

RACE, IDENTITY, AND PROFESSIONAL RESPONSIBILITY: WHY LEGAL SERVICES ORGANIZATIONS NEED AFRICAN AMERICAN STAFF ATTORNEYS

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Given the fundamental importance of the attorney-client relationship in securing favorable outcomes for clients, legal services organizations that serve large populations of African Americans should employ African American staff attorneys because: (1) African American lawyers and clients share a group identity that makes it more likely that a black attorney will be able to gain a black client's trust; (2) black attorneys communicate more effectively with black clients; and (3) the perception of a judicial system that is unfair and racist is likely to encourage black clients to trust black lawyers more than white lawyers, who are more likely to be perceived as part of "the system."

Empirical evidence from the legal and medical fields show that African American clients are more likely to trust and communicate effectively with African American service providers. This Article also explores, however, the reasons why some African Americans may not want a black attorney. One reason is that black clients may feel "better off" with a white lawyer precisely because racism infects the American judicial system. Another reason may be that some African Americans may believe that white lawyers are better lawyers. Finally, in some circumstances, a black client may not want a black lawyer if he perceives the lawyer as "not black enough." Notwithstanding some of these preferences, however, the empirical evidence strongly suggests that more often than not, black clients prefer black lawyers.

*Because race consideration in staffing implicates discrimination law, this Article also considers recent Supreme Court precedent that affects the ability of certain organizations to engage in color-conscious actions. According to a plurality of the Court in *Parents Involved in**

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Community Schools v. Seattle School District No. 1., the school assignment programs at issue conflicted with the premise of Brown, which requires strict adherence to colorblindness. Unfortunately, this approach ignores the continuing power of race and is a stark departure from Justice Blackmun's defense of affirmative action in Bakke. While a definitive conclusion as to when the law allows color-consciousness is difficult in light of the Court's recent decisions, the theme of this Article echoes Justice Blackmun. In essence, this Article argues that we cannot solve the problems that face African Americans by removing race-consciousness from the dialogue about diversity in the legal profession.

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It was the first time that I was meeting this client, a bright kid in foster care who was living with his grandparents. The lawyer who was transitioning off the case—one of my colleagues who also worked for the non-profit legal services organization that I worked for—told me that this would be a good case for me, in part, because I am black and because she wanted this client to have a black role model to emulate. (My colleague was white.) The client, Oswald, and his grandparents, Jimmy and Lisa, were black. When we arrived at their house for our first home

visit, we sat in the living room. My colleague sat in a chair, my new client and his grandfather sat in a loveseat, and I sat next to my client's grandmother. While we were discussing some of the frustrations of navigating the school system, my client's grandmother revved up, slapped me on the leg, and exclaimed, "You know what I'm saying!" I looked at her slightly surprised, but I then quickly smiled. Apparently, she felt comfortable with me. Why? Well, maybe, just maybe, because I am black.

INTRODUCTION: RACE AND THE
ATTORNEY-CLIENT RELATIONSHIP

The attorney-client relationship is a crucial component of effective service delivery. One of the primary purposes of the attorney-client privilege is to promote "full and frank communication" between an attorney and client by protecting attorney-client conversations from disclosure.¹ Given the fundamental importance of the attorney-client relationship in securing favorable outcomes for clients, legal services organizations should facilitate full and frank communication between attorneys and their clients. What this means in practice, at least in part, is that legal services organizations that serve large populations of African American clients should employ staff attorneys who are most likely to engender trust and facilitate communication with their clients. Consequently, these organizations should employ African American² staff

¹ See *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)); see also Corey D. Babington, Note, *Preserving the Attorney-Client Relationship After United States v. Anderson*, 49 U. KAN. L. REV. 221, 238 (2000) (citing *Upjohn Co.*, 449 U.S. at 389).

² When I refer to blacks, African Americans, or black Americans, I am referring both to a physical and sociocultural concept of race. Practically speaking, I am referring to those whom others would identify as a black American, and those who would self-identify as black American. The origin of the term *race* has been traced to nineteenth century colonialism and anthropology. See Neil J. Smelser et al., *Introduction*, in 1 *AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES 2* [hereinafter *AMERICA BECOMING*] (Neil J. Smelser et al. eds., 2001). During the 19th century, the world's populations were classified often by "skin color—white, black, yellow, brown, and red." *Id.* Prior to the 20th century, "[t]he widely accepted definitional basis was biological—skin color, distinctive facial characteristics, height, build, hair texture, and other physical features, as well as temperamental and psychological traits." *Id.* Race, conceived of in this narrow way, allowed some races to be classified as biologically superior to others, ultimately being used to "justify racial discrimination, colonial domination, slavery, genocide, and holocaust." *Id.* In the 20th century, due to the work of behavioral and social scientists, this narrow conception of race was logically discredited with "evidence on millennia of human migration, contact, and genetic diversification through cross-reproduction." *Id.* at 2–3. Consequently, the sociocultural aspects of the concept of race have developed while "continuing to acknowledge the genetic, demographic, and geographic dimensions of human diversity." *Id.* at 3. Social scientists now agree "that both race and ethnicity derive from *sociocultural* categories that are produced, sustained, and reproduced." *Id.* Thus, for this discussion, I will use the following conception of race: "'race' is a social category based on the identification of (1) a physical marker transmitted through reproduction and (2) individual, group, and cultural attributes associated with that marker." *Id.* Another

attorneys.³

Legal services organizations that serve large populations of African American clients should employ African American attorneys for three primary reasons: (1) African American lawyers and clients share a group identity that makes it more likely that a black attorney will be able to gain a black client's trust; (2) black attorneys communicate more effectively with black clients; and (3) the perception of a judicial system that is unfair and racist is likely to encourage black clients to trust black lawyers more than white lawyers, who are more likely to be perceived as part of "the system."⁴

way to think about race is as a form of ethnicity, but an ethnicity that incorporates distinguishing physical characteristics. *See id.*

There are some cautionary notes regarding the definition of race that I am using in the following discussion of race. First, taken to its extreme, one could conceivably argue that given my working definition, race is a figment of our imagination. But race is "real" because it is real to individuals and is a well-established part of our institutional life. *See id.* Second, the terms *race* and *ethnicity* are complex social phenomena that are very difficult to describe, define, or measure. *See id.* at 4. The inherent complexity of these terms makes it difficult to answer questions such as: What physical markers should we be considering? Does, or for that matter, should others' attribution matter? How about self-selection? Should we consider ancestry? Thus, I emphasize that the working definition of race that I am using for the purposes of this discussion is an "analytic strategy rather than a reflection of some fixed social reality." *Id.* Also, while on a fundamental level I acknowledge and appreciate the fact that blacks may consider race a significant part of their identity, I also acknowledge and appreciate that it is not clear what the content of this identity will be. *See* David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1509, 1534 (1998) [hereinafter Wilkins, *Identities and Roles*]. "As theorists from Kimberle Crenshaw to William Julius Wilson trenchantly argue, those of us who are 'black' also have a gender, a social class, and a sexual orientation." *Id.* at 1533. Thus, I freely recognize that, even if one considers race a primary aspect of his character or persona, those standing at the nexus of several categories may ascribe a different meaning to any one category, such as race. *See id.* at 1533-34. Of course, my argument assumes that race is indeed significant. I agree with David Wilkins when he argues, "The existence of gender, class, political, and geographic differences among black Americans has yet to sever the ties that create a common, albeit richly diverse, African American culture in the United States." *Id.* at 1562.

A reasonable question is whether this definition includes black immigrants from, for example, Jamaica, Ethiopia, or Trinidad. It could, if they would be identified by others as a black American and would self-identify as such. *But see* Michael A. Omi, *The Changing Meaning of Race*, in 1 AMERICA BECOMING, *supra*, at 246 (discussing recent immigrants who do not identify as black Americans).

³ My argument here is not that legal services organizations that serve large populations of African American clients should employ exclusively African American staff attorneys, but only that it is important for these organizations to employ some African American staff attorneys to address the needs of their African American clients. Similarly, while not discussed at length in this Article, *Grutter's* diversity rationale discussed *infra* (which can be read to call for the exposure of lawyers and clients to those who are different from themselves, which, in this context, might increase the capacity of legal services organizations to work effectively with diverse populations) is an important consideration. *See infra* text accompanying notes 259-69.

⁴ In this Article I do not discuss at length the question of whether the same is true in other contexts, such as women preferring women attorneys, black women preferring black women attorneys, Jewish people preferring Jewish attorneys, etc. My partial answer to this

While there has been some scholarship in this area, it has focused on people of color generally,⁵ or on the concerns that a black client may have when represented by a white lawyer, and how these concerns might be addressed in the context of that white lawyer-black client relationship.⁶

My argument may be distinguished from existing scholarship in two ways. First, I focus exclusively on African Americans. Second, I argue that legal services organizations will be most effective in serving African American clients if they have African Americans on staff. In other

question is yes, the same is true for other social groups, *provided* that the social group at issue is what Professor Owen Fiss has described as a “specially disadvantaged group,” defined not only by social group status, but also by perpetual subordination and a position in which their political power is circumscribed. See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 154–55 (1976). While an exhaustive discussion of this question is beyond the scope of this Article (consequently, I do not address the question of what limiting principles might apply to this definition) this Article is part of a larger project that examines the use of race, identity, and the law to promote social change. See *id.* One scholar has written a thoughtful article on the concept of representation that touches on these issues. See generally Martha L. Minow, *From Class Actions to Miss Saigon: The Concept of Representation in the Law*, 39 CLEV. ST. L. REV. 269 (1991). Other scholars have touched on the concept of ethnic match, both in and outside of the legal profession. One scholar notes, “As a group, attorneys of color [a]re much more likely to perceive . . . the advantages . . . in dealing with their clients, including better communication” Roland Acevedo et al., *Race and Representation: A Study of Legal Aid Attorneys and Their Perceptions of the Significance of Race*, 18 BUFF. PUB. INT. L.J. 1, 65 (2000); see also Frederick M. Chen et al., *Patients’ Beliefs About Racism, Preferences for Physician Race, and Satisfaction with Care*, 3 ANNALS FAM. MED. 138, 138 (2005) (“Latinos with stronger beliefs about discrimination in health care were more likely to prefer a Latino physician”); Glenn Gamst et al., *Ethnic Match and Treatment Outcomes for Child and Adolescent Mental Health Center Clients*, 82 J. COUNSELING & DEV. 457 (2004) (investigating the effects of client ethnicity and client-counselor ethnic match on treatment outcomes of 1,946 children and adolescent community health center clients and finding that clinical outcomes were maximized when Latino and African American mood disorder clients were ethnically matched). Some scholars have also discussed how gender and class interact with race. See generally PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* (1991); see also Evelyn Brooks Higginbotham, *African-American Women’s History and the Metalanguage of Race*, 17 SIGNS 251, 251 (1992).

⁵ See generally Acevedo et al., *supra* note 4. While the authors in this study recognize that the only way to improve the representation of poor clients of color is to increase the number of attorneys of color (because lawyers of color may be better able to interpret the “narrative” of clients of color), the authors do not discuss the sociocultural characteristics of African Americans that are critical to understanding why legal services organizations should hire African American staff attorneys to represent African American clients. *Id.*

⁶ See Kenneth P. Troccoli, “*I Want a Black Lawyer to Represent Me*”: *Addressing a Black Defendant’s Concerns with Being Assigned a White Court-Appointed Lawyer*, 20 LAW & INEQ. 1, 17–26 (2002). Troccoli concludes that in order to truly effectuate a defendant’s right to counsel, “the appointed lawyer and the other actors in the criminal justice system should become more race-conscious and not only communicate better about race, but also acknowledge and address the concerns, whether real or perceived, that underlie an African-American defendant’s objections to being appointed a lawyer who happens to be Caucasian.” *Id.* at 51. Thus, Troccoli implies that optimal communication in the context of an attorney-client relationship can be achieved through some measure of cultural competence. *Id.*

words, cultural competence training in legal services organizations is not enough. In a fundamental way, this Article is about what legal services organizations must do to remain committed to the social justice principles to which they ascribe.

A premise of this Article is that the experience of African Americans cannot be generalized to the experiences of another group; to say that it can ignores the reality of African Americans. Race, especially for African Americans, has a gravity that cannot be understood if taken out of its socio-political-legal and historical context. The experience of African Americans cannot be fully communicated in books, documentaries, law school, or by cultural competence trainers—it is something that must be lived. Therefore, legal services organizations cannot improve their service delivery to clients by simply hiring cultural competence trainers.

