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### **Race Ethics: Colorblind Formalism and Color-Coded Pragmatism in Lawyer Regulation**

Anthony V. Alfieri

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# ARTICLES

## Race Ethics: Colorblind Formalism and Color-Coded Pragmatism in Lawyer Regulation

ANTHONY V. ALFIERI\*

### ABSTRACT

*The recent, high-profile civil and criminal trials held in the aftermath of the George Floyd and Ahmaud Arbery murders, the Kyle Rittenhouse killings, and the Charlottesville “Unite the Right” Rally violence renew debate over race, representation, and ethics in the U.S. civil and criminal justice systems. For civil rights lawyers, prosecutors, and criminal defense attorneys, neither the progress of post-war civil rights movements and criminal justice reform campaigns nor the advance of Critical Race Theory and social movement scholarship have resolved the debate over the use of race in pretrial, trial, and appellate advocacy, and in the lawyering process more generally. Spoken in archetypal tropes, seen in stereotypical images, and heard in stock stories, race infects the central lawyering roles of advocate and advisor, echoing inside and outside courthouses and resounding in the rules of professional responsibility and the norms of professionalism. By turns cast in colorblind, color-coded, and color-conscious oral, written, and symbolic forms, the meaning of racial identity, racialized narrative, and racially demarcated community is both constructed and contested in the lawyering process and in the regulation of lawyer conduct.*

*In prior writings across the fields of civil rights, criminal justice, and poverty law, I mapped the intersection of race, representation, and ethics against the contours of the lawyering process, professional regulation, and*

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*legal education, especially within law school clinics and indigent civil and criminal justice systems. The purpose of this article is to revisit that body of writing and to reevaluate the continuing uses and the persisting stigma harms of race in contemporary civil rights and criminal justice advocacy, particularly in cases of racial violence. The goal of revisiting and enlarging this previous work is to grasp more fully how civil rights lawyers, prosecutors, and criminal defense attorneys use race to advantage or disadvantage Black litigants, victims, jurors, witnesses, and even other lawyers—and, moreover, how they use ethics rules and standards designed to regulate racial bias and prejudice to justify their conduct.*

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## INTRODUCTION

The recent, high-profile civil and criminal trials held in the aftermath of the George Floyd<sup>1</sup> and Ahmaud Arbery murders,<sup>2</sup> the Kyle Rittenhouse killings,<sup>3</sup> and the Charlottesville “Unite the Right” Rally<sup>4</sup> violence renew debate over race, representation, and ethics in the U.S. civil and criminal justice systems.<sup>5</sup> For civil rights lawyers, prosecutors, and criminal defense attorneys, neither the progress of post-war civil rights movements<sup>6</sup> and criminal justice reform campaigns<sup>7</sup> nor the advance of Critical Race Theory<sup>8</sup> and social movement scholarship<sup>9</sup> have resolved the debate over

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1. See ROBERT SAMUELS & TOLUSE OLORUNNIPA, *HIS NAME IS GEORGE FLOYD: ONE MAN’S LIFE AND THE STRUGGLE FOR RACIAL JUSTICE* 308–54 (2022).

2. See generally Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Feb. 7, 2022), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.htm> [<https://perma.cc/9VVR9-UDBV>]; Christian Powell Sundquist, *White Vigilantism and the Racism of Race-Neutrality*, 99 DENV. L. REV. 763, 765–71 (2022); *Ahmaud Arbery: A Curated Collection of Links*, MARSHALL PROJECT, <https://www.themarshallproject.org/records/8993-ahmaud-arbery> [<https://perma.cc/2VPP-DAGC>] (last visited Feb. 22, 2023).

3. See Liane Jackson, *Race to the Bottom: Guns, Vigilantism and Unequal “Justice,”* 108 ABA J. 11 (2022); Cynthia Lee, *Firearms and Initial Aggressors*, 101 N.C. L. REV. 1, 13, 36–40 (2022); Paige Williams, *Kyle Rittenhouse, American Vigilante*, NEW YORKER (June 28, 2021), <https://www.newyorker.com/magazine/2021/07/05/kyle-rittenhouse-american-vigilante> [<https://perma.cc/4EYM-QCWN>].

4. See Neil MacFarquhar, *Jury Finds Rally Organizers Responsible for Charlottesville Violence*, N.Y. TIMES (Nov. 23, 2021), <https://www.nytimes.com/2021/11/23/us/charlottesville-rally-verdict.html> [<https://perma.cc/DK9U-CECZ>]; Neil MacFarquhar, *The Charlottesville Rally Civil Trial, Explained*, N.Y. TIMES (Nov. 23, 2021), <https://www.nytimes.com/live/2021/charlottesville-rally-trial-explained> [<https://perma.cc/B7CY-HCVJ>]; *Sines v. Kessler*, No. 3:17CV00072, 2021 WL 8533299 (W.D. Va. Nov. 23, 2021) (federal jury verdict awarding plaintiffs \$26,004,743 in compensatory and punitive damages).

5. See Anthony V. Alfieri, *Race, Legal Representation, and Lawyer Ethics*, in *THE OXFORD HANDBOOK OF RACE AND LAW IN THE UNITED STATES* (Devon Carbado, Emily Houh & Khiara Bridges eds., 2022), <https://doi.org/10.1093/oxfordhb/9780190947385.013.22> [<https://perma.cc/22BW-U1MR>].

6. See generally SCOTT L. CUMMINGS, *AN EQUAL PLACE: LAWYERS IN THE STRUGGLE FOR LOS ANGELES* (2021); KEEANGA-YAMAHTTA TAYLOR, *FROM #BLACKLIVESMATTER TO BLACK LIBERATION* (2016); Veryl Pow, *Grassroots Movement Lawyering: Insights from the George Floyd Rebellion*, 69 UCLA L. REV. 80 (2022).

7. See generally Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781 (2020); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017); Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013 (2022).

8. See generally Montré D. Carodine, *Contemporary Issues in Critical Race Theory: The Implications of Race as Character Evidence in Recent High-Profile Cases*, 75 U. PITT. L. REV. 679 (2014); Anne D. Gordon, *Cleaning Up Our Own Houses: Creating Anti-Racist Clinical Programs*, 29 CLINICAL L. REV. 49 (2022); Norrinda Brown Hayat, *Freedom Pedagogy: Toward Teaching Antiracist Clinics*, 28 CLINICAL L. REV. 149 (2021).

9. Compare Scott L. Cummings, *Law and Social Movements: Reimagining the Progressive Canon*, 2018 WIS. L. REV. 441, 441 (discussing the construction and critique of the progressive legal canon—“iconic legal campaigns to advance progressive causes”—in the study of lawyers and social movements), with Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 821 (2021) (defining movement law as “an approach to legal scholarship grounded in solidarity, accountability, and engagement with grassroots organizing and left social movements”), and Betty Hung, *Movement Lawyering as Rebellious Lawyering: Advocating with Humility, Love and Courage*, 23 CLINICAL L. REV. 663, 664 (2017) (denoting

the use of race in pretrial, trial, and appellate advocacy, and in the lawyering process more generally.<sup>10</sup> Spoken in archetypal tropes, seen in stereotypical images, and heard in stock stories, race infects the central lawyering roles of advocate and advisor,<sup>11</sup> echoing inside and outside courthouses in the remarks of prosecutors,<sup>12</sup> criminal defense attorneys,<sup>13</sup> and civil rights lawyers.<sup>14</sup> Race is equally resounding in the *Model Rules of Professional Conduct* (“*Model Rules*”)<sup>15</sup> and norms of professionalism promulgated by the American Bar Association (“ABA”).<sup>16</sup> By turns cast in colorblind, color-coded, and color-conscious oral, written, and symbolic forms, the meaning of racial identity, racialized narrative, and racially demarcated community is both constructed and contested in the lawyering process and in the regulation of lawyer conduct.<sup>17</sup>

Fought out in the public and private routines of daily advocacy, that contest embroils interpretive communities—lawyers, bar associations, courts, civil and criminal justice clients and families, victims and support groups, and others—in a struggle over competing and often irreconcilable visions of race. Ingrained in law, culture, and society, those conflicting egalitarian and subordinating visions

movement lawyering “as the building and exercise of collective power, led by the most directly impacted, to achieve systemic institutional and cultural change”), and Jamelia Morgan, *Lawyering for Abolitionist Movements*, 53 CONN. L. REV. 605, 611 (2021) (offering different frameworks for thinking about lawyering in support of abolitionist movements).

10. See generally GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978); Jeanne Charn, *Service and Learning: Reflections on Three Decades of The Lawyering Process at Harvard Law School*, 10 CLINICAL L. REV. 75 (2003).

11. See MODEL RULES OF PROF'L CONDUCT pmb. ¶ 2 (2018) [hereinafter MODEL RULES] (“As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”).

12. See Anthony V. Alfieri, *Objecting to Race*, 27 GEO. J. LEGAL ETHICS 1129, 1130 (2014); Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE W. RES. L. REV. 39, 41 (2020); Olwyn Conway, *Are There Stories Prosecutors Shouldn’t Tell?: The Duty to Avoid Racialized Trial Narratives*, 98 DENV. L. REV. 457, 485–86 (2021); see also Calhoun v. United States, 568 U.S. 1206, 1206–07 (2013) (statement of Sotomayor, J., respecting the denial of the petition for writ of certiorari).

13. See Darryl K. Brown, *Batson v. Armstrong: Prosecutorial Bias and the Missing Evidence Problem*, 100 OR. L. REV. 357, 359 (2022); Jonathan Markovitz, “A Spectacle of Slavery Unwilling to Die”: *Curbing Reliance on Racial Stereotyping in Self-Defense Cases*, 5 U.C. IRVINE L. REV. 873, 874 (2015); Suzy J. Park, Note, *Racialized Self-Defense: Effects of Race Salience on Perceptions of Fear and Reasonableness*, 55 COLUM. J.L. & SOC. PROBS. 541, 542–43 (2022).

14. See Anthony V. Alfieri, *(Un)Covering Identity in Civil Rights and Poverty Law*, 121 HARV. L. REV. 805 (2008); Angela Onwuachi-Willig & Anthony V. Alfieri, *Racial Trauma in Civil Rights Representation*, 120 MICH. L. REV. 1701, 1701 (2022).

15. See MODEL RULES R. 8.4(g); Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195, 196 (2017).

16. For examples of ABA-encoded colorblind norms of ethical and professional conduct, see ABA LAWYER’S CREED OF PROFESSIONALISM (1988); ABA LAWYER’S PLEDGE OF PROFESSIONALISM (1988).

17. On the construction of, and the contest over, the politics of race and resistance strategies in the criminal justice system, see Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1935 (2019). See also India Thusi, *The Pathological Whiteness of Prosecution*, 110 CALIF. L. REV. 795 (2022) (evaluating progressive prosecutors and their decarceral agenda from the perspective of Critical White Studies).

inform the legal imagination of race and the legal vocabulary of race talk. The upshot of this clash in law and sociolegal culture is a thinly imagined conception of racial harm uncoupled from stigma. As a result of this uncoupling, the concept of stigma harm is absent from the legal imagination and lexicon of race in dominant ethics regimes, even in the regulation of lawyer discriminatory conduct. The ABA, for example, prohibits race-based, law practice-related discriminatory conduct only when it “manifests bias or prejudice towards others” and proves “harmful.”<sup>18</sup>

Linking the antidiscrimination proscriptions of ethical rules to a specific quantum of proof of harm, rather than a conclusive or rebuttal presumption of harm, diminishes the subjective experience of racial stigma and discounts its normative injury. Yet, to the ABA, only objectively harmful conduct intentionally targeting a particular individual or group of individuals establishes grounds for ethics discipline.<sup>19</sup> Moored to an objective standard of reasonableness and an elastic standard of legitimate advice or advocacy, the ABA only judges as harmful “conduct for which there is no reasonable justification,” such as “conduct that is demeaning or derogatory.”<sup>20</sup> However demeaning or derogatory to clients, victims, or third persons, lawyer-inflicted stigma harm remains permissible under the ABA-sanctioned rationale of legitimate advice or advocacy.

In prior writings across the fields of civil rights,<sup>21</sup> criminal justice,<sup>22</sup> and poverty law,<sup>23</sup> I mapped the intersection of race, representation, and ethics against the contours of the lawyering process,<sup>24</sup> professional regulation,<sup>25</sup> and legal education,<sup>26</sup> especially within law school clinics<sup>27</sup> and indigent

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18. MODEL RULES R. 8.4 cmt. 3.

19. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 493 (2020) [hereinafter Formal Op. 493].

20. *Id.*

21. See generally Anthony V. Alfieri & Angela Onwuachi-Willig, *Next Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 YALE L.J. 1484 (2013) (book review); Angela Onwuachi-Willig & Anthony V. Alfieri, *(Re)Framing Race in Civil Rights Lawyering*, 130 YALE L.J. 2052 (2021) (book review).

22. See generally Anthony V. Alfieri, *Mercy Lawyers*, 82 N.C. L. REV. 1297 (2004); Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 GEO. L. J. 2227 (2001).

23. See generally Anthony V. Alfieri, *Inner-City Anti-Poverty Campaigns*, 64 UCLA L. REV. 1374 (2017); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L. J. 2107 (1991).

24. See generally Anthony V. Alfieri, *Faith in Community: Representing “Colored Town,”* 95 CALIF. L. REV. 1829 (2007); Anthony V. Alfieri, *Gideon in White/Gideon in Black: Race and Identity in Lawyering*, 114 YALE L.J. 1459 (2005).

25. See generally Anthony V. Alfieri, *(Er)Race-ing an Ethic of Justice*, 51 STAN. L. REV. 935 (1999); Anthony V. Alfieri, *Ethics, Race, and Reform*, 54 STAN. L. REV. 1389 (2002); Anthony V. Alfieri, *Race-ing Legal Ethics*, 96 COLUM. L. REV. 800 (1996).

26. See generally Anthony V. Alfieri, *Against Practice*, 107 MICH. L. REV. 1073 (2009) (book review); Anthony V. Alfieri, *Denaturalizing the Lawyer-Statesman*, 93 MICH. L. REV. 1204 (1995) (book review); Anthony V. Alfieri, *Educating Lawyers for Community*, 2012 WIS. L. REV. 115 (2012).

27. See generally Anthony V. Alfieri, *Rebellious Pedagogy and Practice*, 23 CLINICAL L. REV. 5 (2016); Anthony V. Alfieri, *The Poverty of Clinical Canonic Texts*, 25 CLINICAL L. REV. 53 (2020).

civil<sup>28</sup> and criminal<sup>29</sup> justice systems. The purpose of that mapping was not only to understand the legal imagination of race, but also to catalogue the ethical and unethical uses of race and to uncover the stigma harms that stain the boundary lines of permissible and impermissible uses. Going forward, the purpose of this article is to revisit that body of writing and to reevaluate the continuing uses and the persisting stigma harms of race in contemporary civil rights<sup>30</sup> and criminal justice<sup>31</sup> advocacy, particularly in cases of racial violence, a subcategory of race trials.<sup>32</sup>

By race trials, I mean civil and criminal proceedings marked by the presence of certain texts, some spoken (argument, objection, and testimony), some written (pleadings, motions, and briefs), and some physical or spatial (art, architecture, and design). As I have explained elsewhere, a text is a cultural and social artifact, a temporal record and representation of inscribed beliefs and practices.<sup>33</sup> Race trials present colorblind, color-coded, and color-conscious representations of identity, narrative, and community in courtrooms, textual representations that encompass familiar racial epithets<sup>34</sup> and code words.<sup>35</sup> The goal of revisiting

28. See generally Anthony V. Alfieri, *Post-Racialism in the Inner-City: Structure and Culture in Lawyering*, 98 GEO. L.J. 921 (2010); Anthony V. Alfieri, *Things Fall Apart: Hard Choices in Public Interest Law*, 31 GEO. J. LEGAL ETHICS 335 (2018); Jeffrey Selbin, Jeanne Charn, Anthony V. Alfieri & Stephen Wizner, *Service Delivery, Resource Allocation and Access to Justice: Greiner and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45 (2012).

29. See generally Anthony V. Alfieri, *Color/Identity/Justice: Chicano Trials*, 53 DUKE L. J. 1569 (2004); Anthony V. Alfieri, *Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists*, 31 HARV. C.R.-C.L. L. REV. 325 (1996).

30. See 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, *Community Education and Access to Justice in a Time of Scarcity: Notes from the West Grove Trolley Garage Case*, 2013 WIS. L. REV. 121 (2013).

31. Compare Anthony V. Alfieri, *Community Prosecutors*, 90 CALIF. L. REV. 1465, 1502–07 (2002) (considering the application of community norms and practices in the prosecution of racial violence), and Anthony V. Alfieri, *Prosecuting the Jena Six*, 93 CORNELL L. REV. 1285, 1302–08 (2008) (assessing the prosecution function in light of a race-conscious outsider conception favoring dignity-restoring relations over identity-degrading and community-disempowering relations), and Anthony V. Alfieri, *Prosecuting Violence! Reconstructing Community*, 52 STAN. L. REV. 809, 849–67 (2000) (exploring methods of reconceiving the prosecutorial norms and narratives employed in cases of racial violence), with Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301, 1320–39 (1995) (analyzing the propriety of criminal defense team deployment of racialized narratives under conventional and alternative ethical regimes), and Anthony V. Alfieri, *Lynching Ethics: Toward A Theory of Racialized Defenses*, 95 MICH. L. REV. 1063, 1069–74 (1997) (describing the narrative form and racialized substance of lynching defenses).

32. See Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293 (1998); Anthony V. Alfieri, *Retrying Race*, 101 MICH. L. REV. 1141 (2003); see also L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115 (2014).

33. See Anthony V. Alfieri, *“He is the Darkey with the Glasses On”: Race Trials Revisited*, 91 N.C. L. REV. 1497, 1500–01 (2013).

34. For a study of racial epithets in the criminal justice system, see Sheri Lynn Johnson, John H. Blume & Patrick M. Wilson, *Racial Epithets in the Criminal Process*, 2011 MICH. ST. L. REV. 755, 759–77 (2011).

35. See Deirdre Pfeiffer & Xiaoqian Hu, *Racial Code Words: A Technology of Racialization and Racism* (2023) (unpublished manuscript) (on file with author). See generally IAN HANEY LOPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* (2014).

those textual representations here is to grasp more fully how civil rights lawyers, prosecutors, and criminal defense attorneys use race to advantage or disadvantage Black<sup>36</sup> actors in the legal process—litigants,<sup>37</sup> victims,<sup>38</sup> jurors,<sup>39</sup> witnesses,<sup>40</sup> and even other lawyers<sup>41</sup>—and, moreover, how they use ethics rules<sup>42</sup> and standards<sup>43</sup> designed to regulate racial bias and prejudice to justify their conduct.<sup>44</sup>

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36. Throughout, I capitalize the term “Black” only when used as a noun to describe a specific racial group. Here, as elsewhere, I use the term “Blacks,” rather than the term “African Americans,” because it is more inclusive. See Alfieri & Onwuachi-Willig, *supra* note 21, at 1488 n.5.

37. See generally Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010); Jocelyn Simonson, *The Place of “the People” in Criminal Procedure*, 119 COLUM. L. REV. 249 (2019).

38. See Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1454–55 (2012).

39. See Ellen S. Cohn, Donald Bucolo, Misha Pride & Samuel R. Sommers, *Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes*, 39 J. APPLIED SOC. PSYCH. 1953 (2009); Elizabeth Ingriselli, Note, *Mitigating Jurors’ Racial Biases: The Effects of Content and Timing of Jury Instructions*, 124 YALE L. J. 1690, 1695 (2015); Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 HARV. J. RACIAL & ETHNIC JUST. 165 (2011).

40. See Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decision-making, Misremembering*, 57 DUKE L.J. 345, 390 (2007); Calvin John Smiley & David Fakunle, *From “Brute” to “Thug:” The Demonization and Criminalization of Unarmed Black Male Victims in America*, 26 J. HUM. BEHAV. SOC. ENV’T 350 (2016); see also *Buck v. Davis*, 580 U.S. 100, 105–109 (2017).

