs,” at times “abandoning the children entirely” and “descend[ing] into depression and drug binges.”²⁶⁷ Graphically detailed, that portrait depicted “how [Andrus’s] mother taught him the drug trade in their old Third Ward neighborhood where, on his first day ‘on the job,’ he encountered an emaciated crack addict trying to trade her newborn baby for \$5-worth of street drugs.”²⁶⁸ Pictured as “a casualty of the school-to-prison pipeline” trapped in “a veritable hell on earth” juvenile detention facility for eighteen months, and a victim of “untreated mental illness” locked up “for weeks at a time in solitary confinement in frigid cells smeared with body fluids in a ward filled with screaming,”²⁶⁹ Andrus emerges out of the text of counsel’s petition as a *race-coded* figure constructed from the permanently disfiguring tropes, narratives, and images of systemic neglect, structural racism, and urban inequality. According to this structural construction of individual pathology, family dysfunction, and societal neglect, Andrus, when released at age eighteen from a “failed” carceral “environment rampant with gang posturing, violent predators, and no meaningful education or rehabilitation,”²⁷⁰ soon “slipped deep into drug addiction and petty crime” in the Third Ward neighborhood of Houston, “a circumstance that culminated in tragedy.”²⁷¹ In spite of that tragedy and its compelling race-coded portraiture, for Gates and for us, Andrus remains more than an imaginary “Negro,” more than an empty signifier of a dangerously brutal, homicidal black savage who failed to “rise” out of the monstrous depravity of inner-city Houston. Indeed, even in the images and narratives of Terence Tramaine Andrus, there is evidence of agency and resistance, of autonomy and opposition. Too often, civil-rights lawyers work hard to investigate, discover, and marshal this evidence but, constrained by race-coded tropes and narratives, distort its courtroom presentation

266. Petition for Writ of Certiorari, *supra* note 203, at 2 (stating also that “[o]ne of these men raped Andrus’s sister when she was eight years old”).

267. *Id.* at 2-3.

268. Reply to State’s Brief in Opposition at 7, *Andrus v. Texas*, 140 S. Ct. 1875 (2020) (No. 18-9674).

269. Petition for Writ of Certiorari, *supra* note 203, at 3-4.

270. *Id.* at 9.

271. *Id.*

or omit it altogether from advocacy for fear of jeopardizing their client's interests, especially client liberty interests.

The work of capital appellate counsel in *Andrus v. Texas*—as with much of the work of civil and criminal-justice lawyers—occurs at the intersection of race and poverty where client agency and resistance, as well as community power and resilience, often go unnoticed. Like the Stanford Law School Supreme Court Litigation Clinic's structural framing of race and racial discrimination in *Ramos* and civil-rights advocacy more generally, appellate counsel's framing in *Andrus* seeks to model a race-conscious, systemic approach to criminal-justice advocacy. Yet, appellate counsel's structural approach flounders when blunted by the constraints of colorblind convention and warped by the distortions of color-coded figuration. However well crafted, the structural framing of advocacy around colorblind conventions and color-coded figurations risks not only falsifying the history of black communities, but also erasing the power of individuals acting in defense of themselves and those communities. Until that approach finds a color-conscious voice and a language of agency, it will continue to falter as an alternative advocacy practice. Appellate counsel's hopeless invocation of "professional norms"²⁷² to censure the ineffectiveness of trial counsel in the *Andrus* petition underlines the additional failure of ethics regimes not only to oversee adequately the representation of indigent offenders, but also to regulate meaningfully the representation of race in cases rooted in structural inequality.

To make progress in neighborhoods like Houston's Third Ward or in our own poverty-stricken neighborhoods of Boston and Miami, we must work with our clients and their communities to build models of contextual, race-conscious lawyering that make room for stronger expressions of black agency, power, and institution-building in civic self-defense and legal-political reform-advocacy campaigns. Gates finds black agency and power in the politics of racial progress and equal rights, rather than in the trope or image of a "New Negro."²⁷³ Translating these antiracist politics into civil- and criminal-justice reform campaigns requires alternative advocacy strategies grounded in client and community leadership and self-determination. Our work teaches us that this historical ground is burdened by hierarchical differentials of caste, social class, and color, and weighted by stereotypical visions of Old Negro dependence and New Negro respectability. Neither the complex differentials nor the double visions of race, Gates notes, call activists or advocates "to step in and solve the so-called Negro Problem for the Negro."²⁷⁴

272. *Id.* at 37.

273. GATES, *supra* note 7, at xv.

274. *Id.* at 80.

To Gates, the myth of the “Negro Problem” stands central to the ideology of white-supremacist paternalism. Too often that subjugating myth reemerges in contemporary civil and criminal-justice reform campaigns, masking clients in a single, unchangeable black image of helplessness and transforming them from “speaking citizen-subject[s]” into “muzzled subcitizen object[s].”²⁷⁵ Like the xenophobic masking of Sambo art described by Gates, the conscious and unconscious masking of individual clients and whole communities in civil and criminal advocacy is a meaning-making cultural practice of white-supremacist imagination and narration, a practice judged natural or necessary and deemed ethically legitimate and even harmless. In this way, the lawyering-process traditions and ethics regimes of past and present advocacy provide a visual, textual, and physical framework for the portrayal of racial status.