My argument proceeds in six parts. Part I discusses African American group identity and the relevance of that identity to the ability of African American lawyers to gain their clients' trust. Part II presents empirical evidence showing that African American service providers communicate better with African American clients than do non-African American service providers. Part III discusses the perception of a two-tiered judicial system in this country and how this perception among African Americans is likely to encourage black clients to trust black lawyers more than white lawyers. In this section, I also discuss why this perception makes it particularly important for legal services organizations to employ African American attorneys if they are to be seen as credible and legitimate by African Americans. Part IV discusses reasons why, in certain circumstances, African American clients may prefer not to have an African American attorney. Part V addresses David Wilkins' work in this area and refutes the argument that the use of one's racial identity when practicing law undermines the principles that underlie the dominant model of American legal ethics. Finally, Part VI discusses when and where the law allows color-consciousness given the recent Supreme Court decision in *Parents Involved in Community Schools v. Seattle School District No. 1*.⁷ The final section concludes.

⁷ 127 S.Ct. 2738 (2007). This case is the consolidation of two cases brought by parents challenging the integration programs in school districts in Jefferson County, Kentucky, and Seattle, Washington.

I. TRUST AND THE ATTORNEY-CLIENT RELATIONSHIP

A. *Black American Group Identity*

The existence of a black group identity has been implicitly recognized by legal scholars,⁸ historians,⁹ authors,¹⁰ and theorists¹¹—most notably by Frantz Fanon in his seminal work *Black Skin White Masks*.¹² Fanon was formally trained in medicine and psychiatry,¹³ but also wrote political essays and plays. In 1952, Fanon presented the world with *Black Skin White Masks* as his first analysis and manifesto of the effects of racism on the black psyche.¹⁴ Throughout this work, Fanon speaks of psychological constructions that bind the black man, i.e., a black consciousness and the psychological health of the black man.¹⁵ In *Black Skin White Masks*, Fanon recognizes that the socio-political-legal and historical environment in which blacks live has created a black group identity.¹⁶

⁸ See, e.g., FISS, *supra* note 4, at 148. In his seminal article, “Groups and the Equal Protection Clause,” Professor FISS recognizes the importance of the concept of black group identity, and argues for an interpretation of the Equal Protection Clause that is based on a fuller (and more accurate) picture of social reality.

⁹ See, e.g., W. D. WRIGHT, *BLACK HISTORY AND BLACK IDENTITY: A CALL FOR A NEW HISTORIOGRAPHY* 1–7 (2002). Wright notes that the historical evidence regarding African identity and the group identity of blacks in America is often downplayed or ignored, which has hampered the ability of historians to study the black experience in America in an accurate way.

¹⁰ See generally RICHARD WRIGHT, *BLACK BOY: A RECORD OF CHILDHOOD & YOUTH* (Harper & Row 1945) (1937) (telling the story of a black youth coming of age in the Jim Crow south); RALPH ELLISON, *INVISIBLE MAN* (Signet 1952) (1947) (chronicling the travels of a young black man as he searches for his place in an America that is culturally intolerant).

¹¹ See, e.g., FRANTZ FANON, *BLACK SKIN WHITE MASKS* 113 (Charles Lam Markmann trans., 1967) (1952).

¹² See *id.* at 16. Fanon was actually not African American, but was Franco-Caribbean as he was born in the Antilles. See DAVID MACEY, *FRANTZ FANON: A BIOGRAPHY* 5 (2000). Fanon’s work was based on many of his observations of north and sub-Saharan Africans. See FANON, *supra* note 11, at 14. Thus, there is a pan-Africanist/universalist flavor to his work. Fanon’s work, however, has been widely recognized as applicable to the black American experience. See, e.g., Steven R. Morrison, *Will to Power, Will to Reality, and Racial Profiling: How the White Male Dominant Power Structure Creates Itself as Law Abiding Citizen Through the Creation of Black as Criminal*, 2 Nw. J. L. & SOC. POL’Y 63, 68 (2007) (“Frantz Fanon’s view of relations between the European colonizer and the African colonized [is] as applicable today in America as ever . . .”).

¹³ See MACEY, *supra* note 12, at 134.

¹⁴ See *id.* at 154–99; see also Gwen Bergner, *Who Is That Masked Woman? Or, The Role of Gender in Fanon’s Black Skin, White Masks*, 110 PMLA 75, 75 (1995).

¹⁵ See FANON, *supra* note 11, at 141–209 (explaining the relationship between “The Negro and Psychopathology”). While I acknowledge that Fanon’s book and analysis is groundbreaking, I do not agree with Fanon’s simplistic and unsympathetic portrait of the black woman’s complicity in colonization.

¹⁶ See *id.* Fanon makes explicit the cultural construction of racial subjectivity and avoids essentializing racial identity. I aim to do the same to the extent that I discuss racial identity in this Article.

Fanon presents the results of his psychoanalysis of the black psyche with chapter titles such as: “The Negro and Language,” “The Woman of Color and the White Man,” “The Man of Color and the White Woman,” “The So-Called Dependency Complex of Colonized Peoples,” “The Fact of Blackness,” “The Negro and Psychopathology,” and “The Negro and Recognition.” Fanon’s titles suggest that he implicitly supports the notion of a black group identity, i.e., a connection between black people that can be described in general terms. Fanon does not try to define what it means to be black, or list “essential” characteristics one needs to be black, but does recognize that most black people are connected.¹⁷ Fanon explicitly summarizes the content of the chapters in *Black Skin White Masks*, illustrating his belief in an identity that is defined, in part, by the color of one’s skin:

The first three chapters deal with the modern Negro. I take the black man of today and I try to establish his attitudes in the white world. The last two chapters are devoted to an attempt at a psychopathological and philosophical explanation of the *state of being* a Negro.¹⁸

Throughout *Black Skin White Masks*, Fanon speaks in terms of a single black psyche or a single black collective consciousness and explicitly uses the term “Negro consciousness,” recognizing that there is an identity that comes with being black.¹⁹ Fanon notes that the essence of this identity is the failure of society to acknowledge the black man’s individuality or emotional reality:

I move slowly in the world, accustomed now to seek no longer for upheaval. I progress by crawling. And already I am being dissected under white eyes, the only real eyes. I am *fixed*. Having adjusted their microtomes, they objectively cut away slices of [structure the contours of] my reality. I am laid bare [betrayed]. I feel, I see in those white faces that it is not a new man who has come in, but a new kind of man, a new genus. Why, it’s a Negro [nigger]!²⁰

¹⁷ See *id.* at 134–35; see also Bergner, *supra* note 14, at 75. Bergner recognizes that *Black Skin, White Masks* effects “a paradigm shift that reconfigures psychoanalysis to account for . . . black [group] identity [that] is shaped by the oppressive sociopolitical structure of colonial culture.” *Id.* at 76.

¹⁸ FANON, *supra* note 11, at 15.

¹⁹ *Id.* at 135.

²⁰ Anjali Prabhu, *Narration in Frantz Fanon’s peau noire masques blancs: Some Reconstructions*, 37 RES. AFR. LIT. 189, 196 (2006) (quoting FANON, *supra* note 11, at 116) (brackets in original). In explaining this passage, Professor Prabhu notes that it illustrates the black man is “not at liberty to construct his own reality.” *Id.* Professor Prabhu adds the bracketed words to emphasize that the reality of the black man has not really been “cut away,” but rather

Similarly, Professor Prabhu, an expert in postcolonial studies, has observed that the black identity is one in which “the black man’s body is given to him through the harsh gaze of the white man through a cultural lens informed by stereotypes inherited from colonialism.”²¹ Professor Prabhu supports this observation by referencing language from *Black Skin White Masks*:

And then the occasion arose when I [we] had to meet the white man’s eyes. An unfamiliar weight burdened me [us]. The real world challenged my [our] claims. In the white world the *man of color* encounters difficulties in the development of his bodily schema. Consciousness of the body is solely a negating activity. It is a third-person consciousness. The body is surrounded by an atmosphere of certain uncertainty.²²

Fanon also observes that part of being black is being in a society in which language is used as a tool to keep the black man in his place:

A white man addressing a Negro behaves exactly like an adult with a child and starts smirking, whispering, patronizing, cozening. It is not one white man I have watched, but hundreds; and I have not limited my investigation to any one class but, if I may claim an essentially objective position, I have made a point of observing such behavior in physicians, policemen, employers.²³

A society that attempts to keep blacks in their place through language reflects a dominant culture that automatically classifies and de-civilizes black Americans.²⁴ Fanon also suggests that the black psyche includes growing up in a society in which negative attitudes about blacks persist:

Over three or four years I questioned some 500 members of the white race [I]n the midst of associational

has been structured by society in a way that fails to recognize his individual or emotional reality. *Id.*

²¹ *Id.* at 197.

²² *Id.* (quoting FANON, *supra* note 11, at 110–11 (emphasis added, brackets in original)). Professor Prabhu sees that in this quote Fanon recognized a unique challenge that the black man faces—he has to establish his “selfhood” and person outside the various “constraints that have been actualized through the history of colonialism.” *Id.* at 198. These constraints have been recognized by many, including Professor Charles Lawrence in his groundbreaking exploration of subtle (or modern) racism discussed *infra* note 30.

²³ FANON, *supra* note 11, at 31. In *Black Skin White Masks*, Fanon illustrates the “white man’s perspective” when he writes, “Talking to Negroes in this way gets down to their level, it puts them at ease, it is an effort to make them understand us, it reassures them” *Id.* at 32.

²⁴ *See id.* at 32.

tests, I inserted the word *Negro* among some twenty others. Almost 60 per cent of the replies took this form:

Negro brought forth biology, penis, strong, athletic, potent, boxer, Joe Louis, Jesse Owens, Senegalese troops, savage, animal, devil, sin.

. . . .

It is interesting to note that one in fifty reacted to the word *Negro* with *Nazi* or *SS*; when one knows the emotional meaning of the *SS* image, one recognizes that the difference from the other answers is negligible. Let me add that some Europeans helped me by giving the test to their acquaintances: In such cases the proportion went up notably. From this result one must acknowledge the effect of my being a Negro: Unconsciously there was a certain reticence.²⁵

In *Black Skin White Masks*, Fanon suggests that blacks are taught what it means to be black at a very early age.²⁶ Even before black Americans begin to fully interact with the world, they have seen magazines, heard nursery rhymes, and seen history texts with representations of blacks in society, which create in their minds a unique group identity as a “black person.”²⁷ This identity reflects that “the Wolf, the Devil, the Evil Spirit, the Bad Man, [and], the Savage are always symbolized by Negroes.”²⁸ At its core, this identity reflects black Americans striving to be recognized as fully human.²⁹ Black Americans are “connected” in

²⁵ *Id.* at 166–67. There is considerable support for the notion that anti-black stereotyping remains widespread in society. See generally PAUL M. SNIDERMAN & EDWARD G. CARMINES, REACHING BEYOND RACE 63–64 (1997) (describing how some Americans negatively characterize black Americans); JAMES WALLER, FACE TO FACE: THE CHANGING STATE OF RACISM ACROSS AMERICA 28–42 (1998) (making note of various stereotypes associated with black Americans); Lawrence D. Bobo, *Racial Attitudes and Relations at the Close of the Twentieth Century*, in 1 AMERICA BECOMING, *supra* note 2, 264, 273–80; Craig St. John & Tamara Heald-Moore, *Fear of Black Strangers*, 24 SOC. SCI. RES. 262, 278–79 (1995). Claude Steele has done extensive work on what he has coined the “stereotype threat” or, in the context of African American students, negative stereotypes that are prevalent in society, e.g., the belief that blacks test poorly, a stereotype that can be extremely harmful and can negatively affect student academic success. See, e.g., Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 797 (1995).

²⁶ See FANON, *supra* note 11, at 148.

²⁷ *Id.*

²⁸ *Id.* at 146.