41. On racial antagonism toward other lawyers, see Jana DiCosmo, *Racism in the Legal Profession: A Racist Lawyer is an Incompetent Lawyer*, 75 NAT’L LAW. GUILD REV. 82, 86 (2018) (surveying racist speech directed at opposing counsel); *Bussey-Morice v. Kennedy*, No. 611CV970ORL41GJK, 2018 WL 4101004, at \*17 (M.D. Fla. Jan. 12, 2018) (sanctioning counsel for “frequent, baseless suggestions of racial bigotry directed towards Defendants, defense counsel, and even the Court”); *Fla. Bar v. Patterson*, 330 So. 3d 519, 527 (Fla. 2021) (suspending attorney for making “repeated, unfounded allegations of racial bias” against courts, counsel, and parties). Cf. Sheri Lynn Johnson, *Racial Antagonism, Sexual Betrayal, Graft, and More: Rethinking and Remediating the Universe of Defense Counsel Failings*, 97 WASH. U. L. REV. 57, 94–95 (2019) (discussing racial animosity toward one’s client); Paul Messick, Note, *Represented by a Racist: Why Courts Rarely Grant Relief to Clients of Racist Lawyers*, 109 CAL. L. REV. 1231, 1235–37 (2021) (discussing lawyer racial animus inside and outside the courtroom); *Frazier v. United States*, 18 F.3d 778, 785 (9th Cir. 1994) (“[W]e can discern no reason whatsoever requiring us to tell an accused too poor to hire an attorney to protect his rights that he must not only prove that his government-appointed attorney verbally assaulted him with racist threats, but that to obtain relief he must show some prejudice over and above such an inexcusable tirade.”).

42. See Tamar R. Birkhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 B.C. L. REV. 379, 436–37 (2017) (“[I]nterpreting the formal rules in the light most favorable to Alfieri, it can be said that although they do not mandate that a lawyer forgo race-talk, they do encourage a lawyer to consider a narrative’s broader impact upon their community.”). See generally MODEL RULES.

43. See STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function (Am. Bar Ass’n 4th ed. 2015).

44. For helpful earlier research on ethics and race, see generally Susan Carle, *From Buchanan to Button: Legal Ethics and the NAACP (Part II)*, 8 U. CHI. L. SCH. ROUNDTABLE 281, 298–307 (2001) (exploring relationship between the NAACP’s public impact litigation strategies and traditional legal ethics norms); Susan D. Carle, *How Should We Theorize Class Interests in Thinking About Professional Regulation?: The Early NAACP as a Case Example*, 12 CORNELL J.L. & PUB. POL’Y 571, 575–81 (2003) (maintaining that “early NAACP national legal committee members’ lack of concern about legal ethics norms reflected the operation of power in relation to those norms, manifested outside formal institutional mechanisms such as rules revision commissions or legislative processes”); Susan Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910-1920)*, 20 LAW & HIST. REV. 97, 130–44 (2002) (examining the legal ethics mind-set of lawyers overseeing NAACP’s early legal strategies).



This Article proceeds in three parts. Part I examines the representation of race under the standard conception of the lawyering process. This section defines the lawyering process as more than an aggregation of role-differentiated behaviors, adversarial relationships, and organizational structures steered by the principles of moral nonaccountability and neutral partisanship.<sup>45</sup> Stepping beyond role, relationship, and structure, it defines the lawyering process as a dual set of descriptive and prescriptive interpretive methods or ways of knowing, seeing, hearing, speaking, and reasoning predominantly shaped by race-neutral and race-coded styles of advocacy. By this definition, the lawyering process not only comprises a changing constellation of roles, relationships, and institutions, but also serves as an evolving sociolegal site for the construction of racial meaning in law, culture, and society.

Part II explores the practice of race-neutral formalism and the ethics of race-neutral rule formalism. Section A of this Part charts the exclusion of racial identity, racialized narrative, and racially demarcated community from the lawyering process, and the forced shift of race markers from a signifying to a non-signifying or muted position in civil and criminal justice advocacy. It also assesses the misconduct-tailored, regulatory framework bracketed by the ABA amendment to Model Rule 8.4 in 2016<sup>46</sup> and Formal Opinion 493 issued by the ABA Committee on Ethics and Professional Responsibility in 2020.<sup>47</sup> Section B surveys the codification of race-neutral formalism in the *Model Rules* governing the essential functions of lawyer competence, diligence, and communication. In addition, it shows how that codification binds the process values of equal treatment, institutional fidelity, and objective reasoning to colorblind conceptions of effective and legitimate representation, thereby defining legitimacy itself in terms of race-neutrality.

Part III considers the practice of race-coded pragmatism and the ethics of race-coded rule pragmatism. Section A of this Part studies the account of racial identity, racialized narrative, and racially demarcated community within the lawyering process methods controlling the functions of decision-making authority, advising, and scope of representation, and recounts the exploitation of the signifying properties of race in civil and criminal justice advocacy. It also evaluates the regulatory import of Model Rule 8.4 and ABA Formal Opinion 493. Section B analyzes the imprinting of race-coded pragmatism inside the *Model Rules* governing the scope of representation, the allocation of authority between lawyer and client, and the lawyer's role as an advisor. And it demonstrates how that

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45. On moral nonaccountability and neutral partisanship in the lawyering process within adversary systems, see DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); David Luban, *The Adversary System Excuse*, in DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 19, 30 (2007); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 2 (1998).

46. See MODEL RULES R. 8.4(g).

47. See Formal Op. 493, *supra* note 19 (addressing the purpose, scope, and application of Model Rule 8.4 (g)).

imprinting fastens the professional norms of ethical discretion, independent judgment, and contextual reasoning to color-coded notions of effective and legitimate representation, thus giving legitimacy to acts of race-coded advocacy.

## I. THE STANDARD CONCEPTION OF RACE IN THE LAWYERING PROCESS

The standard conception of race in the lawyering process features two dominant styles of advocacy: race-neutral formalism and race-coded pragmatism. Race-neutral formalism dictates the use of colorblind terms to describe the socio-legal character, conduct, and community (group affiliation or membership) of litigants, victims, jurors, witnesses, and others.<sup>48</sup> Rooted in the ideology of liberal legalism,<sup>49</sup> race-neutral formalism emphasizes the process values of equal treatment, institutional fidelity, and objective reasoning in advocacy. Equal treatment requires even-handed conduct or respect toward parties (accused offenders, plaintiffs, and defendants) and third persons (victims, families and affinity groups, and witnesses) alike.<sup>50</sup> Institutional fidelity demands loyalty to law, legal relationships, and legal institutions.<sup>51</sup> Objective reasoning involves the scientific realism<sup>52</sup> of evidence-based factual, legal, and policy analysis.<sup>53</sup> Race-neutral formalists admit to the salience of race in advocacy but view its incidence as exceptional and isolated and seek to minimize its use and reduce its adverse

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48. Sociological descriptions of character, conduct, and community crisscross a spectrum of identity markers, including, age, caste, class, culture, disability, ethnicity, gender, history, language, race, and sexuality. See Julia Hernandez, *Lawyering Close to Home*, 27 CLINICAL L. REV. 131, 155 (2020); see also Shani M. King, *Race, Identity, and Professional Responsibility: Why Legal Services Organizations Need African American Staff Attorneys*, 18 CORNELL J. L. & PUB. POL'Y 1, 15 (2008) (noting that "racial identity is uniquely salient for many African Americans"). For a summary of multiple forms of individual and collective identity, see KWAME ANTHONY APPIAH, *THE LIES THAT BIND: RETHINKING IDENTITY* (2019); KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* (2005).

49. Scott Cummings frames this ideology "against the backdrop of the legal liberal debate over the essential law-politics problem in progressive legal theory," namely "how to justify a legitimate role for courts and lawyers in shaping law to promote progressive ends, while preserving the democratic line between law as neutral and procedural, on the one hand, and politics as partisan and substantive, on the other." Scott L. Cummings, *The Social Movement Turn in Law*, 43 LAW & SOC. INQUIRY 360, 366 (2018); see also Scott L. Cummings, *Movement Lawyering*, 27 IND. J. GLOB. LEGAL STUD. 87, 93 (2020) ("Accounts of legal liberalism are oriented around the mid-century emergence of new legal organizations committed to the 'pursuit of legal rights' for underrepresented groups and interests in American society." (footnote omitted)); Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1650 (2017) (linking "the legacy of legal liberalism" to "a critical account of how lawyers sought to advance progressive social change through impact litigation during the Warren Court era" (footnotes omitted)).

50. See ANTHONY KRONMAN, *THE LOST LAWYER* 93 (1993) (discussing the condition of political fraternity); W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* 98 (2010) (considering the norms of equal respect and equal voice); David B. Wilkins, *Practical Wisdom for Practicing Lawyers: Separating Ideals from Ideology in Legal Ethics*, 108 HARV. L. REV. 458, 475 (1994) (book review) (mentioning the societal promise of equal justice).

51. See WENDEL, *supra* note 50, at 9; Anthony V. Alfieri, *Fidelity to Community: A Defense of Community Lawyering*, 90 TEX. L. REV. 635, 639 (2012) (book review).

52. See William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986)).

53. See David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990).

impact, if any.<sup>54</sup> For race-neutral formalists, discrimination is a “distortion” of, or deviation from, the baseline, aspirational norm of colorblindness.<sup>55</sup>

Race-coded pragmatism, by comparison, tolerates the use of stereotypical terms—commonly antebellum and postbellum tropes—to describe the character, conduct, and community of litigants, victims, jurors, witnesses, and others. Grounded in the ideology of instrumental advocacy,<sup>56</sup> race-coded pragmatism stresses the professional norms of ethical discretion, independent judgment, and contextual reasoning in advocacy. Ethical discretion permits the disparate treatment of clients, parties, and third persons for larger, purposive ends.<sup>57</sup> Independent judgment allows for the disruption of, or divergence from, institutional practices and procedures.<sup>58</sup> Contextual reasoning<sup>59</sup> involves intuitive judgment,<sup>60</sup> qualitative analysis,<sup>61</sup> and situational

54. Compare Eduardo R.C. Capulong, Andrew King-Ries & Monte Mills, *Antiracism, Reflection, and Professional Identity*, 18 HASTINGS RACE & POVERTY L.J. 3, 15 (2021) (noting that the call to “white lawyers to recognize their race and assume equal responsibility for racial issues . . . made in the early days of the professional identity development movement, did not integrate the concepts of race-conscious lawyering with the core professional responsibilities of being an attorney” and concluding that, “despite these and similar critiques of legal education and its implicit indoctrination of purportedly race-neutral but actually race-normed standards, little has changed, even within the context of recent reforms”), with Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 FORDHAM L. REV. 2081, 2089–90 (2005) (observing that “White lawyers” view themselves to be “neutral as to race”), and David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1517 (1998) (remarking that, “in contemporary legal culture, bleached out professionalism is powerfully linked with both normative and factual claims about colorblindness”). For criticism of variants of race-neutral formalism in legal education and the legal profession, see Russell G. Pearce, Eli Wald & Swethaa S. Ballakrishnen, *Difference Blindness vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships*, 83 FORDHAM L. REV. 2407, 2430–38 (2015); Christina John, Russell G. Pearce, Aundray Jermaine Archer, Sarah Medina Camiscoli, Aron Pines, Maryam Salmanova & Vira Tarnavska, *Subversive Legal Education: Reformist Steps Toward Abolitionist Visions*, 90 FORDHAM L. REV. 2089, 2096–103 (2022).

55. Kimberlé Williams Crenshaw, *Race Liberalism and the Deradicalization of Racial Reform*, 130 HARV. L. REV. 2298, 2316 (2017).

56. See William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 31 (1978).

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

58. See Robert M. Contois, Jr., *Ethical Considerations: Independent Professional Judgment, Candid Advice, and Reference to Nonlegal Considerations*, 77 TUL. L. REV. 1223 (2003); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988).

59. See W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190 (2022); M.J. Palau-McDonald, *Blockchains and Environmental Self-Determination for the Native Hawaiian People: Toward Restorative Stewardship of Indigenous Lands*, 57 HARV. C.R.-C.L. L. REV. 393 (2022).

60. See Milton C. Regan, Jr., *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L.J. 941, 985 (2007).

61. On the epistemology of qualitative analysis, see Andrew Manuel Crespo, *Probable Cause Pluralism*, 129 YALE L.J. 1276, 1311–12 (2020) (“Epistemologists more faithfully refer to the qualitative method as the ‘clinical method,’ a term meant to evoke the thought processes of physicians, psychologists, and (yes) lawyers, who routinely deploy expert judgment when making predictions and decisions. We routinely ‘put [our] faith in the subjective assessments of [these] knowledgeable observers,’ even though they are not always able to articulate every incremental step of their thought process with logical precision. The foundation for that faith is the fact that such experts employ a decidedly *uncommon* sense, a ‘trained intuition.’” (footnotes omitted)).

logic.<sup>62</sup> Race-coded pragmatists concede the wider salience of race in advocacy but claim the practical necessity of its use, however exploitive of bias and prejudice, and dismiss complaints of stereotype-based, stigma injury<sup>63</sup> and any associated dignitary and citizenship harm as vague, causally indeterminate, and unmeasurable.

Borrowing from the work of R.A. Lenhardt, I define the injury of racial stigma in terms of “negative social meaning, of ‘dishonorable meanings socially inscribed on arbitrary bodily marks [such as skin color], of ‘spoiled collective identities.’”<sup>64</sup> To Lenhardt, racial stigma “implies more than merely being referred to by a racial epithet or even the denial of a particular opportunity on the basis of one’s race.”<sup>65</sup> Bridging individual, micro-level and structural, macro-level dimensions, racial stigmatization for Lenhardt “involves becoming a disfavored or dishonored individual in the eyes of society, a kind of social outcast whose stigmatized attribute stands as a barrier to full acceptance into the wider community.”<sup>66</sup> Racial stigma in this multidimensional sense “imposes real, concrete harms on African Americans and other racial minorities that negatively affect them in their personal lives and also operate at a group level to deny them certain tangible and intangible benefits.”<sup>67</sup> Among this battery of harms, dignitary and citizenship harms stand out.

Dignitary harm is a stigma-based, psychological, and sociocultural injury.<sup>68</sup> It is an injury of disparagement and humiliation endured by individuals, groups,

62. On the rationality of situational logic, see Emmet T. Flood, *Fact Construction and Judgment in Constitutional Adjudication*, 100 YALE L.J. 1795, 1810 (1991) (“[S]ituational construction is not irrational at all. Neither is it ‘rational’ in the limited sense of being governed by a rule. Rather, interpretive construction has the intelligible unity of a dramatic, rather than logical, whole.”).

63. See Devon W. Carbado, *Intraracial Diversity*, 60 UCLA L. REV. 1130, 1164 (2013) (“At bottom, stereotypes are about group-based assumptions.”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989) (“Classifications based on race carry a danger of stigmatic harm . . . [T]hey may in fact promote notions of racial inferiority and lead to a politics of racial hostility . . . [and] ‘reinforce common stereotypes.’” (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978))).

64. R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 809 (2004) (quoting GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 59 (2002)). Compare Matthew Clair, *Stigma*, in CORE CONCEPTS IN SOCIOLOGY 318, 320 (J. Michael Ryan ed., 2018) (“[S]ociologists have considered the macro-level dimensions of stigma, illuminating its structural causes, population-level consequences, and collective responses. This research has identified how stigma reproduces social inequality through the maintenance of group hierarchies.”), with *Stigma*, AM. PSYCH. ASS’N, *DICTIONARY OF PSYCHOLOGY* (2023), <https://dictionary.apa.org/stigma> [<https://perma.cc/RH3N-PHNF>] (defining stigma as “the negative social attitude attached to a characteristic of an individual that may be regarded as a mental, physical, or social deficiency. A stigma implies social disapproval and can lead unfairly to discrimination against and exclusion of the individual.”).

65. Lenhardt, *supra* note 64, at 809.

66. *Id.*

67. *Id.* at 848.

68. On dignitary harm, see Vinay Harpalani, *Asian Americans, Racial Stereotypes, and Elite University Admissions*, 102 B.U. L. REV. 233, 244 n.41 (2022) (“[R]acial stereotyping is an affront to the dignity of all groups—particularly those that have faced a long history of discrimination in the United States[.] The experience of being stereotyped is itself an ‘expressive harm’ or a ‘stigmatic harm’—a harm that is manifested by mere expression, independent of tangible consequences.” (citations omitted)); Tasnim Motala, *Words Still*

and whole communities.<sup>69</sup> Citizenship harm is an economic, sociocultural, and political injury.<sup>70</sup> It is an injury of unequal opportunity, impaired liberty, and impeded participation suffered by individuals, groups, and communities in consumer and labor markets,<sup>71</sup> cultural and social networks, neighborhood spaces,<sup>72</sup> and the public square of politics.<sup>73</sup> The injuries of dignitary and citizenship harm may be experienced singly or jointly and in public or private spheres. For race-coded pragmatists, discrimination, whether or not stigma-inducing, is a necessary, ostensibly harmless departure from the norm of colorblindness.

Both race-neutral formalist and race-coded pragmatic styles of advocacy permit civil rights lawyers, prosecutors, and criminal defense attorneys to use race strategically to advantage or disadvantage Black actors. Contingent on context, colorblind and color-coded tactics may generate a range of short- and long-run legal-political and sociocultural effects. Unsurprisingly, some short-run legal tactics, for instance, demeaning or derogatory representations of race veiled in colorblind or color-coded rhetoric, may generate long-run legal-political disadvantage and sociocultural backlash, especially for Black-led, grassroots law reform campaigns.

In criminal justice arenas, colorblind and color-coded tactics, albeit demeaning and discriminatory,<sup>74</sup> may result in party-centered exculpatory, reintegrative, and

*Wound: IIED & Evolving Attitudes Toward Racist Speech*, 56 HARV. C.R.-C.L. L. REV. 115, 120 (2021) (“While all insults assault the dignity of an individual in some way, racial insults are inextricably linked to an individual’s belonging, citizenship, and equality. They cannot be divorced from historical legacy and societal prejudices from which they are borne.”). See also DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 321 (5th ed. 2004); ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 2–5 (1963).

69. See Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLA. L. REV. 1, 10–51 (2017) (analyzing legal scholarship and doctrine that make a persuasive theoretical case for the inclusion of dignity-based claims in race-equality litigation but questioning the usefulness of dignity-based claims for racial justice); Noah B. Lindell, *The Dignity Canon*, 27 CORNELL J.L. & PUB. POL’Y 415, 418–52 (2017) (exploring the notion of human dignity and explaining how it can be applied to legislative interpretation). For normative groundwork underpinning dignitary harm as a community-wide, expressive harm or injury rooted in antisubordination values, see Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506–16 (1993); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1472–73 (2004).

70. On citizenship harm, see Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. REV. 1435, 1451 (2011) (“Stigma, often exacerbated or inspired by hate speech, can render targeted group members dishonored and erect significant barriers to full acceptance into the wider community.”); Kimani Paul-Emile, *Blackness As Disability?*, 106 GEO. L.J. 293, 344 (2018) (“[B]lackness stigmatizing . . . has an independent stigmatizing effect across a spectrum of areas in an individual’s life that is distinct from the effects of demographics and socioeconomic class.”).

71. Citizenship harm may be experienced as pervasive discrimination in consumer and labor markets. See Peter N. Salib, *Big Data Affirmative Action*, 117 NW. U. L. REV. 821, 829–30 (2022).

72. See Elise C. Boddie, *Racially Territorial Policing in Black Neighborhoods*, 89 U. CHI. L. REV. 477, 477 (2022); I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 43 (2009).

73. Citizenship harm may be inflicted by demeaning government speech. See William D. Araiza, *Teach Your Citizens Well: Demeaning Government Speech, Equal Protection Animus, and Government’s Legitimate Power*, 2022 U. ILL. L. REV. 1861, 1865–68, 1875–78 (2022).

74. See Tania Tetlow, *Discriminatory Acquittal*, 18 WM. & MARY BILL RTS. J. 75, 103–04 (2009).

non-retributive benefits—for example, acquittal, dismissal, and exoneration, sentencing diversion and penalty mitigation, or multiple-party restorative justice mediation and reconciliation, though the stigma costs of such bias-exploiting tactics may be disputed.<sup>75</sup> In addition to stigma costs, the efficacy risks of bias-exploiting tactics may be questioned as well, especially with respect to sentencing impact where race-based, demeaning or derogatory representations may “trigger [] attributions of dangerousness and threat in the minds of judges and other criminal justice officials”<sup>76</sup> or heighten the prejudicial effect of Afrocentric features.<sup>77</sup>

Debate over stigma costs and efficacy risks notwithstanding, colorblind and color-coded tactics may generate broader legal-political and sociocultural effects boosting civil and criminal justice reform campaigns.<sup>78</sup> Those effects may correlate with direct, party- or victim-centered relief to individuals, families, and communities. The 2020 state indictment and subsequent criminal conviction of Travis McMichael, Gregory McMichael, and William “Roddie” Bryan for the murder of Ahmaud Arbery,<sup>79</sup> and the activism and solidarity of communities in Brunswick, Georgia and elsewhere illustrate the localized mobilization effects of colorblind prosecution tactics counterposed against color-coded defense tactics.<sup>80</sup>

75. See Christopher Slobogin, *Race-Based Defenses—The Insights of Traditional Analysis*, 54 ARK. L. REV. 739, 739–40 (2001); Abbe Smith, *Burdening the Least of Us: “Race-Conscious” Ethics in Criminal Defense*, 77 TEX. L. REV. 1585, 1586–91 (1999).