Briefly consider, for example, the racial status framing of black and Latino populations illustrated by the important recent fair-housing litigation in *Bank of America Corp. v. City of Miami*.²⁷⁶ In twin federal complaints filed by a distinguished civil-rights team in 2013 and supported by amicus curiae briefs submitted by LDF and other leading civil-rights organizations in 2016, the City of Miami charged that both Bank of America and Wells Fargo “intentionally issued riskier mortgages on less favorable terms to African American and Latino customers than they issued to similarly situated white, non-Latino customers,” in violation of the FHA.²⁷⁷ Pledaded across several rounds of amended complaints, the City claimed that the riskier mortgages “discriminatorily imposed more onerous, and indeed ‘predatory,’ conditions on loans made to minority borrowers.”²⁷⁸ As a result of those bank practices, the City asserted that “default and foreclosure rates among minority borrowers were higher than among otherwise similar white borrowers and were concentrated in minority neighborhoods.”²⁷⁹ Using statistical analyses to trace its financial losses, the City further contended that higher foreclosure rates and consequent housing vacancies lowered municipal-property values and diminished property-tax revenue, thereby causing increased demand for municipal services (police, fire, and building and code

275. *Id.* at 126.

276. *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1301 (2017) (holding that the City’s claimed injuries fell within the zone of interests arguably protected by the Fair Housing Act (FHA) sufficient to establish itself as an “aggrieved person” eligible to bring suit under the statute, and that, to establish proximate cause under the FHA, a plaintiff must do more than show that its injuries foreseeably flowed from the alleged statutory violation).

277. *Id.* at 1301.

278. *Id.* The alleged predatory conditions included “excessively high interest rates, unjustified fees, teaser low-rate loans that overstated refinancing opportunities, large prepayment penalties, and—when default loomed—unjustified refusals to refinance or modify the loans.” *Id.*

279. *Id.*

enforcement services) needed to remedy the ensuing neighborhood blight and associated unsafe and dangerous conditions.²⁸⁰

In spite of the fact that the City's litigation and amicus teams in *City of Miami* squarely addressed the economic exploitation of inner-city black and Latino populations and the derivative, physical damage to their built environments, the voices, stories, and images of affected individual borrowers are wholly absent from both trial and appellate-court pleadings, motions, and briefs. Nowhere do we see or hear voices of power and resistance, stories of agency and institution building, or images of civic self-defense and homeowner organizing. Instead, from the City's litigation team at oral argument, we hear talk of making neighborhoods "whole again" and restoring "community."²⁸¹ And from LDF's amicus team, we hear about "the human cost of foreclosures" and the "human face of foreclosures and evictions" but we see only helplessness and powerlessness.²⁸² Even in the skillful advocacy work of the LDF amicus team, we cannot hear the human voices of agency and resistance or the human stories of civic self-defense and local institution building that arose from the ground up inside Miami's black and Latino inner-city neighborhoods in a daily, grassroots effort to mitigate the damage of the foreclosure and housing crisis.

For race-conscious lawyers, and perhaps for Gates too, the guiding principles for antiracist civil- and criminal-justice advocacy are client agency, community power, and collaborative client-community resistance and self-defense. Client agency recenters the client-lawyer relationship to address both the means and ends of representation. Community power shifts advocacy toward more integrated, multidimensional legal-political strategies. Collaborative client-community resistance and self-defense locates our work in neighborhoods, in schools, and in churches where individuals and groups can stand and rise together. Our shared advocacy should echo the tropes, images, and narratives of their power.

CONCLUSION

The lessons of race and legal representation offered by *Stony the Road* depart from the Obama Era aspiration of "a post-racial America."²⁸³ Gates rejects an "end of race and racism" narrative as both "naïve and ahistorical."²⁸⁴ He also

280. *Id.* at 1301-02.

281. Transcript of Oral Argument at 34, 41, *City of Miami*, 137 S. Ct. 1296 (Nos. 15-1111, 15-1112).

282. Brief for NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae Supporting Respondent, *City of Miami*, 137 S. Ct. 1296 (Nos. 15-1111, 15-1112), 2016 WL 5903235, at *17, *22.

283. GATES, *supra* note 7, at 2.

284. *Id.*

recognizes an “inextricable linkage between economic advancement and political rights.”²⁸⁵ Most importantly, by uprooting the white-supremacist tropes, narratives, and images of postbellum Redemption and Jim Crow segregation that ground too much of our contemporary U.S. cultural and social discourse, he reveals how race-coded rhetoric continues to shape the lawyering process in civil-rights, poverty-law, and criminal cases. Moreover, he demonstrates for us how the trial of these cases provides a forum for lawyers, judges, jurors, and even witnesses to race-code the identity of accused and convicted offenders, impoverished clients, and victims of discrimination. Further, he shows us how the trial of these cases affords collaborative client-lawyer opportunities to unmask and humanize race-coded identity, restore black agency and power, and contextualize systemic racism.

The challenge posed by Gates for lawyers, and their civil- and criminal-justice clients and partner communities of color, is to learn how collaboratively to devise a joint set of race-conscious practices sufficient to *reframe* black agency, identity, and resistance in legal-political advocacy. Those practices should work to advance local civic self-defense and institution-building initiatives. But the lessons offered by Gates require these practices to move beyond simply curtailing the use of Jim Crow stereotypes in advocacy. Instead, they must equally integrate the community-based politics of black agency and resistance into their advocacy, supporting movement-building campaigns for equal rights.

285. *Id.* at 23.