²⁹ When I use the term “fully human” or “absolute humanity,” I am referring to the quest to be recognized absolutely and unequivocally as a human being, and not in the relative sense. In contrast, someone might be human in the relative sense, “to the extent that they share a common religious, ethnic, cultural or other similarly substantial identity attribute.” See Omar Barghouti, *Relative Humanity: The Fundamental Obstacle to a One State Solution*, ZMAG, Dec. 16, 2003, <http://www.zmag.org/content/showarticle.cfm?ItemID=4696> (last visited Nov.

that they recognize that there are negative representations and stereotypical images of black Americans floating around. At the same time, black Americans are connected in a deeper way as they are a people fighting for recognition of their own absolute humanity; a humanity that stands in stark contrast to these negative representations.³⁰

Like Fanon, W.E.B. Du Bois understood that blacks have an identity that is based, in part, on the fact that they are African American.³¹ From Du Bois' perspective, how blacks are treated in this country, and their individual and collective striving to "throw off the shackles" of a society in which they are often figuratively invisible, are fundamental parts of being black in America.³² In his ground-breaking treatise, *The Souls of Black Folk*, Du Bois recounted one of the first times that he became aware that he was seen as less than human:

And yet, being a problem is a strange experience, — peculiar even for one who has never been anything else, save perhaps in babyhood and in Europe. It is in the early days of rollicking boyhood that the revelation first bursts upon one, all in a day, as it were. I remember well when the shadow swept across me. I was a little thing, away up in the hills of New England, where the dark Housatonic winds between Hoosac and Taghkanic to the sea. In a wee wooden schoolhouse, something put it into the boys' and girls' heads to buy gorgeous visiting-cards — ten cents a package — and exchange. The exchange was merry, till one girl, a tall newcomer, refused my card, — refused it peremptorily, with a glance. Then it dawned upon me with a certain suddenness that I was different from the others; or like, mayhap, in heart

29, 2008). In the latter case, one might be "entitled to only a subset of the otherwise inalienable rights that are due to 'full' humans." *Id.*

³⁰ Professor Charles Lawrence discusses the effect of stereotypes or modern racism on African Americans in his ground-breaking exploration of modern racism, in which he notes that "[i]n a society that no longer condones overt racist attitudes and behavior, many of these attitudes will be repressed and prevented from reaching awareness in an undisguised form" in a way that fails to extend to blacks the status of full humanity. Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 356 (1987) (citation omitted). See generally COLORED CONTRADICTIONS: AN ANTHOLOGY OF CONTEMPORARY AFRICAN AMERICAN PLAYS (Harry J. Elam, Jr. & Robert Alexander eds., 1996) (containing an anthology of plays written by African American playwrights that demonstrate the shared black experience, which is defined, in part, by living in a society in which stereotypical representations of African Americans are omnipresent).

³¹ See generally W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* (Candace Ward ed., Dover Publications 1994) (1903) (discussing how the collective identity of black Americans comes both from the struggles their forefathers faced in Africa and the current struggles of black people in America).

³² See *id.*

and life and longing, but shut out from their world by a vast veil.³³

In appreciating the striving in the souls of African Americans in a society that fails to support the humanity of African Americans, Du Bois recognizes that there is a group identity that all black people have by virtue of the socio-political-legal and historical environment in which they live. Du Bois' biographer, Manning Marable, observes:

Few books make history, and fewer still become foundational texts for the movements and struggles of an entire people [T]his stunning critique of how "race" is lived through the normal aspects of daily life is central to what would become known as "whiteness studies" a century later.³⁴

Black Americans currently live in a society in which racism is a part of their every day reality.³⁵ "In the course of centuries of struggle

³³ *Id.* at 1–2. Thomas Holt has commented on Du Bois' observations of the African American experience. See Thomas C. Holt, *The Political Uses of Alienation: W.E.B. Du Bois on Politics, Race, and Culture, 1903-1940*, 42 AM. Q. 301, 304 (1990) (The question of "how one achieves mature self-consciousness and an integrity or wholeness of self in an alienating environment . . . would become the dominant focus . . . of Du Bois' life and work.") (citation omitted).

³⁴ MANNING MARABLE, *LIVING BLACK HISTORY: HOW REIMAGINING THE AFRICAN-AMERICAN PAST CAN REMAKE AMERICA'S RACIAL FUTURE* 96 (2006); see also Sandra L. Barnes, *A Sociological Examination of W.E.B. Du Bois' The Souls of Black Folk*, N. STAR, Spring 2003, at 1, 1 (noting that "Du Bois' observations and findings are timeless"); Kendra Hamilton, *A Timeless Legacy: Celebrating 100 Years of W.E.B. Du Bois' The Souls of Black Folk — A Salute to Black History Month*, BLACK ISSUES IN HIGHER EDUC., Feb. 13, 2003, at 1, available at http://findarticles.com/p/articles/mi_m0DXK/is_26_19/ai_98171169/pg_1 (last visited Nov. 29, 2008). Scholars have also acknowledged the timelessness of Fanon's work. See Morrison, *supra* note 12, at 63, 68 ("Frantz Fanon's view of relations between the European colonizer and the African colonized [is] . . . as applicable today in America as ever"); see also Prabhu, *supra* note 20, at 189 ("Frantz Fanon's writings remain one of the most influential oeuvres from which postcolonial criticism draws. His work is referred to in discussions on, among other things, violence, nationalism, inequality, racism, capitalism, elitism, sexuality, and ethnicity in both the postcolonial nation state and various metropolitan contexts.").

³⁵ See, e.g., Richard Delgado, *Critical Legal Studies and the Realities of Race—Does the Fundamental Contradiction Have a Corollary?*, 23 HARV. C.R.-C.L. L. REV. 407, 407 (1988). Professor Richard Delgado often writes about the role that race and racism play in everyday life. According to Professor Delgado, one "structural feature of human experience," that separates people of color from white people, is the daily experience of subtle racism, something that white people rarely see, but people of color experience often. *Id.* at 407. Delgado suggests that people of color "live in a world that is dominated by race," and when they get together, often their conversations involve swapping stories of how racism has reared its ugly head on that particular day. *Id.* at 407–08. Similarly, Professor Twila Perry opines:

Although slavery ended over one hundred years ago, Black people in this country remain inescapably aware of the relationship between the oppression of the individual and the subordinated status of the group. Despite the elimination of de jure segregation, many Blacks still perceive racism as an enduring part of the American

against enslavement, cultural alienation, and the spiritual cannibalism of white racism,”³⁶ black Americans have acquired a cohesive identity. In other words, black Americans have a complex reality that has a particular socio-political-legal and historical context, and helps define how many black Americans see the world.³⁷

Professor Dawson, one of the nations leading experts on race, suggests that the forced segregation of the races following the Reconstruction era—enforced through “Jim Crow legislation, electoral disenfranchisement of blacks, the protection of white racial terrorists,” lynching, and “scientific” and “historical” justifications for racism—has led to the development of black institutions including “political organizations, fraternal organizations, businesses, and . . . the black church.”³⁸ It is this “differential association,”³⁹ including the family and other community institutions, which has contributed to the formation of a separate

landscape. Racism pervades every aspect of Black people’s lives. Thus, Blacks of every social, economic, and educational class understand that their difficulty in hailing taxi cabs in our cities is more than just accidental.

Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 50 (1994) (citations omitted).

³⁶ Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 793 (1990) (quoting James Turner, *Black Nationalism: The Inevitable Response*, BLACK WORLD, Jan. 1971, at 4).

³⁷ UCLA Law Professor Devon Carbado, upon his arrival to the United States, quickly became aware of this reality: “I was not eager, upon my arrival to the United States, to assert a black American identity. . . . But I became a black American anyway. . . . [This identity] was ascribed to me.” Devon W. Carbado, (*E*)*racing the Fourth Amendment*, 100 MICH. L. REV. 946, 948 (2002). This reality has been described, in part, by critical race theorists as a “master narrative” of race. These theorists suggest that the only way to understand society is to understand the role that race and racism play in everyday life, including in the media and legal discourse. See Charles R. Lawrence, III, *The Message of the Verdict: A Three-Act Morality Play Starring Clarence Thomas, Willie Smith, and Mike Tyson*, in RACE, GENDER, AND POWER IN AMERICA: THE LEGACY OF THE HILL-THOMAS HEARINGS 105, 107–17 (Anita Faye Hill & Emma Coleman Jordan eds., 1995); see also Lisa Lowe, *Heterogeneity, Hybridity, Multiplicity: Marking Asian American Differences*, 1 DIASPORA 24, 26 (1991) (discussing the role of “master narratives” in the context of Asian American cultural identity); Margaret M. Russell, *Beyond “Sellouts” and “Race Cards”: Black Attorneys and the Straightjacket of Legal Practice*, 95 MICH. L. REV. 766, 773 (1997); David B. Wilkins, *Straightjacketing Professionalism: A Comment on Russell*, 95 MICH. L. REV. 795, 796 (1997) [hereinafter Wilkins, *Straightjacketing Professionalism*]. In discussing the role of media discourses in sharpening tensions between black Americans and Korean Americans in the wake of the acquittal of the police officers in the first “Rodney King” trial, Lisa Ikemoto observes: “I use ‘master narrative’ to describe white supremacy’s prescriptive, conflict-constructing power, which deploys exclusionary concepts of race and privilege in ways that maintain intergroup conflict.” See Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of Black American/Korean American Conflict: How We Constructed “Los Angeles,”* 66 S. CAL. L. REV. 1581, 1582 (1993) (citation omitted); see also Wilkins, *Identities and Roles*, *supra* note 2, at 1520.

³⁸ See MICHAEL C. DAWSON, *BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS* 59–61 (1994).

³⁹ Michael Hechter, *Rational Choice Theory and the Study of Race and Ethnic Relations*, in THEORIES OF RACE AND ETHNIC RELATIONS 264, 274 (John Rex & David Mason eds., 1986). Hechter argues that “differential association” is a key aspect of identity formation, identifying the family and other community institutions as critical in this process. *Id.*

black culture⁴⁰ and separate values⁴¹ among black Americans. In short, “[t]he forced separation of the races in the South and the development of independent black institutions [has] served to reinforce the overwhelming salience of group status and interests for individual African Americans.”⁴²

Race “is still a major shaper of African American lives”⁴³ because it is “a major social, economic, and political force in American society.”⁴⁴ One can turn to evidence of residential segregation to illustrate this point. Scholars argue that residential segregation is still a reality for most African Americans, which, in part, determines (1) the quality of schooling available to blacks, (2) the amount the property of the black middle and working classes appreciates compared to their white counterparts, (3) the amount of wealth blacks have compared to their white counterparts, and (4) the extent to which poverty is concentrated in black neighborhoods.⁴⁵

In speaking to the salience of race in American society, and echoing the work of Fanon and Du Bois, contemporary students of black politics argue that “the entire class structure of black America is distorted by the legacy of racism,”⁴⁶ and that “the black middleclass is economically vulnerable because of its extreme reliance on public and quasi-public sector employment.”⁴⁷ According to Professor Dawson, “middle-class blacks own less wealth per family than poor whites.”⁴⁸ Dawson underscores this point by noting that “[t]he median and the mean levels of household wealth are less for black families that earn over \$50,000 a year than for white families that earn under \$10,000 a year.”⁴⁹

⁴⁰ See DAWSON, *supra* note 38, at 60 (citing HOUSTON A. BAKER, JR., *BLUES, IDEOLOGY, AND AFRO-AMERICAN LITERATURE* 64–112 (1984), and Henry L. Gates, Jr., *Criticism in the Jungle*, in *BLACK LITERATURE AND LITERARY THEORY* 1, 64–75 (Henry L. Gates, Jr. ed., 1984)).

⁴¹ See DAWSON, *supra* note 38, at 60 (citing MILTON ROKEACH, *BELIEFS, ATTITUDES, AND VALUES: A THEORY OF ORGANIZATION AND CHANGE* 62–81 (1976), Milton Rokeach, *Change and Stability in American Value Systems, 1968-1971*, in *UNDERSTANDING HUMAN VALUES: INDIVIDUAL & SOCIETAL* 129, 135–47 (Milton Rokeach ed., 1979), and CORNELL WEST, *PROPHECY DELIVERANCE! AN AFRO-AMERICAN REVOLUTIONARY CHRISTIANITY* 35–36 (1982)).

⁴² DAWSON, *supra* note 38, at 60.

⁴³ *Id.* at 7.