76. See Cassia Spohn, *The Effects of the Offender’s Race, Ethnicity, and Sex on Federal Sentencing Outcomes in the Guidelines Era*, 76 LAW & CONTEMP. PROBS. 75, 104 (2013).

77. See William T. Pizzi, Irene V. Blair & Charles M. Judd, *Discrimination in Sentencing on the Basis of Afrocentric Features*, 10 MICH. J. RACE & L. 327, 330–31 (2005).

78. See, e.g., David A. Graham, *How Criminal-Justice Reform Fell Apart*, ATLANTIC (May 26, 2022), <https://www.theatlantic.com/ideas/archive/2022/05/george-floyd-anniversary-police-reform-violent-crime/630174/>; <https://perma.cc/S5PQ-3XBR>]; Jamiles Lartey, *How Policing Has – and Hasn’t – Changed Since George Floyd*, MARSHALL PROJECT (Aug. 6, 2022), <https://www.themarshallproject.org/2022/08/06/how-policing-has-and-hasn-t-changed-since-george-floyd> <https://perma.cc/R0L6-VG9Z>]; see also Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd’s Murder*, BRENNAN CENTER FOR JUST. (May 21, 2021), <https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder>; <https://perma.cc/85BH-CXGQ>].

79. See Nicholas Bogel-Burroughs & Giulia Heyward, *All Three Men Were Convicted of Murdering Ahmaud Arbery, but Only One Was Convicted of ‘Malice Murder,’* N.Y. TIMES (Nov. 24, 2021), <https://www.nytimes.com/2021/11/24/us/malice-murder-arbery-murder-trial.htm> <https://perma.cc/V12W-HMZF>]; Richard Fausset, *Suspects in Ahmaud Arbery’s Killing Are Indicted on Murder Charges*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/2020/06/24/us/ahmaud-arbery-shooting-murder-indictment.htm> <https://perma.cc/W8WZ-PW6C>]; Richard Fausset, *Three Men Sentenced to Life in Prison in Arbery Killing*, N.Y. TIMES (Jan. 7, 2022), <https://www.nytimes.com/2022/01/07/us/mcmichael-bryan-sentencing-ahmaud-arbery-killing.htm> <https://perma.cc/6CU3-LDP4>]; Richard Fausset, Tariro Mzezewa & Rick Rojas, *Three Men Are Found Guilty of Murder in Arbery Shooting*, N.Y. TIMES (Nov. 24, 2021), <https://www.nytimes.com/2021/11/24/us/ahmaud-arbery-murder-verdict.htm> <https://perma.cc/ZCZ2-RYLC>]; Patrick J. Lyons, *Here Are the Charges that the Defendants Face*, N.Y. TIMES (Nov. 5, 2021), <https://www.nytimes.com/2021/11/05/us/charges-arbery-killing-trial-defendants.htm> <https://perma.cc/XB6L-878H>].

80. See Tariro Mzezewa, *As the Trial in Ahmaud Arbery’s Killing Nears, a Community Is on Edge*, N.Y. TIMES (Oct. 29, 2021), <https://www.nytimes.com/2021/10/29/us/ahmaud-arbery-killing-trial.htm> <https://perma.cc/9Y26-D2AM>]; Tariro Mzezewa, *For Arbery’s Family and Friends, a Time of Anguish and Activism*, N.Y. TIMES (Nov. 22, 2021), <https://www.nytimes.com/2021/11/22/us/ahmaud-arbery-trial-family.htm> <https://perma.cc/DRV6-73M7>]; Tariro Mzezewa, *‘We Serve a God Who Is Not Asleep’: Clergy Members Urge Unity for Ahmaud Arbery’s Family*, N.Y. TIMES (Nov. 5, 2021), <https://www.nytimes.com/2021/11/05/us/arbery-family-church-members.htm>

The rise of the U.S. abolitionist movement in the wake of the 2020 police killing of George Floyd illustrates the nationwide, mobilization effects of interwoven colorblind and color-conscious prosecution tactics laced in opposition to recurring color-coded defense tactics.<sup>81</sup>

In civil justice forums, the remedial effects of colorblind and color-coded tactics may be public law-oriented and institutional or structural in scope (e.g., declaratory and injunctive relief), others may be private right-oriented and narrowly party-centric in reach (e.g., individual or class-wide damages), though even such gains may be controverted.<sup>82</sup> Formalists rely on colorblind tactics of thin identity, narrative, and community description, omitting local histories of legal-political opposition. Pragmatists rest on color-coded tactics of disfiguring identity, narrative, and community description, distorting local histories of legal-political resistance.

The encumbrances of colorblind formalism and color-coded pragmatism constrain civil rights lawyers. Consider the ongoing fair housing challenges to the segregative municipal land use and zoning policies and practices in the historically Jim Crow neighborhoods of Miami, Florida.<sup>83</sup> For race-neutral formalists operating under colorblind ethics regimes dedicated to equal treatment, institutional fidelity, and objective reasoning, the signifying markers of identity, narrative, and community, and their cultural, economic, historical, and sociological backdrops, serve only a limited instrumental function in such litigation campaigns. Their utility lies in their strategic or tactical efficacy. In the race trials of fair housing, formalists deploy the rhetorical tropes and figurative images of

[<https://perma.cc/JMZ8-52R6>]; Rick Rojas & John Eligon, *In Ahmaud Arbery's Hometown, Pain, Anger and Pride in a Shared Racial History*, N.Y. TIMES (May 10, 2020), [<https://www.nytimes.com/2020/05/10/us/ahmaud-arbery-shooting-brunswick-georgia.html>] [<https://perma.cc/FC2K-NG5X>]. See generally Jamila Michener, *Civil Justice, Local Organizations, and Democracy*, 122 COLUM. L. REV. 1389, 1389 (2022).

81. See Akbar, *supra* note 7, at 1781; Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 555–56 (2021); Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019). See generally Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), [<https://www.nytimes.com/article/george-floyd-protests-timeline.html>] [<https://perma.cc/5FFK-JAEM>].

82. See TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT 1–2 (2011); Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 473, 476 (1976); Kenneth W. Mack, *Law and Local Knowledge in the History of the Civil Rights Movement*, 125 HARV. L. REV. 1018, 1021 (2012) (book review).

83. This case illustration is drawn from the community-based research conducted by undergraduate and graduate students enrolled in the Community Equity Lab housed by the Center for Ethics and Public Service at the University of Miami School of Law. See Jane Margolies, *Bohemian or Business: Identities Collide in Miami's Coconut Grove*, N.Y. TIMES (Mar. 24, 2020), [<https://www.nytimes.com/2020/03/24/business/miami-coconut-grove-development.html>] [<https://perma.cc/FTG2-JX99>]. See generally Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1843 (1994); Bethany Y. Li, *Now Is the Time!: Challenging Resegregation and Displacement in the Age of Hypergentrification*, 85 FORDHAM L. REV. 1189, 1189 (2016); Sara Pratt, *Civil Rights Strategies to Increase Mobility*, 127 YALE L.J. FORUM 498, 498 (2017).

identity (caste and color), narrative (subaltern voice and story),<sup>84</sup> and community (racial geography and racialized space) as expedient and schematic means of effective advocacy. For formalists, these markers and their sociocultural meanings lack intrinsic, legal-political value. Refracted in this way, identity merely styles party pleadings. Narrative simply describes factual claims and legal contentions. And community only graphs physical geography and space. To formalists, identity, narrative, and community can advance constitutional and statutory claims of fair housing discrimination, but standing alone cannot sustain race-conscious, normative claims of stigma injury and associated dignitary and citizenship harms. Even when those harms can be traced to racial patterns and practices of discrimination—for example, mass eviction, neighborhood displacement, and residential segregation—formalists struggle to incorporate identity-based, racial narratives of individual and community harm and trauma into their litigation campaigns.<sup>85</sup> To formalists, community-wide racial trauma narratives, the legacy of Jim Crow segregation, and deep poverty carry scarce import inside or outside litigation.

For pragmatists functioning under color-coded ethics regimes committed to ethical discretion, independent judgment, and contextual reasoning, the same signifying markers of identity, narrative, and community, and their cultural, economic, historical, and sociological backgrounds, serve a broad instrumental function. They supply a storehouse of potential material evidence and an opportunity to redescribe racial identity, narrative, and community in whatever terms most effectively advance their clients' legal cause among courts, government agencies, private and nonprofit sectors, and the media. To pragmatists, normative claims of stigma injury and derivative dignitary and citizenship harms traceable to mass eviction, displacement, and segregation carry only tactical or strategic import.

Formalists' tactical omission of client and community resistance histories and pragmatists' strategic distortion of such histories produce jurispathic effects in the lawyering process.<sup>86</sup> Building on the work of Robert Cover and his inchoate jurisprudence of violence, here the term "jurispathic" refers to the power and practice of legal agents (e.g., civil rights lawyers, prosecutors, and criminal

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84. See Aziz Z. Huq, *What We Ask of Law*, 132 YALE L.J. 487, 551 (2022) (book review) (discussing the "subaltern classification of Blackness in the United States"); see also Bennett Capers, *Bringing Up the Bodies*, 2022 U. CHI. LEGAL F. 83, 86 (2022) (analyzing the silencing of defendants in the criminal process); GAYATRI CHAKRAVORTY SPIVAK, MARXISM AND THE INTERPRETATION OF CULTURE 271, 287 (Cary Nelson & Lawrence Grossberg eds., 1988) (noting that, "in the context of colonial production, the subaltern has no history and cannot speak").

85. See Paul Gowder, *Racial Classification and Ascriptive Injury*, 92 WASH. U. L. REV. 325, 326, 329 (2014); Osamudia R. James, *Valuing Identity*, 102 MINN. L. REV. 127, 128 (2017).

86. On the jurigenerative potential of advocacy, see ROBERT M. COVER, NARRATIVE, VIOLENCE AND THE LAW: THE ESSAYS OF ROBERT COVER 139 (Martha Minow, Michael Ryan & Austin Sarat eds., 1992); Anthony V. Alfieri, *The Ethics of Violence: Necessity, Excess, and Opposition*, 94 COLUM. L. REV. 1721, 1748–49 (1994) (reviewing LAW'S VIOLENCE (Austin Sarat & Thomas R. Kearns eds., 1992)).



defense attorneys) to displace, suppress, or exterminate norms and values through marginalizing interpretive practices and subordinating spoken and written narratives.<sup>87</sup> Cover's unfinished jurisprudential project urges recognition of both physical (imprisonment, torture, and capital punishment) and interpretive or normative forms of violence. Interpretive violence encompasses myriad lawyerly ways of seeing, hearing, speaking, writing, and even gesturing among clients in advocacy. When lawyers marginalize, subordinate, and discipline client voices to accommodate stigmatizing identity profiles and narrative scripts in the civil and criminal justice process, they silence, suppress, and exterminate individual, group, and community identities, narratives, and histories. That lawyer-crafted, seemingly law-compelled accommodation forms part of the false necessity<sup>88</sup>—"mistaking the way things are for the way things must be"<sup>89</sup>—central to the ethics regimes of race-neutral formalism and race-coded pragmatism.

Overcoming the burdens of formalism and pragmatism in laying the legal groundwork for fair housing litigation in Miami and elsewhere requires civil rights legal teams to draw on community-based, cultural, economic, historical, and sociological sources of fact to document displacement, out-migration, and resegregation patterns and their damaging neighborhood effects on education, health, and mobility.<sup>90</sup> Those factual sources may enable legal teams to chronicle the racial identity of the affected neighborhoods in pleadings and opening statements, weave the racialized narratives of displaced neighborhood tenants and homeowners into affidavits and witness examinations, and track changing, racially demarcated neighborhood boundary lines in exhibits.

To break free of the hold of formalism and pragmatism, however, the legal teams must do more. As the late Lani Guinier taught and Sherrilyn Ifill echoes, civil rights legal teams must "center[] the stories and accounts of discrimination faced by our clients not just in the paragraphs of a complaint or pages of a brief, but even in how we talk[] about what was at stake in our cases."<sup>91</sup> For Guinier and Ifill, centering stories goes beyond presenting a cognizable statutory claim for voting rights or fair housing.<sup>92</sup> Centering client and community stories entails

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87. See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 40–44 (1983); Alfieri, *supra* note 86, at 1721, 1728–30, 1750 (book review) (quoting Martha Minow, *Introduction: Robert Cover and Law, Judging, and Violence*, in NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER, *supra* note 86, at 1–2).

88. For a discussion of necessitarian logic in law and society, see ROBERTO UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY 2, 174–77, 215 (1987).

89. Lawrence B. Solum, *The Positive Foundations of Formalism: False Necessity and American Legal Realism*, 127 HARV. L. REV. 2464, 2494 (2014) (book review).

90. See Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOCIO. 88, 88–89 (2012); Daria Roithmayr, *Them That Has, Gets*, 27 MISS. C.L. REV. 373, 373–74 (2008); Robert J. Sampson, *Neighborhood Effects and Beyond: Explaining the Paradoxes of Inequality in the Changing American Metropolis*, 56 URB. STUD. 3, 4–5 (2019).

91. Sherrilyn Ifill, *In Memoriam: Professor Lani Guinier*, 136 HARV. L. REV. 743, 744 (2023).

92. See, e.g., 42 U.S.C. §§ 3604, 3605 (2023) (prohibiting discrimination in the sale or rental of housing and other real estate-related practices and transactions).

learning how to infuse “what the clients *really* wanted” into litigation strategy.<sup>93</sup> According to Guinier and Ifill, like Black people pursuing voting rights across the South, what Black fair housing clients in Miami want is “to give meaning to their lives as full and first-class citizens, and to be empowered to change the material conditions of their lives.”<sup>94</sup>

By grounding meaning in full citizenship, individual agency, and community power, Guinier and Ifill demonstrate that the stakes in civil rights litigation are “higher than winning or losing a case.”<sup>95</sup> In doing so, they also demonstrate the limits of formalism and pragmatism. To the extent that formalists and pragmatists elevate winning over meaning, they betray the norms of identity, narrative, and community, values clients *really* want.

Because formalism and pragmatism eschew race-conscious representation, normative dialogues about racial identity, narrative, and community are rendered inaccessible to traditional legal teams. As Guinier and Ifill point out, “[y]ou could understand what your clients wanted only by talking with them. By listening closely. And by respecting that they were the experts about how power worked in the states, towns, and communities where they lived.”<sup>96</sup> Neither formalism nor pragmatism emphasizes candidly talking and fully listening to clients or respecting their experiences of racism and their hard-earned expertise. By failing to reckon with the lived experiences of clients and others similarly affected in civil rights and criminal justice advocacy, for example, families and communities, formalists and pragmatists are unable to “give voice to their truths” in litigation, the race-conscious truths of individual resistance and collective struggle.

## II. RACE-NEUTRAL FORMALISM

The practice of race-neutral formalism and the ethics of race-neutral rule formalism exclude racial identity, racialized narrative, and racially demarcated community from the lawyering process. In doing so, they shift the race markers of identity, narrative, and community from a signifying to a non-signifying or muted position in civil and criminal justice advocacy. Disregarded by the *Model Rules* and condoned by the ABA Committee on Ethics and Professional Responsibility, that codified exclusion and shift binds the process values of equal treatment, institutional fidelity, and objective reasoning to colorblind conceptions of effective and legitimate representation.

### A. RACE-NEUTRAL FORMALISM IN PRACTICE

Race-neutral formalism demands that lawyers use colorblind terms to describe character, conduct, and community. Under the ideology of liberal legalism

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93. Ifill, *supra* note 91.

94. *Id.*

95. *Id.*

96. *Id.*

animating race-neutral formalism, each party (accused offender, plaintiff, and defendant) and third person (victim, juror, and witness) is entitled to equal treatment with respect to matters of race. Equal treatment is even-handed and fair-minded. It makes no invidious racial distinctions.

Moreover, under liberal legalism and across the adjudicative and nonadjudicative proceedings embraced by race-neutral formalism, each decision-making body (courts, legislatures, and administrative agencies) and each substantive and procedural law is deserving of institutional fidelity. Fiduciary in tone, institutional fidelity commands loyalty to law's procedures, relationships between the lawyer and others, and legal organizations. It calls for obedience to the rule of law.

Further, under liberal legalism and the offshoot directives of race-neutral formalism, each factual and legal contention is worthy of objective reasoning. Post-Realist in aspiration, objective reasoning calls for more than a bundle of deductive methods or decision procedures.<sup>97</sup> Distinguished from subjective or personal preference, it strives for an accurate, evidence-based recitation of facts, law, and policy. In this sense, it gives legitimacy to advocacy and adjudication amid normative value conflicts.

Consider, for example, the primarily colorblind stance and predominant race-neutral formalism of the Georgia state prosecution team, from the Cobb County District Attorney's Office, in the trial of the three men—Travis McMichael, Gregory McMichael, and William “Roddie” Bryan—charged with the murder of Ahmaud Arbery in Brunswick, Georgia.<sup>98</sup> Led by Senior Assistant District Attorney Linda Dunikoski<sup>99</sup> in front of a nearly all-white jury,<sup>100</sup> the prosecution team offered “no discussion of race or allegations of bigotry”<sup>101</sup> through ten days of courtroom testimony spanning opening statements<sup>102</sup> and witness examinations.<sup>103</sup> The prosecution team, in fact, “largely shied away from the issue, despite

97. See Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 48–49 (1984).

98. See Richard Fausset, *The Men Pursued Arbery Because ‘He Was a Black Man Running Down the Street,’ the Prosecutor Says in Summation*, N.Y. TIMES, (Nov. 22, 2021), <https://www.nytimes.com/2021/11/22/us/arbery-murder-trial-prosecutor-closing-arguments.html?smid=em-share> [<https://perma.cc/71AN-L2E3>].

99. See Michael Barbaro, Chelsea Daniel, Rachele Bonja, Sydney Harper, Rachel Quester, Robert Jimison, Lisa Tobin, Lisa Chow & Chris Wood, *The Daily: A Prosecutor’s Winning Strategy in the Ahmaud Arbery Case*, N.Y. TIMES (Nov. 29, 2021), <https://www.nytimes.com/2021/11/29/podcasts/the-daily/ahmaud-arbery-prosecution-conviction.html> [<https://perma.cc/U62U-ZQMC>]; Bogel-Burroughs & Heyward, *supra* note 79.

100. See Bogel-Burroughs & Heyward, *supra* note 79; Tariro Mzezewa, Giulia Heyward & Richard Fausset, *Discussions of Race Are Notably Absent in Trial of Arbery Murder Suspects*, N.Y. TIMES (Nov. 24, 2021), <https://www.nytimes.com/2021/11/19/us/ahmaud-arbery-shooting-race.html> [<https://perma.cc/MB13-PU8H>] (reporting that “11 of the 12 jurors” were white).

101. Mzezewa, Heyward & Fausset, *supra* note 100.

102. *Id.*

103. See *id.*; see also Patrick C. Brayer, *Cross-Examination Content and the “Power of Not,”* 51 BRIEF 52, 54–55 (2022).

chances to ask about it as they presented their case.”<sup>104</sup> Dunikoski, in particular, “did not bring up any instances of racist comments that the men were said to have made, including a claim by William Bryan that his fellow defendant, Travis McMichael, used a racist slur just after fatally shooting Mr. Arbery.”<sup>105</sup> Only at closing argument did Dunikoski point out “that the defendants had no justification to pursue Mr. Arbery or to claim they were performing a citizen’s arrest, because they did not have any knowledge that Mr. Arbery had committed a crime that day—they merely assumed that he had.”<sup>106</sup> And only once in her closing argument did Dunikoski mention race, remarking: “[a]ll three of these defendants made assumptions about what was going on that day. And they made their decision to attack Ahmaud Arbery in their driveways, because he was a Black man running down the street.”<sup>107</sup> Having cast-aside her colorblind stance, Dunikoski then pivoted more bluntly to ask: “[s]o what’s going on here? You know what’s really going on here. Mr. Arbery was under attack.”<sup>108</sup>

Later, in a post-trial media interview, Dunikoski defended the prosecution team’s race-neutral strategy, stating:

“We felt that putting up our case, it doesn’t matter whether they were Black or White, that putting up our case that this jury would hear the truth, they would see the evidence and that they would do the right thing and come back with the correct verdict which we felt they did today. . . . I think the message is that you have to let the criminal justice system work and, in this case, yes, it did work, and to trust . . . the system of the constitution and due process just to let it work.”<sup>109</sup>

Race-neutral formalists like Dunikoski and her prosecution team admit the salience of race in advantaging or disadvantaging Black actors in the legal process. And they concede that race affords freedom and impresses constraint within civil and criminal justice forums. Yet, out of a commitment to the norm of colorblindness, formalists seek to minimize the use of race in advocacy, advising, and negotiation—the main constituents of representation. They do so by excluding race as an element of legal knowledge, overlooking racial competence as a skill, and omitting minimum standards of racial thoroughness and preparation in establishing guidelines for effective representation. They also gainsay the validity and measurability of racially attributable, stigma-based dignity and citizenship

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104. Mzezewa, Heyward & Fausset, *supra* note 100.

105. Fausset, *supra* note 98; *see also* Richard Fausset, Tariro Mzezewa & Rick Rojas, *Lawyers Clash Over Whether Pursuit of Arbery Was Justified*, N.Y. TIMES (Nov. 22, 2021), <https://www.nytimes.com/2021/11/22/us/arbery-murder-trial-closing-arguments.html> [<https://perma.cc/986S-H2WY>].

106. Fausset, *supra* note 98; *see also* Bogel-Burroughs & Heyward, *supra* note 79.

107. Fausset, *supra* note 98.

108. *Id.*

109. Amir Vera & Chris Boyette, *Prosecutors in the Trial of Ahmaud Arbery’s Killers Explain Why They Had Faith in the Jury Despite Its Racial Makeup*, CNN (Nov. 25, 2021), <https://www.cnn.com/2021/11/24/us/prosecutors-ahmaud-arbery-verdict-jury-race/index.html> [<https://perma.cc/M32K-F4G4>].

harm in assessing the requisite, particularized knowledge and skill warranted in race trials.

Instead, race-neutral formalists like Dunikoski and her prosecution team endorse a colorblind canon of lawyer proficiency without elaborating on the nature of competence, degree of specialization, criteria of performance, or standard of effective representation appropriate to race trials. This colorblind canon ignores the distinct legal problems of race, the discrete dimensions of racial study and preparation, and the differential standards of competence in civil and criminal justice practice areas impacted by systemic or structural bias.<sup>110</sup> Formalists also remain silent on the factual and legal elements of “race problems,”<sup>111</sup> as well as the adequacy or plausibility of neutral practice methods and procedures in the preparation, litigation, and negotiation of race trials. Silence underscores the absence of any open discussion about the heightened individual, group, and community stakes (dignity, liberty, participation) in race trials and the lack of any cogent explanation for the commonplace treatment of race trials as matters of slighter complexity and smaller consequence.

In race trials, formalists at no point seek to determine whether they possess the legal knowledge of race, command the skill of racial competence, or meet certain minimum standards of racial thoroughness and preparation applicable to the facts and circumstances of public or private violence. Although they regularly advocate, advise, evaluate, and negotiate in locations—pretrial fact investigation and discovery, trial practice, and appellate briefing—fundamental to the construction of racial identity and racialized narrative, they publicly disregard the significance of such identity construction and narrative composition or invention.<sup>112</sup> Correspondingly, formalists at no point *overtly* seek to assess the legal protections, professional conduct rules, and ethical environments of the

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110. By race-saturated, I mean fields of legal practice marked by systemic or structural bias and discrimination, for example, capital punishment. See Sheri Lynn Johnson, *Explaining the Invidious: How Race Influences Capital Punishment in America*, 107 CORNELL L. REV. 1513, 1516–48 (2022). In addition to the criminal justice system, consider the areas of health and transportation. See Deborah N. Archer, “White Men’s Roads Through Black Men’s Homes”: *Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259 (2020); Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758 (2020); Jonathan M. Metzl & Helena Hansen, *Structural Competency: Theorizing a New Medical Engagement with Stigma and Inequality*, 103 SOC. SCI. MED. 126 (2014); Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L.J. 1934 (2015).

111. See DERRICK BELL, *AND WE ARE NOT SAVED* (1987); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL*, at ix (1992); W. E. B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* (1935); W. E. B. DU BOIS, *THE PHILADELPHIA NEGRO: A SOCIAL STUDY* (1899); W. E. B. DU BOIS, *THE SOULS OF BLACK FOLK* (1903); GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944).

112. See, e.g., Sara Burnett, *For World, Floyd’s Death Was About Race. Why Not the Trials?*, AP NEWS (Feb. 24, 2022), <https://apnews.com/article/death-of-george-floyd-ahmaud-arbery-george-floyd-race-and-ethnicity-04ad7633c49f94775d5c9f5c5a381c24>; <https://perma.cc/MEY9-YNRS> (“[I]n the courtrooms where those officers faced trial for their roles in Floyd’s killing—including the three who were convicted Thursday—race was rarely mentioned, at least explicitly, and lawyers and judges told jurors not to consider it.”).

jurisdictions surrounding particular cases of public or private racial violence in order to understand the racial climate of local and state bar associations, courts, and law enforcement agencies. Like identity construction and narrative composition, racial climate assessment goes unacknowledged.

Likewise, in appraising lawyer performance, race-neutral formalists exclude race as an element of diligence, overlook racial diligence as a skill, and omit minimum standards of racial diligence in formulating guidelines for effective representation. In explicating diligence, formalists shun references to race. They decline even to link race to the notion of reasonable diligence in advocacy.

Similarly, in evaluating lawyer proficiency, race-neutral formalists exclude race as an element of communication, overlook intraracial and interracial communication as a skill, and omit minimum standards of intraracial and interracial communication in devising guidelines for effective representation.<sup>113</sup> In the same way, formalists omit mention of the duty to communicate and explain the material risks of, and reasonably available alternatives to, proposed courses of race-neutral conduct *prior* to seeking agreement from the client or others, for example, a victim or the family of a victim. They make this omission although the discharge of that duty requires the adequate disclosure of racially material facts and circumstances. Adequate explanation is indispensable not only to inform the client of the material advantages and disadvantages of a proposed race-neutral course of conduct, but also to apprise the client of other available colorblind, color-coded, or color-conscious options. Formalists make no effort to recommend that the client seek the advice of racially competent independent counsel for purposes of revisiting and reconsidering colorblind, color-coded, or color-conscious advocacy options.

The failure of race-neutral formalists to communicate effectively enhances the risk that the client may be inadequately informed about available race-neutral, race-coded, and race-conscious courses of conduct or colorblind, color-coded, or color-conscious litigation and transactional alternatives. Put differently, the failure of race formalists to grapple with and discuss race may result in legal advice that proves inadequate along informational and strategic axes. The twin failure to provide adequate information undermines the integrity of client consent to a lawyer's strategic and normative recommendations.

In situations of lawyer-elected, race-neutral advocacy, that communication or informational failure precludes seeking client post hoc consent and invalidates previously obtained consent. Preclusion follows from the nonconsentability prohibition critical to the conflict-of-interest principles underpinning the *Model Rules*.<sup>114</sup> The prohibition applies when clients are unable to consent to lawyer-

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113. See Hernandez, *supra* note 48, at 156; Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. REV. 1493, 1493 (2021); Julie D. Lawton, *Am I My Client? Revisited: The Role of Race in Intra-Race Legal Representation*, 22 MICH. J. RACE & L. 13, 24 (2016).

114. See MODEL RULES R. 1.7; *infra* pp. 36–38 and accompanying notes 192–200.

driven litigation decisions due to informational, strategic, and normative conflicts of interest.<sup>115</sup> Informational nonconsentability occurs when the lawyer fails to communicate and explain the rationale for race-neutral advocacy in consulting with the client or others.<sup>116</sup> Strategic nonconsentability arises when the lawyer and client or others cannot come to agreement on the technical, legal, and tactical merits of race-neutral advocacy, an impasse that the lawyer may very well overcome through sheer force of professional discretion.<sup>117</sup> Normative nonconsentability ensues when the client or others morally object to the lawyer-designated, race-neutral advocacy strategy.<sup>118</sup> Generally, the risk of nonconsentability increases when the client or others are inexperienced in race trial-related legal matters and in making race-neutral, race-coded, or race-conscious decisions of the type involved in such litigation. Conversely, the risk of nonconsentability decreases when the client or others are independently represented by racially competent counsel consulted for purposes of resolving the issue of informed consent.

In large part, the above subset of nonconsentable informational, strategic, and normative conflicts stems from the failure of race-neutral formalists to consult with the client or others about the means of accomplishing the objectives of representation. Consultation that excludes race as an element of means-oriented communication overlooks intraracial and interracial communication as a means-oriented skill. It also omits minimum standards of intraracial and interracial, means-oriented communication for effective representation. The lack of means-oriented communication standards impairs the client's ability to give informed consent and impedes the client's meaningful participation in the lawyering process.<sup>119</sup>

Absent proactive lawyer-initiated consultation and collaborative means-oriented assessment, race-neutral formalists cannot adequately communicate or explain the advantageous or disadvantageous use of race-neutral, race-coded, or race-conscious strategies in pretrial, trial, appellate, or negotiation settings. Further, by excluding race as an element of lawyer explanation, overlooking intraracial and interracial explanation as a skill, and omitting minimum standards of intraracial and interracial explanation for effective representation, formalists hamper client participation in means/ends decision-making and hinder client appreciation of the normative, community-wide repercussions of advocacy tactics and strategies.

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115. MODEL RULES R. 1.7.

116. MODEL RULES R. 1.7.

117. MODEL RULES R. 1.7.

118. MODEL RULES R. 1.7.

119. See Cynthia Godsoe, *Participatory Defense: Humanizing the Accused and Ceding Control to the Client*, 69 MERCER L. REV. 715, 723 (2018); Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALBANY L. REV. 1281, 1296 (2015).

Taken together, these exclusions, erasures, and omissions enable race-neutral formalists to treat Black litigants and victims, and at times, jurors, witnesses, lawyers, and others, in ways that inflict or tolerate stigma injury and its associated dignitary and citizenship harm. Equally important, race-neutral formalists squander the opportunities for legal-political organization and mobilization around incidents of public and private racial violence. This formalist posture diminishes the significance of race as a cultural, historical, or sociological marker in advocacy. Reducing the function and diluting the weight of these key racial markers does not mean that they no longer carry evidentiary, substantive, and remedial meaning inside or outside the lawyering process. Indeed, outside the lawyering process, their cultural, social, and historical meaning survives apart and intact, but, inside the lawyering process, their sociolegal or law-in-action meaning loses some of its normative relevance and resonance.

In defending this race-neutral formalist strategy, neither Dunikoski nor her prosecution team confronted the question of whether the adoption of chiefly colorblind pretrial and trial tactics squandered the opportunity to ameliorate Brunswick's structural patterns of police misconduct<sup>120</sup> and racial inequality.<sup>121</sup> And neither Dunikoski nor her team took up the question of whether such tactical calculations relinquished the chance to reform Georgia's Reconstruction-era state citizen's arrest laws<sup>122</sup> and rectify its under-inclusive bias crime laws.<sup>123</sup> They also failed to tackle the question of whether such tactical calibrations wasted a rare occasion to confront Georgia's history of lynching and racial violence.<sup>124</sup> Finally, neither Dunikoski nor the team dealt with the question of whether the prosecution, in part or in whole, could have been harnessed to support transformative, legal-political organizing and mobilizing efforts to prevent incidents of racial violence in Brunswick locally, in Georgia as a whole, and in other Southern states regionally.<sup>125</sup>

120. See Rick Rojas, Richard Fausset & Serge F. Kovalski, *Georgia Killing Puts Spotlight on a Police Force's Troubled History*, N.Y. TIMES (May 8, 2020), <https://www.nytimes.com/2020/05/08/us/glynn-county-police-ahmaud-arbery.html> [<https://perma.cc/5X78-LUTX>].

121. See Mzezewa, *supra* note 80.

122. See Richard Fausset, *Georgia to Weaken Citizen's Arrest Law*, N.Y. TIMES (Mar. 31, 2021), <https://www.nytimes.com/2021/03/31/us/georgia-citizens-arrest-law.html> [<https://perma.cc/LR58-X9MN>]; Frances Robles, *The Citizen's Arrest Law Cited in Arbery's Killing Dates Back to the Civil War*, N.Y. TIMES (May 13, 2020), <https://www.nytimes.com/article/ahmaud-arbery-citizen-arrest-law-georgia.html> [<https://perma.cc/8J94-8QAU>].

123. See Wanda Cooper-Jones, *How Was My Son Ahmaud Arbery's Murder Not a Hate Crime?*, N.Y. TIMES (June 9, 2020), <https://www.nytimes.com/2020/06/09/opinion/hate-crime-bill-ahmaud-arbery.html> [<https://perma.cc/H54A-F23J>].

124. See George Yancy, *Ahmaud Arbery and the Ghosts of Lynchings Past*, N.Y. TIMES (May 12, 2020), <https://www.nytimes.com/2020/05/12/opinion/ahmaud-arbery-georgia-lynching.html> [<https://perma.cc/KY94-GNSJ>].

125. For a transformative vision of the prosecutorial function, see Paul Butler, *Progressive Prosecutors Are Not Trying to Dismantle the Master's House, and the Master Wouldn't Let Them Anyway*, 90 FORDHAM L. REV. 1983 (2022); Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164 (2022); Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1418 (2021).



The silence of Dunikoski and her team, a team of subordinate lawyers<sup>126</sup> over which she exercised supervisory responsibility,<sup>127</sup> seems inconsistent with the broad “seek justice” mandate announced in Model Rule 3.8<sup>128</sup> and Standard 3-1.2<sup>129</sup> governing the functions and duties of prosecutors. It also seems incompatible, or at least discordant, with the best, aspirational practices of prosecutors in the field.<sup>130</sup> And yet, that silence seems compliant with the recently amended text of Model Rule 8.4(g) and its allied provisions governing professional misconduct,<sup>131</sup> provisions congruent with the norms ordering race-neutral formalism.

The ABA House of Delegates adopted Model Rule 8.4(g) in 2016 after years of study and debate.<sup>132</sup> Model Rule 8.4 prohibits lawyer conduct violating or attempting to violate the *Model Rules*, knowingly assisting or inducing another to do so, or doing so through the acts of another.<sup>133</sup> Moreover, it prohibits conduct involving dishonesty, fraud, deceit, or misrepresentation and conduct found prejudicial to the administration of justice.<sup>134</sup> Further, it prohibits “conduct that the lawyer knows or reasonably should know is harassment or discrimination on the

126. On the responsibilities of a subordinate lawyer under the *Model Rules*, see MODEL RULES R. 5.2(a) (“A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.”).

127. On the responsibilities of a supervisory lawyer under the *Model Rules*, see MODEL RULES R. 5.1(b) (“A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.”). See also MODEL RULES R. 5.1(c) (“A lawyer shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”).

128. See MODEL RULES R. 3.8 cmt. 1 (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”).

129. See STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function, *supra* note 43, at Standard 3-1.2(b) (“The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.”).

130. See generally Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L. J. 607, 612–25 (1999); Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. U. L. REV. 805, 823–43 (2020).

131. See MODEL RULES R. 8.4.

132. See Formal Op. 493, *supra* note 19. For the legislative and enforcement history of Model Rule 8.4(g), see Jessie Allen, *Lawyers for White People?*, 69 U. KAN. L. REV. 349, 356–62 (2021); Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 GEO. J. LEGAL ETHICS 31, 45–61 (2018); Josh Blackman, *ABA Model Rule 8.4(g) in the States*, 68 CATH. U. L. REV. 629, 630–42 (2019); Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. LEGAL PRO. 201, 204–32 (2017); Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 241, 243–54 (2017); Alex B. Long, *Of Prosecutors and Prejudice (or “Do Prosecutors Have an Ethical Obligation Not to Say Racist Stuff on Social Media?”)*, 55 U.C. DAVIS L. REV. 1717, 1730–34 (2022); Margaret Tarkington, *Throwing Out the Baby: The ABA’s Subversion of Lawyer First Amendment Rights*, 24 TEX. REV. L. & POL. 41, 43–50 (2019); see also *Annual Meeting 2016: ABA Amends Model Rules to Add Anti-Discrimination, Anti-Harassment Provision*, AM. BAR ASS’N (Aug. 8, 2016), [https://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions\\_ethicsandprofessionalsresponsibility/](https://www.americanbar.org/groups/professional_responsibility/committees_commissions_ethicsandprofessionalsresponsibility/) [<https://perma.cc/F4GH-YH4S>].

133. MODEL RULES R. 8.4(a).

134. MODEL RULES R. 8.4(b), (c).

basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status” in contexts “related to the practice of law.”<sup>135</sup> By express design, this last prohibition—contained in amended paragraph (g)<sup>136</sup>—purportedly “does not preclude *legitimate advice or advocacy* consistent with these Rules.”<sup>137</sup>

The comment accompanying Model Rule 8.4 finds that lawyer acts of discrimination and harassment “in violation of paragraph (g) *undermine confidence in the legal profession and the legal system.*”<sup>138</sup> Comment 3 to the rule defines discrimination broadly to encompass “*harmful verbal or physical conduct that manifests bias or prejudice towards others.*”<sup>139</sup> By this definition, “[h]arassment includes sexual harassment and derogatory or demeaning verbal or physical conduct.”<sup>140</sup> Comment 3 also cites substantive antidiscrimination laws, anti-harassment statutes, and related case law as an appropriate set of materials to “guide application of paragraph (g).”<sup>141</sup>

Nothing in the language of Model Rule 8.4 and its accompanying comment appears to condemn the race-neutral formalism of Dunikoski and her prosecution team. Viewed conventionally, their preponderant race silence does not appear to violate or attempt to violate the *Model Rules*, knowingly assist or induce a witness or another to do so, or do so through the acts of another. Their silence does not appear to involve dishonesty, fraud, deceit, or misrepresentation. And their silence does not appear to be prejudicial to the administration of justice or undermine public confidence in the legal profession and the legal system.

To the contrary, the silence of Dunikoski and her prosecution team appears to have facilitated the administration, and advanced the cause, of justice on behalf of Arbery and his family. Indeed, upon learning of the three jury guilty verdicts, Arbery’s mother, Wanda Cooper-Jones, declared: “[i]t’s good to see racism

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135. MODEL RULES R. 8.4(g) cmt. 4 (“Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.”).

136. In 2020, the ABA Committee on Ethics and Professional Responsibility explained that “events in the legal profession and in the broader community influenced the development of Rule 8.4(g) and demonstrated the necessity for its adoption.” See Formal Op. 493, *supra* note 19, at 1, n.3. The Committee added: “[t]he police-involved killing of George Floyd and the unprecedented social awareness generated by it and other similar tragedies have brought the subject of racial justice to the forefront, further underscoring the importance of Rule 8.4 (g) and this opinion.” *Id.* at 1, n.3.

137. MODEL RULES R. 8.4(g) (emphasis added).

138. MODEL RULES R. 8.4 cmt. 3 (emphasis added).

139. MODEL RULES R. 8.4 cmt. 3 (emphasis added). Notably, lawyer conduct involving the discriminatory exercise of peremptory challenges does not alone establish sufficient bias or prejudice toward others to violate paragraph (g), even in the instance of a trial court finding of discrimination. See MODEL RULES R. 8.4 cmt. 5.

140. MODEL RULES R. 8.4 cmt. 5 (“Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.”).

141. See MODEL RULES R. 8.4 cmt. 5.

lose.”<sup>142</sup> In this sense, the silence of Dunikoski and her team does not appear to constitute either harmful verbal conduct that manifests bias or prejudice toward others, or knowing harassment or discrimination on the basis of race related to the practice of law. And their silence does not appear to run afoul of substantive antidiscrimination laws and anti-harassment statutes. In sum, their silence appears to exemplify a legitimate form of advocacy consistent with the *Model Rules*.

In the same way, nothing in the language of Formal Opinion 493 issued by the ABA Committee on Ethics and Professional Responsibility in 2020<sup>143</sup> appears to condemn the race-neutral formalism of Dunikoski and her prosecution team or reprove their race silence. Drafted to clarify the purpose, scope, and application of Model Rule 8.4(g), Formal Opinion 493 addresses lawyer “conduct related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination on the basis of various categories, including race, sex, religion, national origin, and sexual orientation.”<sup>144</sup> To determine whether specific conduct violates Model Rule 8.4(g),<sup>145</sup> the Opinion directs an assessment based on a “standard of objective reasonableness,” adding that “only conduct that is found *harmful*” in intentionally targeting<sup>146</sup> a particular individual or group of individuals “will be grounds for discipline.”<sup>147</sup> According to the Opinion, the conduct under assessment—for example, racist epithets directed toward others—“must necessarily be judged, in context, from an objectively reasonable perspective.”<sup>148</sup> Because a judgment of harm under Model Rule 8.4(g) “specifically excludes” legitimate advice or advocacy, its “standard of objective reasonableness” assesses or “covers only conduct for which there is no reasonable justification,” such as “conduct that is demeaning or derogatory.”<sup>149</sup>

The ABA Committee on Ethics and Professional Responsibility puts forward two intertwined rationales for the regulatory scope of Model Rule 8.4(g) and, by

142. See Jack Healy & Tariro Mzezewa, “*It’s Good to See Racism Lose*”: Guilty Verdicts Are Hailed in the Arbery Case, N.Y. TIMES (Nov.24,2021), <https://www.nytimes.com/2021/11/24/us/ahmaud-arbery-verdict-reaction.html> (<https://perma.cc/2NMS-83B9>) (quoting Chris Stewart).