⁴⁴ *Id.*

⁴⁵ See *id.*

⁴⁶ *Id.* (citing THOMAS D. BOSTON, *RACE, CLASS, AND CONSERVATISM* (1988)).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*; see also Melvin L. Oliver & Thomas M. Shapiro, *Race and Wealth*, 17 *REV. BLACK POL. ECON.* 5, 11–12 (1989) (noting that the mean and median levels of net worth and net financial assets of blacks earning between \$30,000 and \$44,999 is less than the mean and median levels of net worth and net financial assets of whites earning between \$7,500 and \$14,999).

Dawson is careful to acknowledge that individuals have multiple social identities, such as race, class, gender, and religion, and that scholars and activists have long debated which identity is the most important factor in determining the social status of African Americans.⁵⁰ Thus, Dawson accounts for these social identities in his analysis of the importance of race to African Americans. Dawson observes that both historically and currently, black racial identity has overwhelmed other salient identities and concludes that individual identity and the resulting preferences of African Americans are often significantly shaped by “race in a society structured by a racial hierarchy.”⁵¹

In short, racial identity is uniquely salient for many African Americans.

B. *Black American Group Identity and Trust*

Lawyers are often entrusted with protecting others. Some lawyers, especially those working for non-profit legal services organizations, represent black Americans in their cases against institutions that have been, and are currently perceived as being, discriminatory towards black Americans, such as government agencies and the criminal justice system.⁵² In their cases against these institutions, clients often allege or believe racism or discrimination played a role in their treatment. Similarly, they often believe that their race will factor into how they will be treated throughout the process of obtaining relief and will factor into what relief may be available to them. Under these circumstances, many

⁵⁰ See DAWSON, *supra* note 38, at 46; see also Richard L. Allen et al., *A Schema-Based Approach to Modeling an African-American Racial Belief System*, 83 AM. POL. SCI. REV. 421 (1989) (noting that religion is an important force in shaping African American identity).

⁵¹ DAWSON, *supra* note 38, at 47.

⁵² The widespread perception among blacks that the criminal justice system is stacked against them is well-known and discussed later in this Article. See *infra* Part III.A. Consider a report that concluded that unequal treatment of blacks characterizes every step of the criminal justice process, and that there is a “widely-held belief among black and Hispanic Americans that the criminal justice system is deserving of neither trust nor support.” See LEADERSHIP CONFERENCE ON CIVIL RIGHTS & LEADERSHIP CONFERENCE EDUC. FUND, JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 1, <http://www.civilrights.org/publications/reports/cj/justice.pdf> (discussing the discriminatory treatment black Americans have faced in the criminal justice system and noting that examples of such treatment are racial profiling, disproportionate levels of prosecution, and racially disparate sentencing); see also J. Douglas Allen-Taylor, *BUSD Settles Discrimination Lawsuit*, BERKELEY DAILY PLANET, Mar. 18, 2005, <http://www.berkeleydailyplanet.com/article.cfm?archiveDate=03-18-05&storyID=20960> (last visited Nov. 29, 2008) (discussing the settlement of a lawsuit that alleged a school district discriminated against black American and Latino students by expelling the students without due process); Rebekah Denn, *Blacks Are Disciplined at Far Higher Rates than Other Students*, SEATTLE POST-INTELLIGENCER REPORTER, Mar. 15, 2002, available at http://seattlepi.nwsourc.com/disciplinegap/61940_newdiscipline12.shtml (last visited Nov. 29, 2008); Christian Morrow, *Middle-School Discipline Fails African-American Kids*, PITTSBURG COURIER, Feb. 28, 2006, available at http://news.newamericamedia.org/news/view_article.html?article_id=c4aba556a37a947cc8018f945fc378cf (last visited Nov. 29, 2008).

blacks would likely want their case in the hands of someone who sees the world as they do, someone who can personally identify with their historical and current struggle in this country as black Americans, and someone who may be less likely to judge them because they are black.⁵³ In short, many blacks would want their case in the hands of an African American attorney.

Black group identity includes a particular sensitivity to issues of racism and oppression,⁵⁴ making it more likely that black clients will initially assume that a black lawyer is intrinsically “on their side” and is down to “fight for them.” In addition, black clients are more likely to believe that a black lawyer is less likely to judge them based on the color of their skin, the way that they walk, or the way that they talk.

Many black Americans have heard stories passed down from generation to generation, by a grandfather, uncle, or parent, about the racism their forefathers faced. These stories have been used as a means to strengthen blacks’ resistance to such racism. This common experience, both communicated and lived, makes it more likely that black lawyers will be able to gain the trust of their black clients. In other words, this experience makes it more likely that black clients will assume that black lawyers understand their culture in both deep and superficial ways and see the world as they do, are part of the same historical and current struggle, and will be less likely to judge their character traits that are uniquely black.⁵⁵

⁵³ This is not to say that there are not certain black Americans who may prefer lawyers who are not black. My contention, though, is that these black Americans are in the minority. See discussion *infra* Part IV.

⁵⁴ See, e.g., Sharron M. Singleton-Bowie, *The Effect of Mental Health Practitioners’ Racial Sensitivity on African Americans’ Perception of Service*, in MULTICULTURAL ISSUES IN SOCIAL WORK 491, 492 (Patricia L. Ewalt et al., eds., 1996); discussion *supra* Part I.D.

⁵⁵ See Jacqueline Jordan Irvine, *Beyond Role Models: An Examination of Cultural Influences on the Pedagogical Perspectives of Black Teachers*, 66 PEABODY J. EDUC. 51, 51 (1989). Professor Irvine suggests that the decline in success of black American students or, more specifically, their “increasing alienation and school failure . . . is . . . directly related to the decline” of black American teachers, who “bring to the classroom unique, culturally based pedagogical approaches that are often compatible with the learning needs of their minority students.” *Id.* at 51. She suggests that black teachers are “cultural translators and intercessors for black students” and that “[b]lack teachers are more likely to understand Black students’ personal style of presentation as well as their language.” *Id.* Professor Irvine also notes that black teachers “frequently exhibit a teaching style that attends to cultural differences in perceptions of authority” *Id.* While there is scant research done on the importance of black American lawyers serving black clients, many of Professor Irvine’s conclusions are transferable to the context of the attorney-client relationship. In both contexts, the issue is fundamentally one of communication and trust, whether it is the lawyer understanding the client’s cultural manifestations in the same way that a teacher must understand a student if there is to be effective communication, or a client trusting that a lawyer will not judge him because of his cultural traits in the same way that a student must feel “safe” if she is to have the most effective learning experience.

The culture of black Americans is often “misunderstood, ignored, denigrated or discounted,”⁵⁶ resulting in cultural alienation and miscommunication.⁵⁷ Black people’s “style of walking, glances, dress, and haircuts,”⁵⁸ has historically engendered fear in those who find it foreign, unfamiliar, or uncivilized. Attorneys who see these styles as part of their culture, or understand where these styles come from, are less likely to find them foreign, unfamiliar, or uncivilized.⁵⁹ Attorneys who see these cultural traits as part of their culture (a culture that has developed both in response to and independent of the dominant culture in this country) will be able to identify with these traits—and will be less likely to judge their clients who possess these traits.

Similarly, black culture includes verbal and non-verbal communication, which contains rhythm, pacing, and inflection of speech, as well as assumptions about what should be “spoken and left unspoken.”⁶⁰ Historically, the non-verbal communication of black people, as well as the rhythm, pacing, and inflection of speech used by some black people, has been a basis for stereotyping black people as uncivilized or uneducated, instead of being recognized for what it is—part of a culture that has developed both in response to and independent of a dominant culture that has historically oppressed black people and tried to define black people on its own terms.⁶¹ As with other elements of black culture, the commu-

⁵⁶ *Id.* at 56. In her acclaimed book on hip-hop music, Professor Perry engages in an analysis of this music genre, which she describes as black American music, and observes, “Hip hop has, at various times, served as fodder for conservative and racially biased agendas, but it nonetheless continues to maintain a core of artistic integrity and has grown enormously as an art form over the years it has been under attack.” IMANI PERRY, *PROPHETS OF THE HOOD: POLITICS & POETICS IN HIP HOP 3* (2004). Perry argues that rap music, a popular genre of music for African Americans, which can be traced back to West Africa, is commonly misunderstood and denigrated notwithstanding its artistic integrity and value as an art form.

⁵⁷ See Irvine, *supra* note 55, at 56.

⁵⁸ *Id.*

⁵⁹ See *id.* See generally N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315 (2004) (discussing the longstanding fear of the black man in America as he is portrayed as savage, animalistic, sexually unrestrained, and inherently criminal). There are, of course, black attorneys who would view their clients as “foreign, unfamiliar, or uncivilized” due to internalized racism within the black community. This, however, is the exception rather than the rule. See generally WILLIAM E. CROSS, JR., *SHADES OF BLACK: DIVERSITY IN AFRICAN-AMERICAN IDENTITY* (1991) (exploring the relationship between racial identity and internalized racism in African Americans and using the term self-hatred instead of internalized racism); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 694 (1995) (“[I]nternalized racism [may cause] some African-Americans to devalue black lives”); Beverly A. Greene, *Heterosexism and Internalized Racism Among African Americans: The Connections and Considerations for African American Lesbians and Bisexual Women: A Clinical Psychological Perspective*, 54 RUTGERS L. REV. 931 (2002) (discussing how internalized racism leads to conflict between members of the black American community).

⁶⁰ Irvine, *supra* note 55, at 56–57.

⁶¹ See *id.* In his review of Gynnar Myrdal’s *American Dilemma: The Negro Problem in Modern Democracy*, (1944), Ralph Ellison notes that black American culture has been formed

nication of black people is not monolithic, but instead, reflects who they are as individuals, from the protagonist described in Richard Wright's *Black Boy*⁶² to the protagonist in Ralph Ellison's *Invisible Man*,⁶³ from a black student at the State University of New York College at Oneonta⁶⁴ to a brilliant law student who will follow in the footsteps of Charles Hamilton Houston or Thurgood Marshall. At the same time, the communication of black people, whether a head nod or a unique display of body language, reflects a certain culture that is associated with being African American.⁶⁵ African American lawyers who understand the context in which African American cultural manifestations exist and are less likely to judge them are in a unique position to gain the trust that is necessary for an effective attorney-client relationship.⁶⁶

The importance of an ethnic match between practitioner and client has been recognized in previous scholarship.⁶⁷ It has also been recognized in practice; a recently published *Child Welfare Law Office Guide-*

both as the consequence of a rejection of the dominant culture and independent of the dominant culture: "Much of Negro culture might be negative, but there is also much of great value, or richness, which, because it has been secreted by living and has made their lives more meaningful, Negroes will not willingly disregard." Rhett S. Jones, *Community and Commentators: Black Theatre and Its Critics*, 14 BLACK AM. LIT. F. 69, 72 (1980) (quoting RALPH ELLISON, *An American Dilemma: A Review*, in SHADOW & ACT 303, 316 (1964)).

⁶² See generally WRIGHT, *supra* note 10 (telling the story of a black youth coming of age in the Jim Crow south).

⁶³ See generally ELLISON, *supra* note 10 (chronicling the travels of a young black man as he searches for his place in an America that is culturally intolerant).

⁶⁴ See *Brown v. Oneonta*, 195 F.3d 111, 116 (2d Cir. 1999).

⁶⁵ See generally Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991). Professor Matsuda explains that traces of everyone's life are woven into their manner of speech. See *id.* at 1329. She makes the point that people are inseparable from their accents. See *id.* Professor Matsuda's analysis supports the argument that who people are, including their race and culture, is reflected in their speech patterns. Scholars have also discussed the specific means of communication of African Americans. See generally MICHAEL L. HECHT ET AL., *AFRICAN AMERICAN COMMUNICATION: EXPLORING IDENTITY AND CULTURE* (2003) ("AFRICAN AMERICAN COMMUNICATION"). In *AFRICAN AMERICAN COMMUNICATION*, the authors introduce their book as follows:

What is African American Communication? Perhaps the answer to this question is best illustrated by sociolinguist Richard Wright, who routinely asks his class the following rhetorical question: "If communication can be defined as the universe of forms, processes, and structures that govern how we relate to the world, then aren't there forms, processes, and structures that are particular to African Americans?" Indeed, there is a universe that facilitates how African Americans relate to the world, and it is referenced by African American cultural personhood. *Id.* at 1.