143. See Formal Op. 493, *supra* note 19, at 1 (discussing the purpose, scope, and application of Model Rule 8.4(g)).

144. *Id.*

145. *Id.* at 11 (commenting that “a lawyer would clearly violate Rule 8.4(g) by directing a hostile racial, ethnic, or gender-based epithet toward another individual, in circumstances related to the practice of law”).

146. *Id.* at 14 (emphasis added). The Opinion employs the term “targeting” to elucidate the machinations of harassment, noting that “Rule 8.4(g) addresses harassment in relation to the practice of law that targets others on the basis of their membership in one or more of the identified categories.” *Id.* at 7 (footnote omitted).

147. *Id.* at 14. The Opinion explains that the disciplinary prosecution for Model Rule 8.4(g) violations “will depend on a variety of factors, including, for example: (1) severity of the violation; (2) prior record of discipline or lack thereof; (3) level of cooperation with disciplinary counsel; (4) character or reputation; and (5) whether or not remorse is expressed.” *Id.* at 4, n.14 (citing STANDARDS FOR IMPOSING LAWYER SANCTIONS (Am. Bar Ass’n 2019)).

148. *Id.* at 14, 8 (“Use of a racist or sexist epithet with the intent to disparage an individual or group of individuals demonstrates bias or prejudice.”).

149. *Id.* at 6, 8.

extension, Formal Opinion 493. The first, a public role rationale, rests on the claim that lawyers “serve a broader public role” in safeguarding the legal system and ensuring justice and fairness,<sup>150</sup> a rationale also undergirding Model Rule 3.8 governing prosecutors. The second, a system integrity rationale, relies on the claim that “[h]arassment and discrimination damage the public’s confidence in the legal system and its trust in the profession” and the related contention that Model Rule 8.4(g) stands “critical to maintaining the public’s confidence in the impartiality of the legal system and its trust in the legal profession as a whole.”<sup>151</sup>

Applied to the race-neutral pretrial and trial tactics at issue here, neither rationale appears to contradict or disapprove of the formalism of Dunikoski and her prosecution team or rebuke their silence on race. From the regulatory standpoint of the ABA, there is no evidence that silence in the face of racial violence is discriminatory, objectively unreasonable, harmful, or illegitimate. Instead, here, and elsewhere, the ABA treats silence on race in advocacy as a jurisdictional adaptation provoked by a particular racial climate, time, and place.

Additionally, again from the perspective of the ABA, there is no evidence that Dunikoski and her prosecution team knew or reasonably should have known that silence on race in the face of racial violence ought to be considered discriminatory, objectively unreasonable, harmful, or illegitimate. Rather, here and elsewhere, the ABA regards silence on race as a fact-molded, strategic gambit.

And, once again from the stance of the ABA, there is no evidence that the public prosecutorial role occupied by Dunikoski and her prosecution team required more than race silence to safeguard the legal system, ensure justice and fairness, or preserve public confidence in the impartiality of the legal system and trust in the legal profession. Instead, here and elsewhere, the ABA views silence on race as a circumstance-propelled reshaping of an organic prosecutorial role.

Moreover, nothing in the language of adjacent *Model Rules* overlapping the regulatory purview of Model Rule 8.4 appears to condemn the neutral formalism of Dunikoski and her prosecution team or reject their silence on race. Their silence, for example, does not appear to contravene the prohibition against “conduct intended to disrupt a tribunal” under Model Rule 3.5 governing the impartiality and decorum of the tribunal.<sup>152</sup> Their silence does not appear to violate the prohibition against using “means that have no substantial purpose other than to embarrass, delay, or burden a third person” under Model Rule 4.4 governing respect for the rights of third persons.<sup>153</sup> Their silence does not appear to defy the prohibition against “an extrajudicial statement” by a lawyer who is participating or has participated in the investigation or litigation of a matter when the lawyer knows or reasonably should know that the statement “will be disseminated by

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150. *Id.* at 14.

151. *Id.* at 1 (footnote omitted), 5, 14.

152. MODEL RULES R. 3.5(d).

153. MODEL RULES R. 4.4.

means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter” under Model Rule 3.6, which governs trial publicity.<sup>154</sup> Their silence does not appear to offend the prohibition against a lawyer knowingly making a false statement of material fact or law to a third person in the course of representing a client under Model Rule 4.1, which governs truthfulness in statements to others.<sup>155</sup>

In this way, the ethically permissible silence characterizing the race-neutral formalism of Dunikoski and her prosecution team demonstrates that racial identity, racialized narrative, and racially demarcated community may be strategically excluded, erased, and omitted from the technical, legal, and tactical framework of pretrial and trial advocacy practices in race trials. That same ethically permissible silence demonstrates that the signifying cultural, economic, historical, and sociological markers of racial identity, narrative, and community may be abandoned, displaced, or muted amid the pretrial and trial advocacy practices of race trials. And yet, however muted, the normative relevance and meaning-making resonance of racial identity, narrative, and community may persevere in some form not merely for lawyers, judges, witnesses, and jurors, but for clients, victims, families, and communities.

## B. RACE-NEUTRAL RULE FORMALISM

The regulation of race in the lawyering process operates through the adoption and enforcement of race-neutral, formalist rules of professional responsibility. Race-neutral formalist rules embrace the process values of equal treatment, institutional fidelity, and objective reasoning in governing the basic duties of competence, diligence, and communication. Together, they mold the conduct of civil rights lawyers, prosecutors, and criminal defense attorneys in race trials. To begin, consider the race-neutral formalist rule of competence.

### 1. COMPETENCE

Model Rule 1.1 governs competence. It mandates that “[a] lawyer shall provide competent representation to a client.”<sup>156</sup> Model Rule 1.1 construes this mandate to require “the *legal knowledge, skill, thoroughness and preparation* reasonably necessary for the representation.”<sup>157</sup> On its face, the language of Model Rule 1.1 excludes race as an element of legal knowledge, overlooks racial competence as a skill, and omits minimum standards of racial thoroughness and preparation in evaluating effective representation.

The comments accompanying Model Rule 1.1 repeat the same exclusions and omissions. Comment 1, for example, identifies five factors relevant to

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154. MODEL RULES R. 3.6(a).

155. MODEL RULES R. 4.1(a).

156. MODEL RULES R. 1.1.

157. MODEL RULES R. 1.1 (emphasis added).

ascertaining “whether a lawyer employs the requisite knowledge and skill in a particular matter.”<sup>158</sup> The five factors include: (1) “the relative complexity and specialized nature of the matter,” (2) “the lawyer’s general experience,” (3) “the lawyer’s training and experience in the field in question,” (4) “the preparation and study the lawyer is able to give the matter,” and (5) “whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.”<sup>159</sup> None of the five explicitly addresses race, racial identity, racialized narrative, or racially-attributable dignitary and citizenship harm in assessing the requisite, particularized knowledge and skill warranted in race trials.

Yet, across trial and litigation practice settings, race injects complexity, shapes experience, affects training, sways preparation and study, and influences the feasibility of associating or consulting with other teams of lawyers.<sup>160</sup> Its multiple configurations of bias<sup>161</sup> permeate legal roles, relationships, and institutional practices, fueling a growing call for alternative professional competencies and proficiencies beyond the standards of a general practitioner.<sup>162</sup> Nevertheless, Comment 1 maintains that, “[i]n many instances, the required *proficiency* is that of a *general practitioner*,”<sup>163</sup> implicitly a colorblind or race-neutral general practitioner. Even when exceptional circumstances call for specialized or studied racial proficiency, the comment fails to define the nature of competence, degree of specialization, or standard of effective representation required, thereby defaulting to a neutral benchmark.

Continuing this race-neutral line of reasoning, Comment 2 to Model Rule 1.1 adds that “[a] lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar,” explaining that “[s]ome important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal

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158. MODEL RULES R. 1.1 cmt. 1.

159. MODEL RULES R. 1.1 cmt. 1.

160. See Alina Ball, *Transactional Community Lawyering*, 94 TEMP. L. REV. 397, 443 (2022) (noting the often racialized assumptions and tendencies that impede lawyer understanding and effective client-lawyer communication across “cultural and situational differences”).

161. See generally Anne D. Gordon, *Better than Our Biases: Using Psychological Research to Inform Our Approach to Inclusive, Effective Feedback*, 27 CLINICAL L. REV. 195 (2021); Darren Lenard Hutchinson, “Continually Reminded of Their Inferior Position”: *Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL’Y 23 (2014); Darren Lenard Hutchinson, “With All the Majesty of the Law”: *Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 CAL. L. REV. 371, 398–406 (2022); Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013); L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L. J. 2626, 2639–40 (2013).

162. See Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001); Debra Chopp, *Addressing Cultural Bias in the Legal Profession*, 41 N.Y.U. REV. L. & SOC. CHANGE 364 (2017); Phyllis C. Taite & Nicola “Nicky” Boothe, *Teaching Cultural Competence in Law School Curricula: An Essential Step to Facilitate Diversity, Equity, & Inclusion in the Legal Profession*, 2022 UTAH L. REV. 813 (2022).

163. MODEL RULES R. 1.1 cmt. 1 (emphasis added).

problems.”<sup>164</sup> Among such generalizable skills, the comment observes, “[p]erhaps the most fundamental legal skill consists of determining *what kind of legal problems a situation may involve*, a skill that necessarily transcends any particular specialized knowledge.”<sup>165</sup> That transcendent skill, Comment 2 insists, enables a lawyer to make situated, problem-solving determinations and, by extension, “provide adequate representation in a wholly novel field through necessary study”<sup>166</sup> or “through the association of a lawyer of established competence in the field in question.”<sup>167</sup> This claim ignores the often distinct “legal problems” of race, the discrete dimensions of racial study and preparation, and the differential standards of competence in cases of racial violence.

Amplifying its account of thoroughness and preparation, Comment 5 to the rule notes that “[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners,” including “adequate preparation.”<sup>168</sup> The comment makes clear that “[t]he required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence.”<sup>169</sup> The comment, however, remains silent on the factual and legal elements of “race problems” and the adequacy or plausibility of neutral practice methods and procedures in the preparation, litigation, and negotiation of race trials. This silence is underscored by the absence of any discussion of the heightened individual, group, and community stakes in race trials and the absence of any explanation for the common treatment of race trials as matters of lesser complexity and consequence.

Elaborating on whether it is appropriate to associate with or retain other teams of lawyers to assist in the provision of legal services to a client and, hence, bolster the staffing of a matter, Comment 6 directs that “the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers’ services will contribute to the competent and ethical representation of the client.”<sup>170</sup> That direction presents four interrelated tasks: (1) client communication and consultation, (2) lawyer self-evaluation, (3) internal law firm evaluation, and (4) external law firm evaluation. Lawyer self-evaluation, internal firm evaluation, and external firm evaluation are prerequisites for client communication and consultation. Additionally, client-

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164. MODEL RULES R. 1.1 cmt. 2.

165. MODEL RULES R. 1.1 cmt. 2 (emphasis added).

166. MODEL RULES R. 1.1 cmt. 2; *see also* MODEL RULES R. 1.1 cmt. 4 (“A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation.”).

167. MODEL RULES R. 1.1 cmt. 4.

168. MODEL RULES R. 1.1 cmt. 5.

169. MODEL RULES R. 1.1 cmt. 5.

170. MODEL RULES R. 1.1 cmt. 6 (citations omitted).

lawyer communication and consultation are predicates for obtaining client informed consent to retain supplemental outside counsel.

In seeking out and obtaining client informed consent to ancillary, outside law firm representation in race trials, lawyers and law firms must determine whether they possess the legal knowledge of race, command the skill of racial competence, and meet the minimum standards of racial thoroughness and preparation suitable to staffing high-profile or run-of-the-mill litigation matters. Factors relevant to that determination properly include those catalogued in Comment 6: “the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed.”<sup>171</sup>

In race trials, the education, experience, and reputation of external lawyers and outside law firms in the fields of civil rights and criminal justice surely are relevant. Their specific legal services assignments (pretrial fact investigation and discovery, trial practice, appellate briefing) undoubtedly are also relevant, particularly insofar as those assignments (witness examinations, opening statements, and oral arguments) implicate the construction of racial identity and racialized narratives. And assuredly, the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which they will perform remain relevant, especially the racial environments of local and state bar associations, courts, and law enforcement agencies.<sup>172</sup> The exclusion of race as an element of legal knowledge, the erasure of racial competence as a skill, and the omission of minimum standards of racial thoroughness and preparation from the language of Model Rule 1.1 and the text of its accompanying comments render individual and institutional determinations of lawyer and law firm racial proficiency problematic.

## 2. DILIGENCE

Model Rule 1.3 governs lawyer diligence. It mandates that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.”<sup>173</sup> Here too, the language of Model Rule 1.3 facially excludes race as an element of diligence, overlooks racial diligence as a skill, and omits minimum standards of racial diligence in evaluating effective representation. The comment accompanying Model Rule 1.3 reiterates the same deficiencies.

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171. MODEL RULES R. 1.1 cmt. 6.

172. See David Thomas Konig, *The Persistence of Caste: Race, Rights, and the Legal Struggle to Expand the Boundaries of Freedom in St. Louis*, 67 WASH. U. J.L. & POL’Y 147 (2022); Elina Tetelbaum, Note, *Check Your Identity-Baggage at the Firm Door: The Ethical Difficulty of Zealous Advocacy in Bias-Ridden Courtrooms*, 14 TEX. J.C.L. & C.R. 261 (2009).

173. MODEL RULES R. 1.3.



Comment 1 to the rule instructs that “[a] lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor.”<sup>174</sup> The comment also mandates that a lawyer “act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”<sup>175</sup> Neither the words “opposition, obstruction or personal inconvenience,” nor the phrases “lawful and ethical measures,” “vindicate a client’s cause or endeavor,” “commitment and dedication,” or “zeal in advocacy” expressly reference race, though they implicitly condone its use to the advantage and disadvantage of Black litigants and others in race trials.

The implied tolerance for the advantageous and disadvantageous use of race in advocacy shows the freedom and constraint inscribed in the text of ethics rules and comments. Comment 1, for example, instills or at least invites constraint by admonishing that “[a] lawyer is not bound . . . to press for every advantage that might be realized for a client.”<sup>176</sup> The tension between freedom and constraint in advocacy is encapsulated in the exercise of professional discretion. The comment points out that “a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued.”<sup>177</sup> Derived from agency theory,<sup>178</sup> that professional authority expands a lawyer’s discretionary control over the *means* of representation throughout the legal process.

Comment 1 links agency theory, authority, discretion, and constraint in contending that “[t]he lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”<sup>179</sup> Nowhere, however, does the comment link race and “reasonable diligence,” race and “offensive tactics,” or race and the “legal process” values of “courtesy and respect.” In this way, both the language of Model Rule 1.3 and the text of its accompanying comments exclude race as an element of diligence, overlook racial diligence as a skill, and omit minimum standards of racial diligence in effective representation.

### 3. COMMUNICATION

Model Rule 1.4 governs client-lawyer communication and consists of two parts. Subdivision (a) of the rule contains a cluster of five client-lawyer communication mandates. The first mandate directs the lawyer to “promptly inform the client of any decision or circumstance with respect to which the client’s informed

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174. MODEL RULES R. 1.3 cmt. 1.

175. MODEL RULES R. 1.3 cmt. 1.

176. MODEL RULES R. 1.3 cmt. 1.

177. MODEL RULES R. 1.3 cmt. 1.

178. See RESTATEMENT (THIRD) OF AGENCY §§ 1.01–1.04 (AM. L. INST. 2006); RESTATEMENT OF THE LAW GOVERNING LAWYERS § 49 (1999).

179. MODEL RULES R. 1.3 cmt. 1.

consent, as defined in Rule 1.0(e),<sup>180</sup> is required.”<sup>181</sup> The second instructs the lawyer to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.”<sup>182</sup> The third commands the lawyer to “keep the client reasonably informed about the status of the matter.”<sup>183</sup> The fourth enjoins the lawyer to “promptly comply with reasonable requests for information.”<sup>184</sup> The fifth charges the lawyer to “consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.”<sup>185</sup>

Here again, on its face, the language of Model Rule 1.4 excludes race as an element of communication, overlooks intraracial and interracial communication as a skill, and omits minimum standards of intraracial and interracial communication in evaluating effective representation. As discussed earlier, the *Model Rules*’ mandate that lawyers must promptly inform their client of any decision or circumstance requiring the client’s informed consent omits mention of the lawyer’s duty to communicate adequate information and explanation about the material risks of a proposed course of race-neutral, race-coded, or race-conscious conduct *prior* to seeking a client’s agreement to a particular course of litigation or transactional conduct.<sup>186</sup> At a minimum, discharging that duty requires the disclosure of the racial facts and circumstances giving rise to the litigation; an explanation reasonably necessary to inform the client of the material advantages and disadvantages of a proposed race-neutral, race-coded, or race-conscious course of conduct; and a discussion of the client’s or other person’s colorblind, color-coded, or color-conscious options and alternatives.<sup>187</sup> In addition to such disclosure, litigation circumstances may recommend counseling a client or other person to seek the advice of racially competent, independent outside counsel.<sup>188</sup>

Under Model Rule 1.4, the lawyer’s failure to communicate personally with the client or another relevant person runs the risk that the client or other person may be inadequately informed about available race-neutral, race-coded, and race-conscious courses of conduct or alternative colorblind, color-coded, or color-conscious options.<sup>189</sup> Consonant with the logic of the *Model Rules*, that

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180. MODEL RULES R. 1.0(e) (“‘Informed consent’ denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”); *see also* MODEL RULES R. 1.0 cmt. 6, 7.

181. MODEL RULES R. 1.4(a)(1).

182. MODEL RULES R. 1.4(a)(2).

183. MODEL RULES R. 1.4(a)(3).

184. MODEL RULES R. 1.4(a)(4).

185. MODEL RULES R. 1.4(a)(5).

186. MODEL RULES R. 1.0(e).

187. MODEL RULES R. 1.0 cmt. 6.

188. MODEL RULES R. 1.0 cmt. 6.

189. MODEL RULES R. 1.0 cmt. 6.

failure precludes seeking client consent and invalidates previously obtained client consent.<sup>190</sup> As before, rule preclusion stems from the conflict-of-interest principle of prohibited representations.<sup>191</sup> Comment 14 to Model Rule 1.7 points to the fact that “some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent.”<sup>192</sup> Nonconsentability may result from inadequate information or larger lawyer-client interest conflicts.

Race trials present three branches of nonconsentable conflicts. The first, based on Model Rule 1.4, arises out of the lawyer’s communication of inadequate client information pertaining to race-related technical, legal, and tactical matters. Here again, this is informational nonconsentability. The second, based on Model Rule 1.7, comes from the conflict between the lawyer’s tactical interest in deploying race-neutral, race-coded, or race-conscious forms of advocacy and the client’s self- or other-regarding (third person) interest in alternative colorblind, color-coded, or color-conscious forms of advocacy. Once again, this is strategic nonconsentability. The third, based outside the *Model Rules*, springs from the conflict between the lawyer’s practical or instrumental commitment to race-neutral, race-coded, or race-conscious advocacy and the client’s self- or other-regarding commitment to antisubordination norms (racial dignity and equality) foreclosing such advocacy. Once more, this is normative nonconsentability.

In accordance with Model Rules 1.1, 1.3, 1.4, and 1.7, the consentability of informational, strategic, and normative conflicts of interest “is typically determined by considering whether the interests of the clients will be *adequately protected* if the clients are permitted to give their informed consent to representation.”<sup>193</sup> Determining whether representation burdened by informational, strategic, and normative conflicts of interests is prohibited hinges on the contextual analysis of the lawyer’s willingness and ability to reasonably fulfill the duties of competence, diligence, and communication.<sup>194</sup> The communication and explanation of technical, legal, tactical, and normative information is vital to this determination. To ascertain the reasonable adequacy of lawyer-communicated information and explanation in race trials, a lawyer may draw upon several relevant factors alluded to in Model Rule 1.4. Recast in race-conscious terms, those factors include whether the client or other person is experienced in race-related legal matters generally, whether they are experienced in making race-neutral, race-coded, and race-conscious decisions of the type involved in the litigation or transaction, and whether the client or

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190. MODEL RULES R. 1.0 cmt. 6.

191. MODEL RULES R. 1.7.

192. MODEL RULES R. 1.7 cmt. 14 (“When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.”).

193. MODEL RULES R. 1.7 cmt. 15 (emphasis added).

194. MODEL RULES R. 1.7 cmt. 15.

other person is independently represented by other racially competent counsel when giving consent.<sup>195</sup>

Significantly, under the *Model Rules*, informed consent may not be inferred from a client's or third person's silence, though consent may be inferred from the conduct of a client or other person who has reasonably adequate information about the matter, racial or otherwise.<sup>196</sup> The rules offer no indication of when, how, or why certain client conduct triggers an inference of informed consent. The rules also offer no indication of what constitutes reasonably adequate information and who may reasonably supply it for the purposes of securing informed consent. As a consequence, even in nonrace trials, "[o]btaining informed consent will usually require an affirmative response by the client or other person."<sup>197</sup>

Similarly, the rule-mandate reasonably to consult with the client about the means by which the client's objectives are to be accomplished excludes race as an element of means-oriented communication.<sup>198</sup> That mandate overlooks intraracial and interracial communication as a means-oriented skill. It also omits minimum standards of intraracial and interracial means-oriented communication.

The comment accompanying Model Rule 1.4 notes that the lawyer's duty of reasonable, means-oriented client consultation may require communication in situations prior to taking action, given the importance of the contemplated action and considerations of temporal feasibility.<sup>199</sup> Simultaneously, the comment cautions that a situation's exigency may require the lawyer to act without prior client consultation, for instance, when circumstances demand an immediate decision at trial.<sup>200</sup> Even in such exigent circumstances, the comment commands the lawyer to act reasonably to inform the client of actions that the lawyer has already taken to advance the client's interests.<sup>201</sup>

Under Model Rule 1.4, despite the acknowledged temporal, normative, and substantive import of client-lawyer consultation to client informed consent, both lawyer-initiated consultation and means-oriented assessment practices exclude race as a critical element of communication. Both consultation and assessment practices also overlook the skill of intraracial and interracial communication to facilitate meaningful client participation in the lawyering process. And both practices omit minimum standards of intraracial and interracial, means-oriented communication in measuring effective client representation in race trials.

Likewise, the twin mandates—first, to keep the client reasonably informed about the status of a matter and second, to comply promptly with reasonable requests for information—exclude race as an element of communication. The

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195. MODEL RULES R. 1.7 cmt. 15.

196. MODEL RULES R. 1.0 cmt. 7.

197. MODEL RULES R. 1.0 cmt. 7.

198. See MODEL RULES R. 1.4 cmt. 3 (citation omitted).

199. MODEL RULES R. 1.4 cmt. 3.

200. MODEL RULES R. 1.4 cmt. 3.

201. MODEL RULES R. 1.4 cmt. 3.

mandates also overlook intraracial and interracial communication as a skill, and they omit minimum standards of intraracial and interracial communication in appraising the content of racial information. They even omit standards of intraracial and interracial communication for the purposes of explicating the racial status of litigation matters.

Notably, the comment accompanying Model Rule 1.4 ties client-lawyer communication to client participation in the process of representation. In this respect, Comment 1 unequivocally states: “[r]easonable communication between the lawyer and the client is necessary for the client effectively to *participate* in the representation.”<sup>202</sup> That participatory commitment drives the requirement of Comment 2 that “the lawyer promptly consult with and secure the client’s consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take.”<sup>203</sup>

In the same fashion, the mandate that lawyers should consult with the client about any rule- or law-based limitation on the lawyer’s conduct excludes race as an element of communication. This consultative mandate also overlooks intraracial and interracial communication as a skill, and it omits minimum standards of intraracial and interracial communication. Nothing in this consultative mandate suggests that the advantageous or disadvantageous use of race-neutral, race-coded, or race-conscious strategies gives rise to any relevant limitation on the lawyer’s pretrial, trial, appellate, or negotiation conduct. In fact, nothing in this commandment suggests that the advantageous or disadvantageous use of race-neutral, race-coded, or race-conscious strategies carries any sort of normative relevance for lawyer conduct. Furthermore, nothing suggests that the use of such strategies tumble outside the permissible ambit of the *Model Rules* or other laws prohibiting race discrimination.

Additionally, subdivision (b) of Model Rule 1.4 mandates that “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”<sup>204</sup> Here also the language of the rule facially excludes race as an element of a lawyer’s reasonable explanation or client-informed decision-making, overlooks intraracial and interracial explanation as a skill, and omits minimum standards of intraracial and interracial explanation. Building on the participatory norm undergirding subdivision (a) of the rule, the comment accompanying subdivision (b) emphasizes that a “client should have sufficient information to *participate* intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is *willing and able* to do so.”<sup>205</sup>

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202. MODEL RULES R. 1.4 cmt. 1 (emphasis added).

203. MODEL RULES R. 1.4 cmt. 1 (citation omitted).

204. MODEL RULES R. 1.4(b).

205. MODEL RULES R. 1.4 cmt. 5 (emphasis added).

The phrase “willing and able to do so” conveys a deep-seated paternalism, especially with respect to matters of race and poverty. Historically, civil rights and poverty lawyers have rationalized the exclusion of indigent Black litigants and others from the lawyering process and means/ends decision-making on the grounds that they inherently lacked the willingness and/or ability to participate intelligently in their own representation.<sup>206</sup> As written, the phrase suggests that a client may not want sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued. In the litigation context of indigent Black representation, likely the most common paradigm for race trials, this suggestion implies client dependence and passivity.

As a corollary, the phrase also suggests that a client may not possess the ability to comprehend sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued or, more troubling, the ability to participate intelligently in means/ends decisions of any kind. Again, in the litigation context of indigent Black representation, this suggestion connotes client deficiency and incapacity. Signifying sociocultural inferiority, the racial tropes of dependence and incapacity conjure a subordinating vision of identity, narrative, and community where Black voices are marginalized or silenced altogether.

The comment to Model Rule 1.4 offers no clear rationale for tempering client participation in the lawyering process and in means/ends decision-making based on a supposed socioeconomic- or race-based unwillingness or inability to do so. According to one comment, the adequacy of participation-promoting communication “depends in part on the kind of advice or assistance that is involved.”<sup>207</sup> Distinguishing negotiation and litigation, the comment clarifies that “when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement.”<sup>208</sup>

By contrast, in litigation, the comment asserts that “a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others.”<sup>209</sup> Notwithstanding this directive, under subdivision (b), “a lawyer ordinarily will *not* be expected to describe trial or negotiation strategy in detail.”<sup>210</sup> This lowered expectation diminishes the quality of explanation and, more perniciously, permits the continued invocation of a client’s incompetence or inferiority

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206. See GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VIEW OF PROGRESSIVE LAW PRACTICE* (1992); see also Anthony V. Alfieri, *Practicing Community*, 107 HARV. L. REV. 1747 (1994) (reviewing LÓPEZ, *supra*).

207. MODEL RULES R. 1.4 cmt. 5.

208. MODEL RULES R. 1.4 cmt. 5.

209. MODEL RULES R. 1.4 cmt. 5.

210. MODEL RULES R. 1.4 cmt. 5 (emphasis added).

as a rationale for withholding explanation of technical, legal, and tactical matters and their normative repercussions.

To guide lawyer explanation and consultation at trial and in negotiation, the comment accompanying the rule propounds a three-part formula combining the client's reasonable expectations for information, the lawyer's duty to act in the client's best interests, and the character of the representation. Based on this calculation, the comment urges the lawyer to "fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation."<sup>211</sup> Of note, the comment acknowledges that, "[i]n certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent."<sup>212</sup>

Race trials present precisely such circumstances. In race trials, the harmful or coercive character of race-neutral, race-coded, and race-conscious representation may occasion conflicting client expectations for information and lawyer assessments of the client's best interest. Those diverging assessments may provoke client-lawyer conflicts of interest over tactics, strategies, and objectives, triggering frequently ignored consultation protocols and informed consent procedures.<sup>213</sup> A glaring example of client-lawyer interest divergence pertains to the permissive, lawyer-decreed withholding of information under Comment 7 of Model Rule 1.4. The comment allows that "some circumstances" may justify a lawyer's conduct "in delaying transmission of information" to a client, such as "when the client would be likely to react imprudently to an immediate communication."<sup>214</sup> Both the timing and manner, as well as the form and content, of the transmission are left to the discretion of the lawyer in spite of competing client decision-making and participation norms.

The exclusion of race as an element of lawyer communication, the erasure of intraracial and interracial communication as a skill, and the omission of minimum standards in intraracial and interracial communication militate against the use of communication-enhancing and participation-promoting procedures put forward in Model Rule 1.4. Like the exclusion of race from notions of lawyer competence and diligence, the erasure of racial competence and diligence as lawyer skills, and the omission of minimum standards of racial competence and diligence from professional measures of effective representation under Model Rules 1.1 and 1.3, the exclusions and omissions of Model Rule 1.4 enable civil rights lawyers, prosecutors, and criminal defense attorneys to treat Black actors in ways that inhibit their participation in the lawyering process and inflict dignitary and citizenship

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211. MODEL RULES R. 1.4 cmt. 5.

212. MODEL RULES R. 1.4 cmt. 5.

213. See MODEL RULES R. 1.4 cmt. 7.

214. MODEL RULES R. 1.4 cmt. 7.

harm, all under the aegis of race-neutral rule formalism. Next consider race-coded pragmatism.

### III. RACE-CODED PRAGMATISM

The practice of race-coded pragmatism and the ethics of race-coded rule pragmatism offer an account of racial identity, racialized narrative, and racially demarcated community within the lawyering process that exploits the signifying properties of race in civil and criminal justice advocacy. Embedded within the *Model Rules* governing the scope of representation, the allocation of authority between lawyer and client, and the lawyer's role as an advisor and ratified by the ABA Committee on Ethics and Professional Responsibility, that codified exploitation fastens the professional norms of ethical discretion, independent judgment, and contextual reasoning to color-coded notions of effective and legitimate representation.

#### A. RACE-CODED PRAGMATISM IN PRACTICE

Race-coded pragmatism in practice exploits or, alternatively, tolerates the use of stereotypes to describe the character, conduct, and community of litigants, victims, jurors, witnesses, and others. By now familiar, the stereotypes pull from antebellum and postbellum tropes and images of the Black body, figuration, and imagery that fuel narratives of inherent bestiality, natural inferiority, and innate immorality.<sup>215</sup> Galvanized by the ideology of instrumental advocacy, race-coded pragmatism displays the professional norms of lawyer control over the means of representation.

Consider, for example, the race-coded pragmatism of Paul Butler when he served as a prosecutor in the misdemeanor section of the U.S. Attorney's Office for the District of Columbia in the 1990s, representing the United States in municipal criminal court.<sup>216</sup> A former trial attorney at the U.S. Department of Justice, Butler frankly describes his exercise of prosecutorial "power to lock up my own."<sup>217</sup> His description of the D.C. court system points out that "white people," though a substantial demographic segment, "were almost utterly absent from the criminal court."<sup>218</sup> That absence, Butler

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215. See N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315 (2004); Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 MICH. ST. L. REV. 1243, 1246–53 (2018); Lawrence Vogelmann, *The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom*, 20 FORDHAM URB. L.J. 571 (1993); see also Kim Shayo Buchanan & Phillip Auba Goff, *Racist Stereotype Threat in Civil Rights Law*, 67 UCLA L. REV. 316 (2020); Devon W. Carbado, *Strict Scrutiny & the Black Body*, 69 UCLA L. REV. 2 (2022).

216. Paul Butler, *Locking Up My Own: Reflections of A Black (Recovering) Prosecutor*, 107 CAL. L. REV. 1983, 1983–84 (2019); cf. Mary A. Lynch, *Building an Anti-Racist Prosecutorial System: Observations from Teaching a Domestic Violence Prosecution Clinic*, 73 RUTGERS U.L. REV. 1515, 1516 (2021).

217. Butler, *supra* note 216, at 1983.

218. *Id.* (footnotes omitted).



mentions, “is one of the reasons that [he] was hired to be an African American prosecutor.”<sup>219</sup>

Attentive to the sociocultural context of federal and state prosecution, Butler explains:

Most of the jurors were black like me. And they were usually elderly black people—the main folks . . . who bothered to show up for jury duty—and they arrived at the superior court in their Sunday go-to-church clothes. They seemed not far removed from the 1950s, when they might have migrated to D.C. from North Carolina. . . . It was probably a bother to be called for jury duty, but it was also an honor, because they could remember when black people were not allowed to be on juries at all. They had expected that the defendant was going to be black, and they were right.<sup>220</sup>

But, Butler notes, “what they had not expected was this other African American man in a suit and tie, loudly proclaiming that his name was Paul Butler and that he represented the United States of America.”<sup>221</sup> Indeed, perceptive to the play of emotions in the context of criminal law and the expressive role of emotions in the mobilization of rights and social movements,<sup>222</sup> he observes: “[t]hese old black people would beam at me like they were thinking, ‘You go, boy, you represent the United States of America!’”<sup>223</sup> Admitting that he did not yet “know the phrase ‘politics of respectability,’” Butler comments that he “did know *how*, when I cross-examined a defendant, to mock his diction and references to his ‘baby’s mama.”<sup>224</sup> In fact, he states: “I knew how, at the end of my frothy mouthed closing statement, to button up my jacket and let my eyes roam from the defendant to the jury in a way that communicated that the *jurors and I were good Negroes, but that the defendant was a thug who needed to be locked up.*”<sup>225</sup> Butler adds: “I won most of my cases . . . it was not only because of my trial advocacy skills.”<sup>226</sup>

Contrast this with the jurispathic, race-coded tactics of Kevin Gough, Laura Hogue, and other members of the defense teams representing the three men—Travis McMichael, Gregory McMichael, and William “Roddie” Bryan—charged in the murder of Ahmaud Arbery. Spanning jury selection, courtroom statements,

219. *Id.*

220. *Id.* at 1984 (footnote omitted).

221. *Id.*

222. On law and emotions, see Kathryn Abrams, *Emotions in the Mobilization of Rights*, 46 HARV. C.R.-C. L. L. REV. 551 (2011); Kathryn Abrams & Hila Keren, *Who’s Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997 (2010).

223. Butler, *supra* note 216, at 1984.

224. *Id.* (emphasis added).

225. *Id.*

226. *Id.*; see also Devon W. Carbado & L. Song Richardson, *The Black Police*, 131 HARV. L. REV. 1979, 1992 (2018) (book review) (“The basic point here is that African Americans (and other people of color) have some of the same racial biases against other African Americans that white people have.”).

and closing argument,<sup>227</sup> their race-coded tactics aroused wide condemnation in the media and in the public square.<sup>228</sup> First, in jury selection, Gough struck eight Black prospective jurors from a jury pool drawn from a county population registering more than a quarter Black, consigning a single Black person to sit on a jury of twelve.<sup>229</sup> Second, in statements directed at Black clergy inside and outside the courtroom, Gough declared: “[w]e don’t want any more Black pastors coming in here.”<sup>230</sup> Gough also called for a courtroom ban on “high-profile members of the African American community” and “tried unsuccessfully to have peaceful demonstrators . . . moved from the front lawn of the Glynn County Courthouse on grounds that they might ‘intimidate or influence the jury.’”<sup>231</sup> Third, in her closing argument, Hogue declaimed: “[t]urning Ahmaud Arbery into a victim after the choices that he made does not reflect the reality of what brought Ahmaud Arbery to Satilla Shores in his khaki shorts with no socks to cover his long, dirty toenails.”<sup>232</sup>

Pragmatic ethical discretion permitted Butler, Gough, and Hogue to break from professedly race-neutral regulatory norms in order to race-code the actions of individuals and groups in District of Columbia and Georgia courtrooms. Race-

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227. See also STANDARDS FOR CRIMINAL JUSTICE, The Defense Function, Standard 4-1.6 (Am. Bar Ass’n 4th ed. 2015); cf. Alan J. Gocha, *A Call for Realism in the Justice System: Why Criminal Defense Attorneys Should Take Race into Account When Advising Clients*, 28 GEO. J. LEGAL ETHICS 547 (2015) (urging amendment of the Model Rules to incorporate a duty to investigate and communicate how race may impact a client’s case at trial). See generally Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755 (2012) (assessing the need for criminal defense lawyers to be conscious of race bias).

228. See Theresa Waldrop, *Defense Lawyer Prompts Outrage for Bringing Up Ahmaud Arbery’s Toenails in Closing Arguments*, CNN (Nov. 24, 2021, 2:23 PM), <https://www.cnn.com/2021/11/22/us/ahmaud-arbery-trial-toenails-comment-outrage/index.htm> [<https://perma.cc/RAQ6-QPYH>].

229. See Richard Fausset & Giulia Heyward, *In the Trial Over Ahmaud Arbery’s Killing, a Nearly All-White Jury Is Selected*, N.Y. TIMES (Nov. 11, 2021), <https://www.nytimes.com/2021/11/03/us/ahmaud-arbery-killing-trial-jury-selection-race.htm> [<https://perma.cc/D18Q-NM95>]; Devon M. Sayers, Alta Spells & Christina Maxouris, *Judge Says ‘There Appears to Be Intentional Discrimination’ in Arbery Jury Selection, but Allows Trial to Move Forward with 1 Black Juror*, CNN (Nov. 12, 2021, 9:52 PM), <https://www.cnn.com/2021/11/03/us/ahmaud-arbery-jury-what-we-know/index.htm> [<https://perma.cc/7P28-QTYL>].

230. See Mzezewa, Heyward & Fausset, *supra* note 100; Devon M. Sayers, Alta Spells & Christina Maxouris, *‘We Don’t Want Any More Black Pastors Coming in Here,’ Says Defense Attorney in Arbery Death Trial*, CNN (Nov. 12, 2021, 12:36 PM), <https://www.cnn.com/2021/11/11/us/ahmaud-arbery-trial-defense-attorney-black-pastors/index.htm> [<https://perma.cc/E9B3-QXMJ>].

231. Richard Fausset, *Lawyer for Man Accused of Killing Ahmaud Arbery Draws Scrutiny*, N.Y. TIMES (Nov. 24, 2021), <https://www.nytimes.com/2021/11/11/12/us/ahmaud-arbery-trial-lawyer-kevin-gough.htm> [<https://perma.cc/RFR3-STWK>]; Richard Fausset & Tariro Mzezewa, *Judge Rejects Call for Mistrial in Case Against Men Accused of Killing Arbery*, N.Y. TIMES (Nov. 15, 2021), <https://www.nytimes.com/2021/11/15/us/ahmaud-arbery-trial.htm> [<https://perma.cc/WK6Q-P78G>].

232. Richard Fausset, *A Defense Lawyer’s Comment About Ahmaud Arbery’s Toenails Draws Sharp Rebuke*, N.Y. TIMES (Nov. 24, 2021), <https://www.nytimes.com/live/2021/11/24/us/ahmaud-arbery-murder-trial/#a-defense-lawyers-comment-about-ahmaud-arberys-toenails-draws-a-sharp-rebuke> [<https://perma.cc/GCC7-6KLB>]; Bry’Onna Mention, *Ahmaud Arbery’s Mother Jabs Back at Defense Lawyers Over “Dirty Toenails” Remark*, ESSENCE (Jan. 7, 2022), <https://www.essence.com/news/wanda-cooper-jones-fights-toenail-comment/> [<https://perma.cc/BR7Z-FF2K>].

coding redescribes economic, historical, and sociological categories of analysis, reinterpreting the meaning of core concepts like agency, causation, intent, and harm, among others. In this way, race-coding reconfigures social reality—for example, the cause and effect of intraracial or interracial crime, the impartiality of law enforcement, and the degree of victim culpability for incidents of violence.

Likewise, pragmatic, independent judgment allowed Butler, Gough, and Hogue to depart from purportedly race-neutral institutional practices and remake them into race-coded procedural and substantive forms in jury selection, closing argument, and trial publicity. Deep-rooted in the culture of the legal profession, judgmental independence applies to attorney-client relationships, courtrooms, and legal organizations (law firms, prosecutor offices, and public defender bureaus) to the extent that they harbor environments of relative lawyer autonomy. In this view, race-coding signals the exercise of professional independence, often at the expense of client agency, decision-making, and participation in civil rights and criminal defense litigation and negotiation.

Similarly, pragmatic, contextual reasoning enabled Butler, Gough, and Hogue to rely on their intuition, subjective observation, and situational instinct in race-coding the performance of litigants, victims, jurors, witnesses, and others at trial. Displacing the claimed objectivity of race-neutral formalism, the contextual reasoning of race-coding falls highly susceptible to implicit bias—for example, in fact investigation and discovery. Bias easily infiltrates the civil and criminal prosecution of community-enmeshed race trials, where individual and group histories may be missed or misunderstood and, therefore, left undiscovered and underutilized in litigation.

Astute in their appreciation of law and acute in their perception of culture and society, race-coded pragmatists like Butler, Gough, and Hogue acknowledge the salience of race in advocacy but assert its practical necessity. As damage skeptics, prosecutor and defense attorney pragmatists see little risk of harm or injury to litigants, victims, jurors, witnesses, or others from race-coding and clear material advantages to the state—measured in terms of conviction rates, and to the accused, gauged in terms of acquittals and plea-bargain outcomes. Civil rights lawyer pragmatists also see tactical or strategic advantages in race-coding their own clients, often where pretrial, trial, and appellate narratives portray them as dependent, inferior, or passive and where the organization of the advocacy process affords them scant opportunity for agency or participation. To that extent, prosecutors, defense attorneys, and civil rights lawyers engaged in race-coding put litigants, victims, jurors, witnesses, and others at risk of stigma injury and the dignitary and citizenship harms that flow from it. The dignitary harm of stigma injury arises out of disparagement and humiliation suffered privately at personal and interpersonal levels, and publicly at state juridical and street levels. More diffuse, the citizenship harm of stigma injury rises out of unequal opportunity, thwarted liberty, and frustrated participation.