⁶⁶ See HECHT ET AL., *supra* note 65, at 1 (explaining that African Americans have a shared set of cultural realities).

⁶⁷ See, e.g., Stanley Sue, *In Search of Cultural Competence in Psychotherapy and Counseling*, 53 AM. PSYCHOLOGIST 440, 443 (1998) (finding a significant relationship between ethnic match and treatment outcomes). While the psychotherapist-client relationship is distinct from the attorney-client relationship, the issues of rapport and alliance are similarly important to the attorney-client relationship and, thus, the findings of this article are applicable here.

book, produced by the National Association of Counsel for Children as a “Best Practice Guide” for attorneys representing children in abuse, neglect, and dependency cases, emphasizes the importance of ethnic match in legal representation:

A client’s perception of a staff member may be directly affected by one’s external cultural markers. For example, a client may be reluctant to work with someone of a different race or ethnicity because of a previous negative experience. This reluctance may manifest itself through the client’s behavior (i.e., being chronically late or missing appointments). A client may directly express discomfort, but will most likely present non-verbal cues. One’s ability to identify and adequately address these issues will be critical to the success of engaging and working with clients.⁶⁸

As this excerpt implies, we cannot afford for race-consciousness to be seen as an arbitrary, irrational evil, irrespective of who is taking race into consideration and regardless of the context in which it is being used.⁶⁹ People who view race-consciousness as arbitrary and irrational fail to appreciate the various contexts of race.⁷⁰ Race is a central basis for understanding the significance of various social relations.

The significance of race must be considered when legal services organizations think about the racial and ethnic compositions of their legal staffs. In short, when considering the racial and ethnic compositions of their organizations and their African American clients, legal services organizations should take into account the group identity of blacks which is a product of the black socio-political-legal and historical experience in this country. This group identity makes it more likely that a black client will assume that a black lawyer understands her culture in both deep and superficial ways, is part of the same historical and current struggle, and will be less likely to judge her character traits that are uniquely black. In sum, as further illustrated by the empirical evidence below, the existence of a black group identity makes it more likely that a black attorney will be able to gain a black client’s trust.

⁶⁸ Shannan Wilber & Ron Gutierrez, Legal Services for Children, Inc., *Cultural Competence: A Child Welfare Law Office Should Deliver Culturally Competent Services*, in *Child Welfare Law Office Guidebook: Best Practice Guidelines for Organizational Legal Representation of Children in Abuse, Neglect, and Dependency Cases* 31, 32 (Nat’l Ass’n of Counsel for Children ed., 2006).

⁶⁹ See Peller, *supra* note 36, at 759.

⁷⁰ See *id.* at 759–60.

C. *Empirical Evidence from the Legal Arena*

In a survey regarding desired character traits for their attorney, clients cited trustworthiness as the most important.⁷¹ In a seminal article in this area, “‘I Want a Black Lawyer to Represent Me’: Addressing a Black Defendant’s Concerns with Being Assigned a White Court-Appointed Lawyer,” Kenneth P. Troccoli addresses the preference that black defendants in the criminal justice system often have for black lawyers—a preference that is often based on trust and mutual understanding.⁷²

Troccoli begins the article by offering three reasons why black defendants may have concerns about having a white court-appointed lawyer. These concerns address the issues of “racism, attorney effectiveness, and the practical difficulties in educating the white lawyer on the impact race has on the defendant’s case.”⁷³ First, Troccoli suggests that black defendants may not be comfortable with white lawyers because of their belief that their white court-appointed lawyer is racist.⁷⁴ Second, Troccoli suggests that white lawyers cannot fully understand or appreciate what it means to be black in America (and thereby miss a large part of the client’s story and problem).⁷⁵ Lastly, Troccoli suggests that even if white lawyers could be as effective as their black counterparts, getting white lawyers “up-to-speed” would require more time and effort than the typical black defendants has.⁷⁶

Troccoli relies primarily on a survey of all staff and managing attorneys within the Civil Division of the Legal Aid Society for the City of New York published in 2000.⁷⁷ The survey involved both personal interviews and a written survey. When the personal interviews were conducted, every attempt was made to match the race and the gender of the attorney and interviewer.⁷⁸ The survey consisted of sixty-four questions in six categories, one of which was “Issues of Race and the Clients.”⁷⁹

⁷¹ See Carolyn Copps Hartley & Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 WASH. U. J.L. & POL’Y 133, 133 (2004).

⁷² See Troccoli, *supra* note 6, at 36.

⁷³ *Id.* at 5. Troccoli discusses reasons that black defendants might have problems with white court-appointed lawyers for reasons other than their race (e.g., the client may perceive the attorney as part of “the system”). *Id.* at 17–26. While these may be relevant to the attorney-client relationship, they are outside the scope of this Article and I do not address them at length here.

⁷⁴ See *id.* at 17.

⁷⁵ See *id.* at 25.

⁷⁶ See *id.*

⁷⁷ Troccoli relies on the survey discussed in Acevedo’s article. *Id.* at 3 n.5; see also Acevedo et al., *supra* note 4, at 4.

⁷⁸ See Acevedo et al., *supra* note 4, at 24.

⁷⁹ See *id.* at 25.

The results indicate that white lawyers and black lawyers have very different ideas regarding the significance of race to the attorney-client relationship. From the perspective of the black attorneys (and attorneys of color generally), clients typically prefer an attorney who is of the same race.⁸⁰ To the question: “Do you believe your clients take the race of their attorney into consideration?,” most of the attorneys of color answered “yes,” while most of the white attorneys answered “no.”⁸¹ In her written response to this question, a Latina attorney wrote, “I believe that clients feel more comfortable with individuals ‘like them.’”⁸² A Latino attorney wrote, “I sense a certain degree of apprehension and confusion when the attorney of record lacks the necessary sensitivity with minority clients. Those clients see the attorney . . . as just one more peg in the white machinery of government.”⁸³ Finally, an African American attorney noted “that clients often make assumptions about the ability of their lawyer to identify with their concerns based on whether or not their attorney is of the same race.”⁸⁴

Similarly, a former clinical professor at the University of Michigan, Clark Cunningham, who is white, recounts a poignant story of a black defendant’s skepticism of—and inability to trust—his white lawyers.⁸⁵ While at Michigan in the 1990s, Cunningham supervised two white male students who were appointed to represent a black male named Dujon Johnson.⁸⁶ According to Cunningham, state troopers stopped Johnson at a gas station and accused him of running a red light.⁸⁷ Johnson immediately questioned whether the stop and search was lawful.⁸⁸ Notwithstanding his protestations, Johnson was given two citations (neither having to do with running a red light): one for driving with a suspended license and one for disorderly conduct.⁸⁹

The report filed by the state troopers indicated that Johnson stated that the charges were false and that the officers were only charging him because of the color of his skin.⁹⁰ In the initial interview with the Michigan law students, however, Johnson did not mention that he thought that

⁸⁰ See *id.* at 33–46.

⁸¹ See *id.* at 33–34.

⁸² *Id.* at 34 (footnote omitted).

⁸³ *Id.* (footnote omitted).

⁸⁴ *Id.* (footnote omitted).

⁸⁵ See Marjorie A. Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 FLA. COASTAL L.J. 219, 221–29 (2002) (citing Clark D. Cunningham, *The Lawyer as a Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992)).

⁸⁶ *Id.* at 221.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 363 (1997).

⁹⁰ See Silver, *supra* note 85, at 221.

the troopers had stopped him because he was black.⁹¹ Subsequently, in a two-page statement of facts written by the students after the initial interview with Johnson, the students failed to mention that racism could have played a part in this case.⁹²

On the first day of trial, the prosecutor moved to dismiss the case and the judge granted the motion.⁹³ Much to Cunningham's surprise, the dismissal brought Johnson very little relief.⁹⁴ Instead, "Johnson felt the actions of the students and Cunningham imposed upon him the same injury that had been imposed upon him by the troopers, i.e., they had all acted to deprive him of his right to control his life, his right to equal respect, and his right to be treated like an adult."⁹⁵ Johnson had never felt respected by his lawyers and had never fully been able to trust them, resulting in him never telling them the entire story, i.e., that he thought that race had played a role, or the deciding role in his arrest. Or, in Johnson's words (speaking to Cunningham after the verdict):

You're the kind of person who usually does the most harm. You have a guardian mentality, assume that you know the answer. You presume you know the needs and the answers. Oversensitivity. Patronizing. All the power is vested in you. I think you may go too far, assuming that you would know the answer.⁹⁶

In "People from the Footnotes," Professor Jacobs notes that Cunningham failed to understand why Johnson did not tell the law students that he believed the police officers had stopped him because he was black.⁹⁷ It does not appear that Cunningham even considered that their client may not have trusted them. When Cunningham asked Johnson why he had not explicitly raised the issue of race, Johnson said:

I did not tell you that it was a racial issue, although I knew from the beginning that it was (my arrest) racially motivated. *I would have confided this, but who would have believed me anyway?* I felt that on the basis of law itself that I did not have to interject the aspect of racial bias. I knew, legally, that Kiser's [trooper] actions were wrong. And I felt I had taken the higher moral and legal ground.⁹⁸

⁹¹ See *id.* at 226.

⁹² See *id.*

⁹³ See *id.* at 224.

⁹⁴ See Jacobs, *supra* note 89, at 364.

⁹⁵ *Id.* (footnote omitted).

⁹⁶ Silver, *supra* note 85, at 225 (footnote omitted).

⁹⁷ See Jacobs, *supra* note 89, at 386.

⁹⁸ *Id.* at 386–87 (footnote omitted, emphasis added).

While Johnson's difficulty in trusting his white lawyers seems to have surprised Cunningham, Johnson's response is not surprising when considered in light of social science data which suggests that white counselors, as compared to black counselors, have a more difficult time gaining the trust of their black clients.⁹⁹ A review of social science data on ethnic match in the clinical relationship indicates that ethnic differences between client and counselor (e.g., a white counselor and black client), have been related to premature termination of the counseling relationship.¹⁰⁰ Similarly, in other studies, researchers have found that white counselors may have difficulty gaining the trust of black students.¹⁰¹ These studies also indicate that white counselors may have a hard time convincing black students that they will be able to help solve their problems, or even to get them to return for a follow-up visit.¹⁰²

In the context of the lawyer-client relationship, Professor Cunningham eventually found that being of a different race than his client made it a challenge to gain his client's trust. This discovery is in line with social science data which indicates that white counselors, as compared to black counselors, may have a more difficult time gaining the trust of their black clients. As I discuss in the next section, empirical evidence from the medical field also supports the notion that one's group identity, specifically black American identity, makes it more likely that black lawyers will create an environment where their black clients can trust them. These clients, in turn, may be more likely to trust a black lawyer than a lawyer who is not black.

⁹⁹ See e.g., C. Edward Watkins, Jr., et al., *Cultural Mistrust and Its Effects on Expectational Variables in Black Client-White Counselor Relationships*, 36 J. COUNSELING PSYCHOL. 447, 448-49 (1989).

¹⁰⁰ See Colleen Halliday-Boykins et al., *Caregiver-Therapist Ethnic Similarity Predicts Youth Outcomes from an Empirically Based Treatment*, 73 J. CONSULTING & CLIN. PSYCHOL. 808, 814 (2005); see also Francis Terrell & Sandra Terrell, *Race of Counselor, Client Sex, Cultural Mistrust Level, and Premature Termination from Counseling Among Black Clients*, 31 J. COUNSELING PSYCHOL. 371, 373-74 (1984). While there are studies that show that ethnic/racial match is important, there are also studies that conclude the opposite. For example, in one study, the authors conducted a meta-analysis of ten published and unpublished studies between 1991 and 2001 and found no statistically significant effect of racial/ethnic match on various variables related to the doctor patient relationship. See Sung-Man Shin et al., *A Meta-Analytic Review of Racial-Ethnic Matching for African American and Caucasian American Clients and Clinicians*, 52 J. COUNSELING PSYCHOL. 45, 47, 52 (2005). While this study concludes that other factors, such as similar attitudes and values, may be more important than ethnic match, the overwhelming majority of studies found that ethnic match is indeed important. See *id.* at 52. Furthermore, the authors in this study conclude that things such as "similar attitudes and beliefs" may be more important than ethnic match, but I suggest that similar attitudes and beliefs, i.e., a black group identity, may, in many cases, be synonymous with ethnic match. See *id.* at 52.