It is an injury of consumer and labor market exclusion, cultural and social segregation, and political disenfranchisement.

Among civil rights and criminal defense lawyers, race-coded pragmatists deploy the professional norms of ethical discretion, independent judgment, and contextual reasoning in negotiating the scope of client representation, the allocation of client-lawyer authority, and the role of the lawyer as an advisor. Prosecutors do the same in their negotiation with victims, victim families, and affected groups, such as Black clergy and church congregations. Fundamentally paternalistic, race-coded pragmatists exclude race as an element of the negotiated scope of representation and allocation of decision-making authority, overlook the intraracial and interracial negotiation of scope and decision-making as a skill, and omit minimum standards of intraracial and interracial negotiation of scope and decision-making in evaluating effective representation. Pragmatists forge those exclusions and omissions out of their sole means-oriented, decision-making authority. That expansive authority gives race-coded pragmatists control over means-oriented, client and victim consultation procedures, effectively determining the allocation of means/ends decision-making in the representation of race trials.

The paternalistic, means/ends rationality animating pragmatic race-coding denies that caste- or color-infused forms of advocacy reflect or construct the meaning of identity, narrative, and community in law, culture, and society. It also denies that the stigma injury caused by the disparagement or humiliation of Black litigants, victims, jurors, witnesses, and other lawyers or the curtailment of their public and private opportunity, liberty, and participation result in dignitary and citizenship harm. That manifold denial both normalizes and immunizes lawyer control and decision-making power over technical, legal, and tactical considerations in advocacy.

Imbued by means/ends hierarchical reasoning, race-coded pragmatists disregard the interests of third persons in prosecuting and defending cases of racial violence—for example, the interests of litigant families and affinity groups, victims, witnesses, jurors, and local communities. Ethics rules recognize both a client's concern for and a lawyer's responsibilities to third persons when their interests may be adversely affected by lawyer-dictated, means-oriented technical, legal, and tactical decisions. Rather than embrace a client's other-regarding concern for third persons who might be adversely affected by such technical, legal, or tactical decisions, pragmatists exercise their prerogative over the means of representation to override client objections with minimal consultation and without the need to articulate decision-making procedures.

In doing so, race-coded pragmatists exclude racial harm as an element of lawyer independent professional judgment and candid advice. They erase racial-harm-related judgment, candor, and advice as discernible skills. They also omit minimum standards of racial-harm-related judgment, candor, and advice from professional measures of effective representation. This recurrent pattern of

exclusion ignores a lawyer's sizeable latitude to consider and refer to race as a relevant moral, economic, social, and political factor specific to the client's situation as an individual, a class member, an entity constituent, or a neighborhood representative. Amenable to lawyers' honest assessment and straightforward advice, the situational factors of race trials present abundant opportunities for candid intraracial and interracial advice, consultation, and counseling. Consider, for example, the situational factors of public or private bias, prejudice, and violence or the factors of racially subordinating identity and narrative.

Instead of offering candid intraracial and interracial advice or engaging in a counseling dialogue on the risk or prospect of stigma injury and dignitary and citizenship harm, pragmatists exert their decision-making and discursive independence to shift unilaterally from race-neutral to race-coded forms of pretrial, trial, and appellate advocacy. Blatantly discretionary, the shift from colorblind to color-coded forms of advocacy ratchets up the inflammatory meaning of identity, narrative, and community as signifying markers in race trials.<sup>233</sup>

To illustrate this inflammatory shift, compare Dunikoski's race-neutral formalism with Butler's race-coded pragmatism. Like Dunikoski's formalism, Butler's pragmatism seems inconsistent with the broad "seek justice" mandate proclaimed in Model Rule 3.8<sup>234</sup> and Standard 3-1.2,<sup>235</sup> which govern the functions and duties of prosecutors. Similarly, his pragmatism seems incompatible with the best aspirational practices and standards of federal and state prosecutors.<sup>236</sup> And yet, like Dunikoski's race-neutral formalism, his pragmatism seems compliant with the amended text of Model Rule 8.4(g) and its allied provisions governing professional conduct and professionalism. Recall that Model Rule 8.4(g) prohibits 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 contexts "related to the practice of law."<sup>237</sup> Recall also that this prohibition "does not preclude *legitimate advice or advocacy* consistent with these Rules."<sup>238</sup>

233. See Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739 (1993); Praatika Prasad, Note, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response*, 86 FORDHAM L. REV. 3091 (2018).

234. See MODEL RULES R. 3.8 cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

235. See STANDARDS FOR CRIMINAL JUSTICE, *The Prosecution Function*, *supra* note 43, at Standard 3-1.2(b) ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.").

236. See *id.* at Standard 3-1.6. For previous calls for race-conscious prosecution, see Justin Murray, *Reimagining Criminal Prosecution: Toward a Color-Conscious Professional Ethic for Prosecutors*, 49 AM. CRIM. L. REV. 1541 (2012); Ellen S. Podgor, *Race-ing Prosecutors' Ethics Codes*, 44 HARV. C.R.-C.L. L. REV. 471 (2009). See also U.S. DEP'T OF JUST., JUSTICE MANUAL § 8-3.135 (2023) (designating criteria for the prosecution of a high-profile civil rights incident in the enforcement of civil rights criminal statutes).

237. MODEL RULES R. 8.4(g).

238. MODEL RULES R. 8.4(g) (emphasis added).

Revisited here, nothing in the language and comment of Model Rule 8.4 appears to denounce the race-coded pragmatism of Butler in his prosecution of accused offenders or “thugs” in the District of Columbia or Gough and Hogue in their criminal defense of William Bryan and Gregory McMichael in Brunswick. Under ABA rule conventions, their pragmatic advocacy does not appear to violate or attempt to violate the *Model Rules*, knowingly assist or induce a witness or another to do so, or do so through the acts of another. Under the same conventions, their pragmatic advocacy does not appear to involve dishonesty, fraud, deceit, or misrepresentation, undermine public confidence in the legal profession and the legal system, or substantially stir prejudice in the administration of justice. On the contrary, their advocacy appears to have facilitated the administration of justice on behalf of a portion of the majority Black population in the District of Columbia<sup>239</sup> and on behalf of a sector of the minority white population in Brunswick.<sup>240</sup>

Unsurprisingly, read against the colorblind backcloth of Model Rule 8.4(g) and Formal Opinion 493, the race-coding of Butler, Gough, and Hogue does not appear to constitute either harmful verbal conduct that manifests bias or prejudice toward others or knowing harassment or discrimination on the basis of race related to the practice of law. Recall that Formal Opinion 493 addresses lawyer “conduct related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination on the basis of various categories, including race, sex, religion, national origin, and sexual orientation.”<sup>241</sup> Recall as well that the Opinion directs an assessment based on a “standard of objective reasonableness,” noting that “only conduct that is found *harmful*” in intentionally targeting a particular individual or group of individuals “will be grounds for discipline.”<sup>242</sup> For purposes of assessment, that conduct, for example, racist epithets directed toward others, again “must necessarily be judged, in context, from an objectively reasonable perspective.”<sup>243</sup> Having specifically excluded legitimate advice or advocacy from the algorithm for and the ambit of harm assessment under Model Rule 8.4(g), this “standard of objective reasonableness” considers “only conduct for which there is no reasonable justification” such as “conduct that is demeaning or derogatory.”<sup>244</sup> Unless their pretrial and trial conduct is judged racially demeaning or derogatory, and the State Bar of Georgia declined to do so,<sup>245</sup> the

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239. Butler, *supra* note 216, at 1983.

240. See Richard Fausset & Rick Rojas, *Where Ahmaud Arbery Ran, Neighbors Cast Wary Eyes*, N.Y. TIMES (May 22, 2020), <https://www.nytimes.com/article/satilla-shores-ahmaud-arbery-killing.html> [<https://perma.cc/C6PY-973Z>].

241. Formal Op. 493, *supra* note 19.

242. *Id.* (emphasis added).

243. *Id.*

244. *Id.*

245. On January 18, 2022, the State Bar of Georgia dismissed a grievance complaint filed by Georgia State Representative Viola Davis against Gough requesting his censure. Letter from Leigh Burgess, Assistant Grievance Counsel, State Bar of Georgia, to Georgia State Rep. Viola Davis (Jan. 18, 2022) (on file with the

race-coding of Butler, Gough, and Hogue appears to exemplify a legitimate form of advocacy consistent with the *Model Rules* and relevant Formal Opinions.

Applied to the pretrial and trial tactics at issue here, close study of the text and policy rationale of Formal Opinion 493 appears to show no evidence that race-coding is discriminatory, objectively unreasonable, harmful, or illegitimate. Instead, for the ABA, the tactics deftly ply a climate-sensitive, jurisdictional adaptation. Careful review of the same tactics appears to show no evidence that Butler, Gough, and Hogue knew or reasonably should have known that race-coding should be considered discriminatory, objectively unreasonable, harmful, or illegitimate. Rather, for the ABA, the tactics shrewdly press a fact-modeled, tactical or strategic gambit. For these lawyers, and for the ABA as well, race-coding safeguards the legal system, ensures justice and fairness, and preserves public confidence in the impartiality of the legal system and trust in the legal profession.

Additionally, nothing in the text of coinciding *Model Rules* appears to reproach these lawyers for their race-coded pragmatism. Nothing in the language and comment of Model Rule 3.1 governing meritorious claims and contentions, for example, appears to prohibit Butler's prosecutorial tactics or Gough's and Hogue's criminal defense strategies.<sup>246</sup> Model Rule 3.1 permits Butler to bring a proceeding and assert or controvert an issue, provided there is a basis in law and fact for doing so that is not frivolous.<sup>247</sup> At the same time, Model Rule 3.1 also permits Gough and Hogue, as the lawyers for co-defendants in a criminal proceeding, to "so defend the proceeding as to require that every element of the case be established."<sup>248</sup> Here, both prosecutor and defense attorneys appear to discharge their corresponding duties "to use legal procedure for the fullest benefit of the client's cause"<sup>249</sup> and to "inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions,"<sup>250</sup> though the quality of their good faith determinations and the content of their good faith arguments seem racially suspect.

author). The grievance complaint, dated January 7, 2022, alleged that "Gough violated standards of ethical conduct and professional integrity with racially insensitive motions and statements causing public backlash due to the statements being racist, inflammatory, offensive, etc. He failed to treat Ahmaud Arbery's family, friends, and supportive clergy with respect and equal justice under the law." Letter from Georgia State Rep. Viola Davis to State Bar of Georgia (Jan. 7, 2022), <https://www.newsjax.com/news/local/2022/03/04/georgia-bar-dismisses-complaints-against-attorneys-involved-in-ahmaud-arbery-death-investigation>, <https://perma.cc/BSHN-73FJ>. The complaint also objected that Gough "failed to treat Ahmaud Arbery's family, friends, and supportive clergy fairly and with dignity." *Id.*

246. See MODEL RULES R. 3.1.

247. "[T]his includes a good faith argument for an extension, modification or reversal of existing law." MODEL RULES R. 3.1.

248. MODEL RULES R. 3.1 cmt. 3 ("The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.").

249. MODEL RULES R. 3.1 cmt. 1.

250. MODEL RULES R. 3.1 cmt. 2.

Similarly, nothing in the language and comment of Model Rule 3.3 governing candor toward the tribunal appears to prohibit Butler's tactics or Gough's and Hogue's strategies.<sup>251</sup> Model Rule 3.3 prohibits each of these lawyers from knowingly making a false statement to a tribunal, failing to correct a false statement previously made to the tribunal by them, or offering evidence that they know to be false.<sup>252</sup> And a comment accompanying Model Rule 3.3 confirms the "special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process."<sup>253</sup> According to the comment, when lawyers act as advocates in adjudicative proceedings, they have "an obligation to present the client's case with persuasive force," a performative obligation "qualified by the advocate's duty of candor to the tribunal."<sup>254</sup> Even in an adversary proceeding, that duty of candor prevents the lawyer from misleading the tribunal "by false statements of law or fact or evidence that the lawyer knows to be false."<sup>255</sup>

Here, neither Butler nor Gough and Hogue appear knowingly to make a false statement of fact or law to a tribunal, fail to correct a false statement of material fact or law previously made to the tribunal by them, or offer evidence that they know to be false in the courts of the District of Columbia or Georgia. And none of them appear to mislead those courts by false statements of law, fact, or evidence that they know to be false. In this respect, they appear to fulfill their special duties as officers of the court to avoid conduct that undermines the integrity of the adjudicative process and, thus, meet their duty of candor to the tribunal.

Further, nothing in the language and comment of Model Rule 3.4 governing fairness to opposing party and counsel appears to prohibit the Butler tactics or the Gough and Hogue strategies.<sup>256</sup> Designed to promote fair competition in the adversary system,<sup>257</sup> Model Rule 3.4 prohibits a lawyer in trial from alluding "to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence."<sup>258</sup> The rule also prohibits a lawyer at trial from asserting "personal knowledge of facts in issue except when testifying as a witness" or stating "a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused."<sup>259</sup>

Here, again under ABA conventions, these lawyers do not appear to allude to any matter that each does not reasonably believe is relevant or that will not be supported by admissible evidence, though their claims of materiality and

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251. See MODEL RULES R. 3.3.

252. MODEL RULES R. 3.3(a)(1)–(3).

253. MODEL RULES R. 3.3 cmt. 2.

254. MODEL RULES R. 3.3 cmt. 2.

255. MODEL RULES R. 3.3 cmt. 12 ("Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process.").

256. See MODEL RULES R. 3.4(e).

257. MODEL RULES R. 3.4 cmt. 1.

258. MODEL RULES R. 3.4(e).

259. MODEL RULES R. 3.4(e).



admissibility seem attenuated. They also do not appear to assert personal knowledge of facts at issue or state a personal opinion as to the justness of a cause, though they seem to inject their racial character and history—both Black and white—into their pragmatic styles of advocacy. And, while pressing the outer bounds of ABA conventions, they do not appear to fully pronounce a personal opinion as to the credibility of a witness or the guilt or innocence of an accused offender, though their thinly veiled opinions seem implicitly and, at times, explicitly racialized.

Moreover, nothing in the language and comment of Model Rule 3.6 governing trial publicity appears to prohibit Butler's prosecution tactics or Gough's and Hogue's defense strategies.<sup>260</sup> Model Rule 3.6 prohibits a lawyer who is participating or has participated in the investigation or litigation of a matter from making "an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."<sup>261</sup> Despite this prohibition, the rule permits a lawyer to "make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client."<sup>262</sup> Triggered by the risk of "material prejudicial effect" in a civil matter triable to a jury or a criminal matter that could result in incarceration,<sup>263</sup> this protective statement encompasses subjects that relate to "the character, credibility, reputation or criminal record of a party" as well as "any opinion as to the guilt or innocence of a defendant."<sup>264</sup>

Once again, under ABA conventions, Butler, Gough, and Hogue do not appear to make an extrajudicial statement that each knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing criminal proceedings in the District of

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260. See MODEL RULES R. 3.6. Declaring that "there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves," Model Rule 3.6 seeks "to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression." MODEL RULES R. 3.6 cmt. 1. In calibrating that balance, the rule finds that the public not only "has a right to know about threats to its safety and measures aimed at assuring its security" but also has "a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern," reasoning that "the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy." MODEL RULES R. 3.6 cmt. 1.

261. MODEL RULES R. 3.6(a) cmt. 3 ("The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding.").

262. MODEL RULES R. 3.6(c) cmt. 7 (commenting that "extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client").

263. MODEL RULES R. 3.6 cmt. 5; see also MODEL RULES R. 3.6 cmt. 6 ("Criminal jury trials will be most sensitive to extrajudicial speech.").

264. MODEL RULES R. 3.6 cmt. 5.

Columbia or in Brunswick, though Gough's extrajudicial statements seem racially inflammatory. Recall Gough's efforts to ban "high-profile members of the African American community" from the courtroom and to "have peaceful demonstrators . . . moved from the front lawn of the Glynn County Courthouse on grounds that they might 'intimidate or influence the jury.'"<sup>265</sup>

Also, nothing in the language and comment of Model Rule 4.1 governing truthfulness in statements to others appears to prohibit Butler's prosecution tactics or Gough's and Hogue's defense strategies.<sup>266</sup> Model Rule 4.1 prohibits a lawyer in the course of representing a client from knowingly making a false statement of material fact or law to a third person.<sup>267</sup> One comment to the rule underlines that "[a] lawyer is required to be truthful when dealing with others on a client's behalf,"<sup>268</sup> and another adds elusively that "[w]hether a particular statement should be regarded as one of fact can depend on the circumstances."<sup>269</sup> Once again, under ABA conventions, it appears that these lawyers made no false statement of material fact or law to a third person in their pretrial and trial advocacy, though their statements seem racially charged.

Finally, nothing in the language and comment of Model Rule 4.4 governing respect for the rights of third persons appears to prohibit Butler's prosecution tactics or Gough's and Hogue's defense strategies.<sup>270</sup> Model Rule 4.4 prohibits a lawyer from using "means that have no substantial purpose other than to embarrass, delay, or burden a third person, or us[ing] methods of obtaining evidence that violate the legal rights of such a person."<sup>271</sup> A comment accompanying the rule clarifies that a lawyer's responsibility "to subordinate the interests of others to those of the client . . . does not imply that a lawyer may disregard the rights of third persons."<sup>272</sup> Once more, under ABA conventions, it appears that Butler, Gough, and Hogue made no use of prosecutorial or defense means to embarrass, delay, or burden a third person or for any substantial purpose other than to win a conviction or an acquittal, though their remarks seem racially tailored to wound accused offenders, their victims, and their allies.

The ideological and rule tolerance of race-coded pragmatism, here illustrated by contrasting prosecutorial and defense strategies, demonstrates that racial identity, racialized narrative, and racially demarcated community may be exploited through the technical, legal, and tactical means of pretrial and trial practice. That tolerance also demonstrates that the bias and prejudice entrenched in signifying cultural, economic, historical, and sociological markers may be used to sway

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265. Fausset, *supra* note 231; Fausset & Mzezewa, *supra* note 232.

266. See MODEL RULES R. 4.1.

267. MODEL RULES R. 4.1(a).

268. MODEL RULES R. 4.1 cmt. 1.

269. MODEL RULES R. 4.1 cmt. 2.

270. MODEL RULES R. 4.4.

271. MODEL RULES R. 4.4(a).

272. MODEL RULES R. 4.4 cmt. 1.

judges, witnesses, jurors, and the media and harm clients, victims, families, and communities.

## B. RACE-CODED RULE PRAGMATISM

Race-coded pragmatic rules regulate the conduct of civil rights lawyers, prosecutors, and criminal defense attorneys toward Black litigants, victims, jurors, witnesses, and other lawyers in race trials through the professional norms of ethical discretion, independent judgment, and contextual reasoning. Model Rules 1.2 and 2.1 stand out in their regulatory force. These rules govern the scope of client representation, the allocation of client-lawyer authority, and the role of the lawyer as an advisor. Woven together, they reproduce the tension between freedom and constraint in the use of race in negotiating the scope of representation, allocating decision-making authority, and offering advice and counsel.

### 1. SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY

Model Rule 1.2 addresses the scope of client representation and the allocation of authority within the client-lawyer relationship in litigation and transactional matters. Model Rule 1.2 is divided into four parts, three of which are germane here. Subdivision (a) of the rule mandates that “a lawyer shall abide by a client’s decisions concerning the objectives of representation” and, consistent with Model Rule 1.4, “shall consult with the client as to the means by which they are to be pursued.”<sup>273</sup> It also grants a lawyer discretion to “take such action on behalf of the client as is impliedly authorized to carry out the representation.”<sup>274</sup> That freedom is restrained by the lawyer’s duty to “abide by a client’s decision whether to settle a matter,”<sup>275</sup> a duty heightened in criminal cases where the lawyer is additionally obligated to “abide by the client’s decision, after consultation . . . as to a plea to be entered, whether to waive jury trial and whether the client will testify.”<sup>276</sup> Subdivision (b) cautions that the formation of the client-lawyer relationship and the fact of representation itself, by appointment or otherwise, “does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”<sup>277</sup> Subdivision (c) enlarges the range of rule-authorized discretion by permitting the lawyer to “limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”<sup>278</sup>

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273. MODEL RULES R. 1.2(a).