¹⁰¹ See e.g., C. Edward Watkins, Jr. & Francis Terrell, *Mistrust Level and Its Effects on Counseling Expectations in Black-White Counselor Relationships: An Analogue Study*, 35 J. COUNSELING PSYCHOL. 194, 196 (1988).

¹⁰² See *id.*

D. Empirical Evidence from the Medical Field

Studies from the medical field support the notion that African American service providers are more likely to gain the trust of their African American clients because the providers and clients share a group identity.¹⁰³ One such study examines the level of awareness of racial oppression of mental health practitioners in Washington, D.C., and explores how this awareness affects clients' perceptions of service delivery.¹⁰⁴ The study measures three variables: (1) the sensitivity of case managers to the "existence of racially oppressive attitudes, beliefs, and behaviors in the mental health services system," (2) the effect that level of sensitivity to racial oppression had on service delivery to African American clients, and (3) how case managers' level of sensitivity to racial oppression affected clients' perceptions of quality of life.¹⁰⁵ The authors found that race, gender, and degree type (e.g., a degree in social work) influence racial oppression sensitivity, *with race being the most significant*.¹⁰⁶ The study also found that "moderately and highly sensitive case managers are, perhaps, more attentive to the emotional and material needs of their African American clients."¹⁰⁷ The study concluded that "[c]ase managers who are sensitive to the dilemma faced by African Americans in general . . . are perhaps more likely to create an empathetic

¹⁰³ See Singleton-Bowie, *supra* note 54, at 500–02 (concluding that the life experiences of African American mental health practitioners may make them better able to create an empathetic and supportive environment for their African American patients); see also COMMITTEE ON UNDERSTANDING & ELIMINATING RACIAL & ETHNIC DISPARITIES IN HEALTHCARE, INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTHCARE 13 (Brian D. Smedley et al. eds., 2003) [hereinafter UNEQUAL TREATMENT] (explaining how a primary care provider that bridges cultural gaps may make her African American patients less weary of the health care system); Chen et al., *supra* note 4, at 138 (finding that African Americans who have strong beliefs about racial discrimination prefer African American physicians and are more likely to be satisfied with their care when this preference is met); Gamst et al., *supra* note 4, at 457 (investigating the effects of client ethnicity and client-counselor ethnic match on treatment outcomes of 1,946 children and adolescent community health center clients and finding that clinical outcomes were maximized when Latino and African American mood disorder clients were ethnically matched).

¹⁰⁴ See Singleton-Bowie, *supra* note 54, at 493.

¹⁰⁵ *Id.*

¹⁰⁶ See *id.* at 500.

¹⁰⁷ *Id.* at 501. Strikingly, according to the study, insensitivity to racial oppression resulted in high rates of psychiatric institutionalization among African Americans. See *id.* "Even more important," the study noted, "it has been demonstrated that this insensitivity can lead to misdiagnosis and maltreatment of a most vulnerable population." *Id.* Singleton-Bowie also found that the overall low sensitivity to racial oppression contrasted with the high percentage of case managers of color. See *id.* Singleton-Bowie suggests that "this dichotomy [may indicate] a tendency of workers to incorporate the values and the behavior of the larger society in direct opposition to their own life experiences and personal views." *Id.* at 500; see also Gamst et al., *supra* note 4, at 462 (discussing a study of 1,946 children and adolescent community health center clients, which found that clinical outcomes were maximized when Latino and African American mood disorder clients were ethnically matched).

and supportive relationship with their African American clients while at the same time removing barriers to services and resources.”¹⁰⁸ This study suggests that African American service providers are more likely to create a relationship with their African American clients that facilitates service delivery due to a higher level of racial awareness and sensitivity on the part of the service providers. This study suggests that African American service providers are uniquely able to create a working relationship in which their client is able to trust them.

While only a few studies have tried to analyze the connection between patients’ beliefs about racism in the health care system and their experiences in the health care system, the findings of one such study suggest that African American clients who believe that there is discrimination in the health care system prefer African American service providers. Dr. Fredrick Chen and his colleagues conducted one of these studies by using telephone survey data to explore the potential connection between patients’ beliefs about racism within the health care system and their preferences for a physician of the same the race.¹⁰⁹

Dr. Chen’s study found that African Americans who believe there is discrimination in the health care system tend to prefer an African American physician.¹¹⁰ While this study found that only 22% of African Americans preferred to have an African American physician, it also found that among those who preferred an African American physician, those who had one, as compared to those who did not have one, were more likely to rate their physician as excellent.¹¹¹

One of the most well-known reports in this area is The Comprehensive Report of the Institute of Medicine (IOM), which was commissioned by Congress in 2002 to study disparities in health care.¹¹² This report also paints a picture of a society in which African Americans may be more likely to trust—and prefer—service providers who know what it is like to be a black American. In relevant part, two of the major findings of this report were:

Racial and ethnic disparities in healthcare occur in the context of broader historic and contemporary social and economic inequality, and evidence of persistent racial

¹⁰⁸ Singleton-Bowie, *supra* note 54, at 501.

¹⁰⁹ See Chen et al., *supra* note 4, at 1.

¹¹⁰ See *id.* The perception of racial discrimination in the justice system among African Americans is discussed throughout this Article and need not be repeated at length here. But it is worth noting that this perception makes the findings of Dr. Chen’s study particularly salient.

¹¹¹ See *id.* While the authors did find that African Americans overall did not appear to prefer African American physicians, this finding is distinguishable from the legal context for a number of reasons, including the fact that there is a widely held perception that the judicial system in this country has historically been and is currently racist. See *infra* Part III.A.

¹¹² See UNEQUAL TREATMENT, *supra* note 103, at 3.

and ethnic discrimination in many sectors of American life.¹¹³

. . . .

Bias, stereotyping, prejudice, and clinical uncertainty on the part of healthcare providers may contribute to racial and ethnic disparities in healthcare.¹¹⁴

Based, in part, on the above findings, the IOM report highlights the importance of increasing the proportion of underrepresented groups, such as African Americans, in the health care system.¹¹⁵ The findings of the IOM report and its recommendations support the notion that African American service providers are less likely to find African American clients' style of walking, dress, communication or culture unfamiliar or uncivilized. More fundamentally, the IOM report supports the notion that a black client will be more likely to trust—and prefer—an African American service provider, as the black client will likely assume that a black service provider will understand her culture in both deep and superficial ways, is part of the same historical and current struggle, and is less likely to judge her character traits that are uniquely black.

Thus, empirical evidence from the medical field also supports the notion that the socio-political-legal and historical environment of black Americans has resulted in a black group identity, and that African American lawyers may better be able to gain the trust of their African American clients.

II. COMMUNICATION AND THE ATTORNEY-CLIENT RELATIONSHIP

The second reason that legal services organizations should employ African American attorneys is that African American attorneys communicate more effectively with African American clients.¹¹⁶

¹¹³ *Id.* at 19.

¹¹⁴ *Id.*

¹¹⁵ *See id.* at 14.

¹¹⁶ While there are exceptions to every rule, the empirical evidence (much of which is cited here) supports this conclusion. In a 2006 meeting of leading children's rights lawyers at the University of Nevada Las Vegas Law School, a Working Group considered the role of race, ethnicity, and class in the attorney-client relationship, concluding:

This Working Group considered the role of race, ethnicity, and class (hereinafter "REC") in the attorney-client relationship. Participants recognize that, in American society, children in the child welfare and juvenile justice systems are disproportionately poor and of color while the lawyers for those children and decision makers are overwhelmingly white and middle class. *This racial disparity may affect attorney client communication, perpetuate stereotypes, foster distrust of the legal system and contribute to bad outcomes for the affected children and families.* Issues related to the REC, which often are ignored both in the attorney client relationship and more

A. *Empirical Evidence from the Legal Arena*

Kenneth P. Troccoli's article addresses the issue of communication between an attorney and a client.¹¹⁷ In relevant part, Troccoli provides:

Those who share a common identity group factor such as race, should feel better able to communicate their needs and their feelings to others of the same race. Their shared identity would facilitate understanding and allow for more productive counseling. What little scholarship there is in this area seems to support this theory.¹¹⁸

Again, Troccoli primarily relies on a survey of all of the staff and managing attorneys within the Civil Division of the Legal Aid Society for the City of New York published in 2000.¹¹⁹

As noted earlier, the results indicate that white and black lawyers often report very different perceptions of the significance of race to the attorney-client relationship.¹²⁰ While a number of questions from the survey have been discussed above,¹²¹ there are few that are related to attorney-client communication and have not been mentioned. For example, Question 44 from the survey was: "Do you believe your race has an effect on how you represent your clients?"¹²² A majority of the white attorneys responded to this question by answering that their race has no effect on how they represent their clients.¹²³ However, the majority of the attorneys of color believed that their race has a positive effect on how they represent their clients, indicating that they feel that sharing a racial identity with their clients "foster[s] more meaningful communication."¹²⁴

Question 49 asked the survey respondents if "[c]lients are more open with attorneys of the same race as them."¹²⁵ The answers to this

generally in the administration of justice, must be identified, confronted, and resolved.

Report of the Working Group on the Role of Race, Ethnicity, and Class, 6 NEV. L.J. 634, 634 (2006) (emphasis added). The Working Group was composed of leading scholars and participants in the children's rights field. *See id.* These participants rightly recognized the importance of considering ethnic match in the context of the attorney-client relationship. It is, in part, because of minorities' distrust of the legal system that the Working Group concluded that issues related to the importance of race in the attorney-client relationship must be resolved. *See id.*

¹¹⁷ *See* Troccoli, *supra* note 6, at 6.

¹¹⁸ *Id.* at 22 (citing Acevedo et al., *supra* note 4, at 18).

¹¹⁹ Troccoli relies on the survey discussed in Acevedo's article cited *supra* note 4. *Id.* at 3 n.5; *see also* Acevedo et al., *supra* note 4, at 4.

¹²⁰ *See* Acevedo et al., *supra* note 4, at 33-46.

¹²¹ *See supra* Part I.C.

¹²² *See* Acevedo et al., *supra* note 4, at 37.

¹²³ *See id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 40.

question were striking. A majority of the attorneys of color agreed with the statement.¹²⁶ In this case, however, only a minority of white attorneys disagreed with this statement, “indicating that even those who earlier did not acknowledge race as an issue now seem to believe that people of color are more open with attorneys of color.”¹²⁷

B. *Empirical Evidence from the Medical Field*

Some of the most telling empirical evidence supporting the notion that African American service providers, as compared to non-African American service providers, communicate better with African American clients, comes from the medical field. A study led by physicians at Johns Hopkins found that when both the physician and the patient are African American, the patients have better medical care experiences, speak slower, are more comfortable, and are more relaxed with their physician.¹²⁸ In addition, the study found that when African American patients are matched with African American physicians, the physician visits are more participatory.¹²⁹

This study involved the analysis of audio-taped conversations of the medical appointments of 252 patients (142 African Americans and 110 whites) at 16 primary care clinics in Baltimore and Washington, D.C.¹³⁰ The patients were receiving care from 31 physicians (18 African Americans and 13 whites). The audiotapes were analyzed for length of visit, speech patterns and overall patient satisfaction.¹³¹ The results showed race-concordant visits were on average two minutes longer and had a more positive emotional tone and higher satisfaction rating than race-discordant visits.¹³²

Dr. Lisa Cooper, the lead author of the study and associate professor of medicine and health policy and management at Johns Hopkins, spoke of the results of the study:

[P]eople tend to speak slower when they are more comfortable and relaxed, which could account for the longer visit times in race-concordant visits. Even when the verbal content of the visits was the same, perceptions of the visit were more positive in race-concordant visits, suggesting that patient and physician attitudes and expecta-

¹²⁶ See *id.*

¹²⁷ *Id.*

¹²⁸ See Lisa A. Cooper et al., *Patient-Centered Communication, Ratings of Care, and Concordance of Patient and Physician Race*, 139 ANN. INTERN. MED. 907, 907 (2003).

¹²⁹ *Id.*

¹³⁰ See *id.*

¹³¹ See *id.* at 908–09.

¹³² See *id.* at 910.

tions, rather than the actual words used to communicate, may have affected patients' experiences¹³³

Dr. Cooper continued:

Teaching communication skills to physicians is important to improve the patient-physician relationship However, this study suggests that simply training physicians to make conversation in race-discordant visits mimic that of race-concordant visits may not be enough to improve patients' experiences in visits with a physician of a different race. *Increasing ethnic diversity among physicians and engendering trust and comfort between patients and physicians of different races may be the best strategies to improve health care experiences for members of ethnic minority groups.*¹³⁴

Similar (and undoubtedly related) to the findings on trust, there is empirical evidence to support the conclusion that black lawyers are better able to communicate with black clients. I now turn to the third reason that legal services organizations that serve large populations of African American clients should have African American attorneys: the perception of a judicial system that is unfair and racist, i.e., the perception of a two-tiered system of justice.

III. THE PERCEPTION OF A TWO-TIERED SYSTEM OF JUSTICE

Since there is a widely held view that the American judicial system was and still is racist, black clients may be less likely to think that a black lawyer is part of that system.¹³⁵ The black client will be less likely to worry that a black lawyer will be unable to imagine what it is like to be on the second tier of a two-tier system. In addition, the black client

¹³³ Press Release, Johns Hopkins Medicine, Whites, African-Americans Better Rate Their Medical Care Experiences When Seeing Same-Race Physicians (Dec. 3, 2003), http://www.hopkinsmedicine.org/Press_releases/2003/12_03_03.html (last visited Nov. 29, 2008) (quoting Dr. Lisa A. Cooper discussing Cooper et al., *supra* note 128).

¹³⁴ *Id.* (emphasis added); see also Thomas A. Laveist & Amani Nuru-Jeter, *Is Doctor-Patient Race Concordance Associated with Greater Satisfaction with Care?*, 43 J. HEALTH & SOC. BEHAVIOR 296, 296 (2002) (examining racial/ethnic differences in patient satisfaction among patients in multiple combinations of doctor-patient race/ethnicity pairs and finding that respondents who were race concordant reported greater satisfaction with their physician); Somnath Saha et al., *Patient-Physician Racial Concordance and the Perceived Quality and Use of Health Care*, 159 ARCHIVES INTERNAL MED. 997, 997 (1999) (finding that when black patients have black physicians they are more likely to rate their physicians as excellent and concluding that their findings "confirm the importance of racial and cultural factors in the patient-physician relationship and reaffirm the role of black physicians in caring for black patients").

¹³⁵ See Troccoli, *supra* note 6, at 17; see also Bobo, *supra* note 25, at 280–85.

will be less likely to worry that a black lawyer cannot understand the circumstances that the client is in by virtue of being black in a historically racist system. This section is divided into two sub-sections. First, I explore the historical and current widely held perception among African Americans that the American judicial system is racist. Second, I explore why, in light of this widely held perception, legal services organizations will be more credible from their clients' perspective if they reflect the racial and ethnic make-up of their populations. This latter concept has been referred to as "external legitimacy."¹³⁶

A. *The American "Justice" System*

In *The Souls of Black Folk*, W.E.B Du Bois discussed the "shared perspective of blacks" regarding the American legal system. Specifically, Du Bois opined that "the Negro is coming more and more to look upon law and justice, not as protecting safeguards, but as sources of humiliation and oppression."¹³⁷

Du Bois describes a judicial system that was trying to adjust to a world that it was not originally designed for, namely, a world in which the primary purpose was not as an appendage to the system of chattel slavery (in which the main goal was to "keep track of all negroes" and make sure they were returned to their owner in the event of an escape or theft of them as property), but instead was to protect society from individuals who were not abiding by the law of the land.¹³⁸ The perception of the American judicial system that Du Bois describes is eerily timeless. In part, Du Bois explains:

For, as I have said, the police system of the South was originally designed to keep track of all Negroes, not simply of criminals; and when the Negroes were freed and the whole South was convinced of the impossibility of free Negro labor, the first and almost universal device was to use the courts as a means of reënslaving the blacks. It was not then a question of crime, but rather one of color, that settled a man's conviction on almost any charge. Thus, Negroes came to look upon courts as instruments of injustice and oppression, and upon those convicted in them as martyrs and victims.

When, now, the real Negro criminal appeared, and instead of petty stealing and vagrancy we began to have

¹³⁶ Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 22 (2005).

¹³⁷ DU BOIS, *supra* note 31, at 106.

¹³⁸ *Id.* at 108.

highway robbery, burglary, murder, and rape, there was a curious effect on both sides the color-line: the Negroes refused to believe the evidence of white witnesses or the fairness of white juries, so that the greatest deterrent to crime, the public opinion of one's own social caste, was lost, and the criminal was looked upon as crucified rather than hanged. On the other hand, the whites, used to being careless as to the guilt or innocence of accused Negroes, were swept in moments of passion beyond law, reason, and decency.¹³⁹

While *The Souls of Black Folk* was written over one hundred years ago, the collective experience of blacks today includes living in a society in which there is the perception of a two-tiered legal system, a system in which blacks are treated as second-class citizens.¹⁴⁰ For example, a 2007 Pew Research Center Survey found that while slightly more than half (55 percent) of all black Americans think that the police enforce the law well, only 38 percent are confident that the police will refrain from using excessive force, and only 37 percent of African Americans think that the police treat races equally.¹⁴¹ Blacks' perception of the legal system contrasts sharply with that of whites, as 74 percent of whites believe that the police treat whites and blacks equally.¹⁴² Among those who expressed a "great deal" of confidence in the police, the differences between white and black perceptions of the legal system are even more striking. For

¹³⁹ *Id.* It is also worth recalling the infamous 1856 *Dred Scott* decision, in which Justice Tanney pronounced that blacks were akin to white man's property and were "so far inferior, that they had no rights which the white man was bound to respect." *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856).

¹⁴⁰ See Manning Marable, *Injustice Along the Color Line*, BLACK ISSUES IN HIGHER EDUC., Feb 17, 2000, at 1, available at http://findarticles.com/p/articles/mi_m0DXK/is_26_16/ai_60498483 (last visited Nov. 29, 2008) ("*Dred Scott* is unfortunately alive and well in America's racist Criminal Justice System."). See generally THE DARDEN DILEMMA: 12 BLACK WRITERS ON JUSTICE, RACE, AND CONFLICTING LOYALTIES (Ellis Cose ed., 1997) [hereinafter THE DARDEN DILEMMA]. In *The Darden Dilemma*, Cose presents twelve essays written by black professionals—including former prosecutors and jurists—on the American justice system, in which many of the authors note that blacks share a perception of the American justice system as one that doles out two-tiered justice. *Id.* For example, in his essay entitled, *Outside Players*, syndicated columnist for the Chicago Tribune Clarence Page discusses what he describes as the somewhat "perverse" reaction that some blacks had to the not-guilty verdict in the O. J. Simpson case due to their perception that "it was refreshing to see that a black man had achieved enough wealth to afford 'rich white man's justice.'" Clarence Page, *Outside Players*, in THE DARDEN DILEMMA, *supra*, at 159; see also Paul Butler, *By Any Means Necessary: Using Violence and Subversion to Change Unjust Law*, 50 UCLA L. REV. 721, 721 (2003).

¹⁴¹ See PEW RESEARCH CENTER, BLACKS SEE GROWING VALUES GAP BETWEEN POOR AND MIDDLE CLASS: OPTIMISM ABOUT BLACK PROGRESS DECLINES 37 & tbl. (2007), <http://pewsocialtrends.org/assets/pdf/Race.pdf>.

¹⁴² See *id.*

example, while 47 percent of whites expressed a great deal of confidence that the police will enforce the law, only 21 percent of blacks feel this way; 42 percent of whites expressed a great deal of confidence that the police will avoid excessive force as compared to 11 percent of blacks; and 42 percent of whites expressed a great deal of confidence that the police will treat the races equally as compared to 14 percent of blacks.¹⁴³

Many cases over the years have reinforced black mistrust of the American judicial system, including the infamous Charles Stuart case in Boston,¹⁴⁴ and the Central Park Jogger¹⁴⁵ and Amadou Diallo cases in New York.¹⁴⁶ The African American community's reaction to these cases and the cases themselves are illustrative of the perception that the African American community must contend with a two-tiered system of justice.

In "The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man," Temple University law professor N. Jeremi Duru discusses the Central Park Jogger case. In this infamous case, black teenagers were convicted of raping a white woman in New York's Central Park (a crime that they did not commit and for which their convictions were ultimately overturned), due in large part, to the persistence of racism and racial stereotyping in American society.¹⁴⁷ Professor Duru argues that the "myth of the Bestial Black Man,"¹⁴⁸ or the "myth, deeply

¹⁴³ See *id.*; see also Bobo, *supra* note 25, at 281 (in a 1995 ABC News/Washington Post poll, 88 percent of blacks indicated that the police treat them unfairly, as contrasted with 47 percent of whites); Perry, *supra* note 35, at 51–52 ("[R]esearch indicates that blacks and whites have very different views about the roles of race in American life. Whites as a group see racism as less of a problem and are more optimistic about its eradication. In the view of many blacks, however, this society is neither colorblind nor is it in the process of being so." (citations omitted)). Ironically, the divergence between blacks' and whites' views on police treatment of blacks widened during the late 1980s to mid-1990s. See HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 265 (1997).

¹⁴⁴ See Margaret Carlson, *Presumed Innocent*, TIME, Jan. 22, 1990, at 10. In this infamous case, Charles Stuart killed his wife and then shot himself in the stomach in an attempt to cover up his crime. *Id.* At the time of the shootings, Stuart told the police that they had been attacked by a black gunman and set off a whirlwind of racial tension fueled by an intense door-to-door search for the "suspect" in the Mission Hill Neighborhood in Boston, a predominantly black lower income neighborhood. *Id.* at 10–11. It was later widely acknowledged that the Boston Police were driven by "assumptions about race and crime so powerful" that they ignored holes in Stuart's account of what had happened that night. *Id.* at 10; see also Fox Butterfield & Constance L. Hays, *Motive Remains a Mystery in Deaths That Haunt a City*, N.Y. TIMES, Jan. 14, 1990, at A1.

¹⁴⁵ See Duru, *supra* note 59 (discussing the Central Park Jogger case).

¹⁴⁶ See Timothy Williams, *City Settles Lawsuit with Diallo Family for \$3 Million*, ASSOC. PRESS, Jan. 6, 2004, at 1. In this infamous case, New York City police officers gunned down Amadou Diallo, an unarmed West African immigrant, in the vestibule of his Bronx apartment, firing 41 shots, hitting Mr. Diallo 19 times, and ultimately walked out of the courthouse free men due to a jury clearing them of any wrongdoing in Mr. Diallo's death. *Id.*

¹⁴⁷ See Duru, *supra* note 59, at 1320.

¹⁴⁸ *Id.*

imbedded in American culture, that black men are animalistic, sexually unrestrained, inherently criminal, and ultimately bent on rape,”¹⁴⁹ persists today and is one of the reasons why these teenagers were convicted despite a lack of evidence to support the conviction.¹⁵⁰

In this case, five teenagers from Harlem, who participated in a so-called “wilding” spree with more than 30 young people in Central Park, were accused of raping a white woman.¹⁵¹ Four of the teenagers initially confessed, but then immediately retracted their confessions “contending that they had been . . . coerced.”¹⁵² “There was no physical evidence linking them to the crime.”¹⁵³ In fact, during the trials of the youths, the FBI DNA expert called by the prosecution testified on cross-examination that based on their DNA tests “the semen could not have come from any of the five defendants.”¹⁵⁴ Furthermore, FBI testimony on cross-examination indicated that only one person had ejaculated inside the victim.¹⁵⁵ Although the victim was unable to positively identify any of the youths, and the forensic evidence strongly suggested that none of the youths had taken part in the sexual assault, the prosecution continued to pursue the case against the five teenagers.¹⁵⁶

A week after the youths were charged, Donald Trump “took out a full-page ad in each of the city’s four daily newspapers”, and wrote, “I want to hate these muggers and murderers. They should be forced to suffer and, when they kill, they should be executed I am looking to punish them I want them to be afraid.”¹⁵⁷ In what was ostensibly an attempt to coerce a confession from one of the youths, Linda Fairstein, who worked the case as the head of the Manhattan District Attorney’s Sex Crimes Prosecution Unit, “bullied and stalled and blocked the mother and two friends of one suspect, Yusef Salaam, from gaining access to him.”¹⁵⁸ The unfair treatment continued even though the lead attorney for the prosecution claimed he was missing some of the necessary evidence.¹⁵⁹ Ultimately, the youths were convicted.¹⁶⁰

¹⁴⁹ *Id.* The “myth of the Bestial Black Man” has its origins in the very first interactions between Africans and Europeans and was the norm during the time of American slavery. *Id.*

¹⁵⁰ *See id.* at 1346.