274. MODEL RULES R. 1.2(a).

275. MODEL RULES R. 1.2(a).

276. MODEL RULES R. 1.2(a).

277. MODEL RULES R. 1.2(b) cmt. 5 (noting that “representing a client does not constitute approval of the client’s views or activities”).

278. MODEL RULES R. 1.2(c) cmt. 7 (mentioning that, “[a]lthough this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances”).

The language of Model Rule 1.2 excludes race as an element of the scope of representation and allocation of decision-making authority, overlooks the intraracial and interracial negotiation of scope and decision-making as a skill, and omits minimum standards of intraracial and interracial negotiation of scope and decision-making in evaluating effective representation. The comments accompanying Model Rule 1.2 recapitulate the same exclusions and omissions. Comment 1, for example, confirms the “ultimate authority” of the client “to determine the purposes to be served by legal representation,” but only “within the limits imposed by law and the lawyer’s professional obligations.”<sup>279</sup> Practically, the checking function of positive law and professional obligation constrains client authority within lawyer-prescribed limits. From that stance, the lawyer, rather than the client, determines whether the purposes of the representation exceed those limits. This diminution or downgrading of client “authority” over the chief purposes of representation recurs in the allocation of means-oriented, decision-making authority.

Configured hierarchically, the allocation of decision-making authority “[w]ith respect to the *means* by which the client’s objectives are to be pursued”<sup>280</sup> tips deferentially toward the lawyer. Deference gives way to a duty of means-oriented consultation that devalues ultimate, strategic, and normative client decision-making authority. That thin duty fails to consider or assess the intraracial and interracial nature of client-lawyer negotiation over the allocation of means/ends decision-making. It is the allocation of means/ends decision-making that determines the overall scope of representation in race trials.

Consistent with the professional norms of ethical discretion, independent judgment, and contextual reasoning, the consultation-only duty governing means-oriented decision-making under Model Rule 1.2 combines the properties of both paternalism and pragmatism. Comment 2 to the rule, for example, erects a paternalistic framework for pragmatic race-coding based on means/ends rationality.<sup>281</sup> Again, on this applied, hierarchical reasoning, the client determines the restricted purposes or objectives of representation while the lawyer chooses the means of achieving those objectives. In race trials, the means of representation typically includes alternately race-neutral, race-coded, and race-conscious forms of pre-trial, trial, and appellate advocacy. Those colorblind, color-coded, and color-conscious forms of advocacy reflect and construct the meaning of identity. They reflect and construct the meaning of narrative. And they reflect and construct the meaning of community. When that meaning disparages or humiliates Black actors in the legal process, it causes the dignitary and citizenship harm of racial stigma injury for individuals and groups.

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279. MODEL RULES R. 1.2 cmt. 1.

280. MODEL RULES R. 1.2 cmt. 1 (emphasis added).

281. See MODEL RULES R. 1.2 cmt. 2.

The starting point of means/ends hierarchical reasoning under Model Rule 1.2 is the admission that, “[o]n occasion . . . a lawyer and a client may disagree about the means to be used to accomplish the client’s objectives.”<sup>282</sup> Rather than treat the means of representation as a threshold gateway for means-oriented client-lawyer communication or counseling dialogue in race trials and elsewhere, Comment 2 conclusively presumes that “[c]lients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters.”<sup>283</sup> This presumed obeisance normalizes lawyer control over the means of advocacy and reinforces lawyer power over the lawyering process. Although vesting control and decision-making power over technical, legal, and tactical matters in the hands of the lawyer, neither the rule nor the comment specifically prescribes how the lawyer should resolve means-specific “disagreements.”<sup>284</sup> To be sure, the comment urges the means-conflicted lawyer to “consult with the client and seek a mutually acceptable resolution of the disagreement” and, where called for, consult with other law (common law, statutes, or regulations) apart from the *Model Rules*. Predictably, the comment also recites the lawyer withdrawal<sup>285</sup> and client discharge<sup>286</sup> options available under Model Rule 1.16<sup>287</sup> in circumstances of “fundamental disagreement” between the lawyer and client,<sup>288</sup> a recitation that is either indifferent or oblivious to the access to justice crisis endemic to the civil and criminal representation of indigent Black litigants in U.S. courts.<sup>289</sup>

Employing other law or opting for withdrawal to resolve legal or tactical disagreements, however, will not counter or displace the means/ends hierarchical reasoning embedded in Model Rule 1.2. Surprisingly, the normative counterweight to such means/ends logic comes from the competing interests of third persons—for example, litigant families and affinity groups, victims, witnesses, jurors, and even local communities or neighborhoods. Comment 2 acknowledges

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282. MODEL RULES R. 1.2 cmt. 2. The instant discussion rests on the assumption that the client did not authorize the lawyer to take specific action on the client’s behalf without further consultation at the outset of a representation. *See* MODEL RULES R. 1.2 cmt. 3.

283. MODEL RULES R. 1.2 cmt. 2.

284. MODEL RULES R. 1.2 cmt. 2 (“Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved.”).

285. MODEL RULES R. 1.2 cmt. 2 (“If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation.”) (citing MODEL RULES R. 1.16(b)(4)).

286. MODEL RULES R. 1.2 cmt. 2 (“Conversely, the client may resolve the disagreement by discharging the lawyer.”) (citing MODEL RULES R. 1.16(a)(3)).

287. *See* MODEL RULES R. 1.16.

288. MODEL RULES R. 1.2 cmt. 2.

289. *See* Rebecca L. Sandefur & James Teufel, *Assessing America’s Access to Civil Justice Crisis*, 11 U.C. IRVINE L. REV. 753, 780 (2021); Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785 (2001). *See generally* Pamela K. Bookman & Colleen F. Shanahan, *A Tale of Two Civil Procedures*, 122 COLUM. L. REV. 1183 (2022).

and, in doing so, validates those interests, observing that “lawyers usually defer to the client regarding such questions as the . . . concern for third persons who might be adversely affected”<sup>290</sup> by the choice of means in advocacy. Model Rule 1.7(a)(2) also recognizes the interests of third persons and the lawyer’s corresponding responsibilities in analyzing concurrent conflicts of interest.<sup>291</sup> The comment accompanying Model Rule 1.7 indicates that “a lawyer’s duties of loyalty and independence may be materially limited . . . by the lawyer’s responsibilities to other persons,”<sup>292</sup> such as those litigant families, affinity groups, victims, and community members most often affected in race trials.

The dual recognition of a client’s concern for, and a lawyer’s responsibilities to, third persons when their interests may be adversely affected by lawyer-dictated, means-oriented technical, legal, and tactical decisions suggests that certain means or methods of representation may be susceptible to normative objection and override. Among such means or methods of representation may be race-neutral and race-coded forms of advocacy that construct identity, narrative, and community in ways that disparage, humiliate, or otherwise harm Black litigants, victims, jurors, witnesses, and lawyers, which are exactly the means and methods apt for normative objection and override. The descriptive, albeit empirically controversial, statement that the lawyer usually defers to the client regarding concern for third persons who might be adversely affected strengthens the suggestion that some methods of race-neutral or race-coded forms of advocacy may be not only susceptible to normative objection, but perhaps regularly subject to override. While plausible, this inference likely proves too much.

Indisputably, the *Model Rules* contemplate both normative objection to, and rejection of, certain means and methods of advocacy. Comment 6, for example, mentions that “the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client’s objectives.”<sup>293</sup> The limitations enacted by those terms “may exclude actions . . . that the lawyer regards as repugnant or imprudent.”<sup>294</sup> As expected, this proviso is asymmetrical. It creates a nonmutual, lawyer-arrogated exclusion prerogative that signals and fortifies the hierarchical structure of client-lawyer decision-making. Under its tilted scaffolding, the lawyer and client each may object to a specific means of representation, but only the lawyer may exclude that precise means of representation. If the client objects to a lawyer-chosen or lawyer-excluded means of representation and instructs the lawyer to either forgo or adopt its use, the lawyer nonetheless may rebuff the client’s instructions. To ratify this

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290. MODEL RULES R. 1.2 cmt. 2 (emphasis added).

291. See MODEL RULES R. 1.7(a)(2) cmt. 1 (“Concurrent conflicts of interest can arise from the lawyer’s responsibilities to another client, a former client or a third person or from the lawyer’s own interests.”).

292. MODEL RULES R. 1.7(a)(2) cmt. 9 (describing lawyer’s responsibilities to former clients and other third persons).

293. MODEL RULES R. 1.2 cmt. 6.

294. MODEL RULES R. 1.2 cmt. 6.

refusal, the lawyer need only consult with the client. Strictly speaking, the lawyer need not explain the refusal or obtain consent for it. As Comment 13 notes: “if the lawyer intends to act contrary to the client’s instructions, the lawyer must consult with the client regarding the limitations on the lawyer’s conduct.”<sup>295</sup>

Nothing in the text of Model Rule 1.2 or its accompanying comment sets forth decision-making procedures when a lawyer intends to act contrary to a client’s instructions. And nothing in the rule or comment sets out internal control and governance measures or risk assessment and management systems when a law firm intends to act contrary to a client’s instructions.<sup>296</sup> More troubling, nothing in the rule, comment, or in the *Model Rules* altogether<sup>297</sup> defines the nature of the consultation required when a lawyer or a law firm intends to act contrary to a client’s means-oriented instructions arising out of the client’s own normative concern for third persons who might be adversely affected by the lawyer’s choice of race-neutral, race-coded, or race-conscious styles of representation. In particular, nothing in the rule or comment denotes the extent (form, content, or timing) of the consultation required in such circumstances. Nothing even points to anecdotal or empirical evidence that a lawyer or a law firm usually defers to a client’s objections or instructions expressing normative concern for third persons who might be adversely affected by the lawyer’s choice of race-neutral, race-coded, or race-conscious means of representation.

## 2. ADVISOR

Model Rule 2.1 governs the lawyer’s role as an advisor.<sup>298</sup> Like Model Rule 1.2, Model Rule 2.1 regulates the color-coded conduct of civil rights lawyers, prosecutors, and criminal defense attorneys toward Black litigants, victims, jurors, witnesses, and other lawyers in race trials through the professional norms of ethical discretion, independent judgment, and contextual reasoning. Delimiting freedom and constraint in client representation, Model Rule 2.1 mandates that a lawyer “shall exercise independent professional judgment<sup>299</sup> and render candid advice.”<sup>300</sup> In addition, the rule expressly permits a lawyer in “rendering advice” to “refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”<sup>301</sup>

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295. MODEL RULES R. 1.2 cmt. 13 (citing MODEL RULES R. 1.4(a)(5)).

296. See MODEL RULES R. 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers).

297. See MODEL RULES R. 1.0 (Terminology).

298. See MODEL RULES R. 2.1.

299. The notion of independent professional judgment emerges elsewhere in the *Model Rules*, for example, in the regulation of third-party payment for legal services and nonlawyer fee-sharing and professional association. See MODEL RULES R. 5.4(c), (d), cmt. 1, 2 (professional independence of a lawyer).

300. MODEL RULES R. 2.1.

301. MODEL RULES R. 2.1.

Neither the mandatory nor the permissive language of Model Rule 2.1 links race, identity, narrative, or community to the lawyer exercise of independent professional judgment or the rendering of candid advice. The exclusion of race as an element of a lawyer's independent professional judgment and candid advice; the erasure of racial judgment, candor, and advice as discernible skills; and the omission of minimum standards of racial judgment, candor, and advice from professional measures of effective representation persist in the comments accompanying Model Rule 2.1. Still, the broad terms of the rule and the comments coalesce to give the lawyer concrete latitude to consider and refer to race as a relevant moral, economic, social, and political factor specific to the client's situation as an individual, a class or group member, an entity constituent, or a neighborhood representative. That latitude affords the narrative freedom at the crux of race-coded rule pragmatism.

Comment 1 to Model Rule 2.1 governs the scope of lawyer advice.<sup>302</sup> Merging advice and the agency-based fiduciary duty of honest or fair dealing,<sup>303</sup> Comment 1 declares that “[a] client is entitled to *straightforward advice* expressing the lawyer's *honest assessment*.”<sup>304</sup> Again, in race trials, identity, narrative, and community exemplify situational factors amenable to the lawyer's honest assessment and straightforward advice. Even when, as the comment observes, “[l]egal advice . . . involves *unpleasant facts and alternatives that a client may be disinclined to confront*,”<sup>305</sup> those situational factors remain essential to lawyers' honest assessment and advice, particularly in instances of bias-motivated hate crime and violence. Although the comment permits the lawyer to strive to “sustain the client's morale” in presenting advice and to “put advice in as acceptable a form as honesty permits,”<sup>306</sup> it underlines that “a lawyer *should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client*.”<sup>307</sup> However unpalatable to the client and the lawyer, the situational factors of race trials once again present opportunities for candid intraracial and interracial advice and counseling, even under the rubric of race-coded rule pragmatism. Those situational factors span evidence of bias, prejudice, and violence; the identity, narrative, and community stigma of subordinating discourse; and the individual and collective experience of dignitary and citizenship harm.

Comment 2 to the rule addresses the content of that advice.<sup>308</sup> Conspicuously, the comment acknowledges that “[a]dvice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as . . .

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302. MODEL RULES R. 2.1 cmt. 1.

303. See RESTATEMENT (THIRD) OF AGENCY § 8.11 (AM. L. INST. 2006) (positing agency duty to provide information).

304. MODEL RULES R. 2.1 cmt. 1 (emphasis added).

305. MODEL RULES R. 2.1 cmt. 1 (emphasis added).

306. MODEL RULES R. 2.1 cmt. 1.

307. MODEL RULES R. 2.1 cmt. 1 (emphasis added).

308. See MODEL RULES R. 2.1 cmt. 2.



*effects on other people, are predominant.*<sup>309</sup> In race trials, the situational factors of racial identity, racialized narrative, and racially demarcated community increase the likelihood of predominant, practical effects on other people, including stigmatizing effects that may disparage or humiliate, deny equal opportunity to, impair the liberty of, and curtail the civic participation of Black litigant families and communities, victims, jurors, witnesses, and other lawyers. Comment 2 concedes that such practical effects (in this instance, individual or group dignitary and citizenship harm) may render “[p]urely technical legal advice . . . inadequate.”<sup>310</sup> This concession frees “a lawyer to refer to relevant moral and ethical considerations in giving advice.”<sup>311</sup> Lawyer reference to considerations of this kind displays the freedom of race-coded rule pragmatism. As the comment observes, those considerations “may decisively influence how the law will be applied”<sup>312</sup> by lawyers and by courts as well.

Comments 3 and 4 to Model Rule 2.1 augment the identity-making and narrative-inscribing freedom that a lawyer garners from race-coded rule pragmatism.<sup>313</sup> That freedom, manifested in decision-making and discursive independence, permits the lawyer to shift from race-neutral to race-coded forms of pretrial, trial, and appellate advocacy even when “[a] client may expressly or impliedly ask the lawyer for purely technical advice.”<sup>314</sup> Comment 3 accentuates that, “[w]hen such a request is made by a client inexperienced in legal matters . . . the lawyer’s responsibility as advisor may include indicating that more may be involved than strictly legal considerations.”<sup>315</sup>

Pronounced in its paternalism, this responsibility gives the lawyer pragmatic room to maneuver around legal considerations (offender guilt or innocence and party burdens of pleading or proof) in order to marshal relevant moral, economic, social, and political factors favoring race-coded advocacy on behalf of the client, a maneuver unfettered by the requirement of client consent. A freewheeling exercise of ethical discretion, independent judgment, and contextual reasoning, that maneuver is fueled by the engine of race-coded pragmatism. Comment 4 adds that such non-legal considerations may include extralegal professional consultation with specialists from other fields.<sup>316</sup> Where the jurisdictional situation of the Black litigant earlier referenced in Comment 6 of Model Rule 1.1 evinces clustered, race-tainted legal protections, professional conduct rules, and ethical environments, lawyer extralegal professional consultation (e.g., jury selection, trial

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309. MODEL RULES R. 2.1 cmt. 2. (emphasis added).

310. MODEL RULES R. 2.1 cmt. 2.

311. MODEL RULES R. 2.1 cmt. 2.

312. MODEL RULES R. 2.1 cmt. 2.

313. See MODEL RULES R. 2.1 cmt. 3–4.

314. MODEL RULES R. 2.1 cmt. 3–4.

315. MODEL RULES R. 2.1 cmt. 3–4.

316. See MODEL RULES R. 2.1 cmt. 4 (“Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation.”).

practice, and mediation experts) actually may work to buttress false necessity claims in favor of the shift from race-neutral to race-coded advocacy. Jury selection and trial practice consultants, for example, may confirm the “unpleasant facts” of juror bias and party or witness prejudice, facts that bolster the “unpalatable” pivot to race-coded advocacy.<sup>317</sup>

The shift from purportedly colorblind to blatantly color-coded forms of advocacy tolerated by race-coded rule pragmatism transforms the meaning of identity, narrative, and community in race trials from non-signifying to signifying cultural, economic, historical, and sociological markers. Comment 5 to Model Rule 2.1 explicates the advisory and counseling components of the lawyer shift from race-neutral to race-coded advocacy. Addressing lawyer conduct in the rudiments of offering advice,<sup>318</sup> Comment 5 enunciates the general principle that “a lawyer is not expected to give advice *until asked* by the client.”<sup>319</sup> This principle of reactive advice, however, is qualified. The comment notes, for example, that

[W]hen a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer’s duty to the client under Model Rule 1.4 *may require that the lawyer offer advice* if the client’s course of action is related to the representation.<sup>320</sup>

Applied to race trials, this qualifying proviso suggests that, when the lawyer knows that a client-proposed race-neutral, race-coded, or race-conscious course of action is likely to result in substantial adverse legal consequences contrary to the best interests of the client, the lawyer may proactively offer advice, including advice to adopt signifying, race-coded tactics.<sup>321</sup> Indeed, according to the comment, the “lawyer *may initiate advice* to a client when doing so appears to be in the client’s interest,” notwithstanding the customary precept that the “lawyer ordinarily has no duty to initiate investigation of a client’s affairs or to give advice that the client has indicated is unwanted.”<sup>322</sup> Under race-coded ethics regimes, that lawyer-initiated, affirmative advice entails the recommended adoption of color-coded pretrial, trial, and appellate advocacy tactics.

## CONCLUSION

The high-profile civil and criminal trials following the George Floyd and Ahmaud Arbery murders, the Kyle Rittenhouse killings, and the Charlottesville “Unite the Right” Rally violence sparked renewed debate over race, representation,

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317. MODEL RULES R. 2.1 cmt. 1.

318. See MODEL RULES R. 2.1 cmt. 5.

319. MODEL RULES R. 2.1 cmt. 5 (emphasis added).

320. MODEL RULES R. 2.1 cmt. 5 (emphasis added).

321. See MODEL RULES R. 2.1 cmt. 5 (adding that, “when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation”).

322. MODEL RULES R. 2.1 cmt. 5.

and ethics in the U.S. civil and criminal justice systems. To civil rights lawyers, prosecutors, and criminal defense attorneys, neither post-war civil rights movements and criminal justice reform campaigns nor Critical Race Theory and social movement scholarship have resolved that debate. Today, in fact, controversy continues to envelop the uses and the stigma harms of race in pretrial, trial, and appellate advocacy, in the lawyering process, and in professional regulation.

The main point of remapping the intersection of race, representation, and ethics in the lawyering process and professional regulation here is to reevaluate the continuing uses and the persisting harms of race in contemporary civil rights and criminal justice advocacy. Although a continuing work in progress, that reevaluation exposes how civil rights lawyers, prosecutors, and defense attorneys use race to advantage and disadvantage Black litigants, victims, jurors, witnesses, and others, and, equally, how they use ethics rules and standards designed to regulate racial bias and prejudice to justify their conduct. It also reveals how race-neutral and race-coded styles of advocacy shape both descriptive and prescriptive interpretive methods or ways of knowing, seeing, hearing, speaking, and reasoning in race trials.

By parsing the strands of race-neutral formalism, especially its exclusion of racial identity, narrative, and community from the lawyering process, the hope is that we will better understand the consequences of shifting race markers from a signifying to a non-signifying or muted position in civil and criminal justice advocacy. Likewise, by sorting out the elements of race-coded pragmatism, particularly its disfiguring account of racial identity, narrative, and demarcated community within the lawyering process, the hope is that we will be better able to constrain the exploitation of the signifying properties of race in advocacy. The starting point for each endeavor is a careful investigation of the regulation of race under the ethics regimes of race-neutral rule formalism and race-coded rule pragmatism installed in the *Model Rules*, ABA formal and informal opinions, and state and local codes, including their colorblind and color-coded conceptions of effective and legitimate representation. Until there is a more thoroughgoing investigation of the underlying caste, class, and color of dominant ethics regimes, there will be little chance of a shift toward race-conscious regime change in lawyer regulation.