¹⁵¹ *See* Sydney H. Schanberg, *A Journey Through the Tangled Case of the Central Park Jogger*, *VILLAGE VOICE*, Nov. 20–26, 2002, at 36, 37; *see also* Duru *supra* note 59, at 1316; Chris Smith, *Central Park Revisited*, *N.Y. MAGAZINE*, Oct. 22, 2002, at 28.

¹⁵² Schanberg, *supra* note 151, at 37.

¹⁵³ *Id.* at 38.

¹⁵⁴ *Id.*

¹⁵⁵ *See id.*

¹⁵⁶ *See id.* at 39.

¹⁵⁷ *Id.* at 38.

¹⁵⁸ *Id.*

¹⁵⁹ *See id.*

¹⁶⁰ *See id.* at 38–39.

Years later, when a convicted murderer confessed to the assault and rape, the District Attorney's office re-examined the inconsistencies in the youths' confessions and the exculpatory DNA evidence.¹⁶¹ While some law enforcement officials and members of the press were still convinced that the five youth were involved in the attack, the District Attorney thought differently and moved to have the convictions vacated.¹⁶² In a striking reversal of course, the office of District Attorney Robert Morgenthau noted the "extraordinary circumstances" of this case and wrote:

[A] comparison of the statements reveals troubling discrepancies [T]he accounts given by the five defendants differed from one another on the specific details of virtually every major aspect of the crime—who initiated the attack, who knocked the victim down, who undressed her, who struck her, who held her, who raped her, what weapons were used in the course of the assault, and when in the sequence of events the attack took place

[I]n many other respects the defendants' statements were not corroborated by, consistent with, or explanatory of objective, independent evidence. And some of what they said was simply contrary to established fact.¹⁶³

While the nation was consumed with this case, a thirty-eight year-old black woman was forced onto a roof and raped by two white men.¹⁶⁴ The men then threw her off of the roof to her death.¹⁶⁵ The *New York Times* published more than 150 articles on the Central Park Jogger case, and the media continued to refer to the black boys as a "pack," inferring a pack of wolves.¹⁶⁶ In contrast, there were only three stories in the *New York Times* on the black woman who was raped and killed.¹⁶⁷ The extensive coverage of the Central Park Jogger case—viewed by many as a baseless prosecution of black men, which was based largely on stereotypical notions of who these men are "supposed" to be—compared with the virtually non-existent coverage of the murder and rape of the black

¹⁶¹ See Duru, *supra* note 59, at 1315–17.

¹⁶² See *id.* at 1317–18.

¹⁶³ Affirmation in Response to Motion to Vacate Judgment of Conviction at ¶¶ 86 & 91, *State v. Wise et al.*, Indict. No. 4762/89 (N.Y. Sup. Ct. 2002), available at <http://news.findlaw.com/hdocs/docs/crim/nywiseetal120502aff.pdf>.

¹⁶⁴ See Chino Wilson, Op-Ed., *Central Park Jogger Case Exposes Racist Justice System*, DAILY COLLEGIAN ONLINE (Penn State), Jan. 24, 1991, at 1, available at <http://www.collegian.psu.edu/archive/1991/01/01-24-91tdc/01-24-91dops-column-01.asp> (last visited Nov. 29, 2008).

¹⁶⁵ See *id.* at 2.

¹⁶⁶ See *id.*

¹⁶⁷ See *id.*

woman, exemplifies the two-tiered justice system that exists in the United States.¹⁶⁸

Another infamous judicial decision that captures what many African Americans perceive as a two-tiered judicial system in this country is the case of *Brown v. Oneonta*.¹⁶⁹ *Oneonta* involved a series of events that occurred in Oneonta, a small town in upstate New York.¹⁷⁰ At the time, Oneonta had approximately 10,000 full-time residents.¹⁷¹ In addition, about 7,500 students resided at the State University of New York College at Oneonta (SUCO).¹⁷² Oneonta was a very white town—fewer than 300 blacks lived there and only two percent of SUCO students were black.¹⁷³ “On September 4, 1992, just before 2:00 a.m., someone broke into a house just outside Oneonta and attacked a seventy-seven-year-old white woman.”¹⁷⁴ The woman told police that she never saw the attacker’s face, but that based on her view of his hand and forearm, he was black.¹⁷⁵ She said that he appeared to be young because he crossed the room quickly.¹⁷⁶ She also told police that her assailant cut his hand with a knife during the struggle.¹⁷⁷ After the assailant fled, a police canine unit tracked the alleged assailant’s scent toward the SUCO campus, “but lost the trail after several hundred yards.”¹⁷⁸

The police immediately “attempted to locate and question every black male student at SUCO.”¹⁷⁹ This “sweep” of all black male students at SUCO produced no suspects.¹⁸⁰ Over the next several days, the local police (assisted by the New York State Police) conducted a sweep of the entire town of Oneonta, stopping and questioning blacks on the streets and inspecting their hands for cuts.¹⁸¹ More than two hundred people were questioned, but the police failed to find the alleged assailant.¹⁸² Black American boys waiting for the bus were stopped and interrogated.¹⁸³ Blacks were stopped in their cars and interrogated.¹⁸⁴

¹⁶⁸ See *id.* at 3.

¹⁶⁹ 195 F.3d 111 (2d Cir. 1999).

¹⁷⁰ See *id.* at 116.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ See *id.*

¹⁸¹ See *id.*; see also Bob Herbert, *In America; Breathing While Black*, N.Y. TIMES, Nov. 4, 1999, at A29.

¹⁸² *Oneonta*, 195 F.3d at 116.

¹⁸³ See *id.*; see also MARABLE, *supra* note 34, at 1.

¹⁸⁴ See *Oneonta*, 195 F.3d at 116; see also Marable, *supra* note 140, at 1.

In early 1993, the SUCO students, along with others who were questioned during the sweep of Oneonta (plaintiffs), filed an action in the Southern District of New York against the City of Oneonta, the State of New York, SUCO, certain SUCO officials, and various police departments and police officers (defendants).¹⁸⁵ The plaintiffs filed suit under 42 U.S.C. § 1983, asserting that the defendants violated their civil rights by singling out blacks in their sweep of Oneonta.¹⁸⁶

Civil liberties groups were outraged by the sweep of Oneonta.¹⁸⁷ The state's governor, Mario Cuomo, publicly apologized for the officials' misconduct.¹⁸⁸ The District Court for the Southern District of New York then dismissed some of the plaintiffs' claims and granted summary judgment to the defendants on the others.¹⁸⁹ The plaintiffs appealed the judgment of the District Court to the United States Court of Appeals for the Second Circuit.¹⁹⁰ The Second Circuit affirmed the decision of the District Court and found "that police officers in Oneonta, N.Y., did not violate the Constitution when they tried to stop every black man in town in 1992 after a woman said she had been robbed in her home by a young black man."¹⁹¹

The *Oneonta* decision sent a message to many black Americans that "neither their rights as citizens nor their humanity mattered."¹⁹² To many black Americans this situation was just more of the same and was representative of the indiscriminate searches of blacks that occur every day in this country.¹⁹³ For some black Americans, the *Oneonta* decision evoked thoughts of *Dred Scott*¹⁹⁴ and proved that black Americans still

¹⁸⁵ *Oneonta*, 195 F.3d at 116.

¹⁸⁶ *Id.* Section 1983 allows individuals to sue state actors in federal courts for civil rights violations. Interestingly, Section 1983 is part of what was originally referred to as The Civil Rights Act of 1871, or the "Ku Klux Klan Act," which was enacted, in part, to provide blacks redress—i.e., access to federal court—for violations of their civil rights by Klansmen and complicit local and state officials, who, at best, did nothing to stop violence against blacks. Scholars and lawyers have written extensively on Section 1983. See Martin A. Schwartz, *Fundamentals of Section 1983 Litigation*, in 21ST ANNUAL SECTION 1983 CIVIL RIGHTS LITIGATION 41 (Hon. George C. Pratt & Martin A. Schwartz eds., 2005). See generally Gloria Jean Rottell, *Paying the Price: Its Time to Hold Municipalities Liable for Punitive Damages Under 42 U.S.C. § 1983*, 10 J.L. & POL'Y 189, 189 (2001) (describing various § 1983 actions).

¹⁸⁷ See Marable, *supra* note 140, at 1.

¹⁸⁸ See *id.*

¹⁸⁹ See *Oneonta*, 195 F.3d at 118. While not all of plaintiffs' claims were either dismissed or lost via summary judgment, the remaining claims were immaterial as the parties stipulated to the discontinuance or dismissal of these claims with an eye towards securing an appealable final judgment. The judgment was then appealed to the Second Circuit. See *id.*

¹⁹⁰ See *id.* at 111.

¹⁹¹ Herbert, *supra* note 181, at A29 (quoting but failing to cite a previous *New York Times* story); see also *Oneonta*, 195 F.3d at 123.

¹⁹² *Id.*

¹⁹³ See Marable, *supra* note 140, at 1.

¹⁹⁴ *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

“had no rights which the white man was bound to respect.”¹⁹⁵ For many black Americans, this was undoubtedly another illustration of a two-tiered American judicial system in which blacks are on the second tier.

The verdict in the infamous Rodney King case had a similar impact on black Americans. Local and national surveys taken shortly after the 1992 jury verdict that exonerated the white police officers showed that while both whites and blacks disapproved of the verdict, only blacks held a general perception that the criminal justice system is biased against blacks.¹⁹⁶ This perception of a double standard of justice offends a fundamental sense of fairness for black Americans.¹⁹⁷ As Professor Katheryn Russell-Brown observes:

For African Americans, a communal sense of fairness flows directly from the groups’ common history and shared space. The belief in fairness is not only a statement that Blacks have rights, too; it acknowledges that Blacks have and continue to experience a double standard of justice. African Americans take note of their personal experiences within the justice system and the experiences of other African Americans—friends, family members, acquaintances, colleagues, strangers, and Blacks in the news. Black sensitivity to racial injustices within the justice system is heightened by the fact that many Blacks stand within one or two degrees of someone—sibling, parent, child, cousin, or friend—who is in prison or in some way caught in the justice system (e.g., parole or probation). Further, Blacks also consider what role racial bias plays in criminal and non-criminal cases involving Blacks, compared with Whites.¹⁹⁸

Since there is such a widely held view among black Americans that the American judicial system was and still is racist,¹⁹⁹ black Americans are more likely to trust black lawyers to guide them through what they perceive to be a hostile system. As mentioned above, black Americans

¹⁹⁵ *Id.* at 407; see also Herbert, *supra* note 181, at A29 (describing the events surrounding the *Oneonta* decision).

¹⁹⁶ See Bobo, *supra* note 25, at 282–83.

¹⁹⁷ See KATHERYN RUSSELL-BROWN, *PROTECTING OUR OWN: RACE, CRIME, AND AFRICAN AMERICANS* 35 (2006).

¹⁹⁸ *Id.* (footnote omitted). See generally ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007) (discussing reforms that will help eliminate the racial disparities in the criminal justice system).

¹⁹⁹ Professor Kenneth Nunn argues that African Americans have a moral obligation not to prosecute crimes, as the criminal justice system reflects racial disparities at all levels, is “one of the most racist institutions in the United States,” and is “oppressive to African American people.” Kenneth B. Nunn, *The “Darden Dilemma”: Should African Americans Prosecute Crimes?*, 68 *FORDHAM L. REV.* 1473, 1478–80 (2000).

may be less likely to worry that a black lawyer is part of that system, less likely to worry that a black lawyer will be unable to imagine what it is like to be on the second tier of a two-tier system, and less likely to worry that a black lawyer cannot understand the circumstances that the client is in as a black American in a historically racist system.

B. *External Legitimacy*

Because African Americans believe that the American judicial system is racist, the legitimacy of organizations that serve African Americans in the American judicial system is of utmost importance. If these organizations reflect the racial and ethnic make-up of the populations that they serve, African American clients are more likely to consider these organizations credible and legitimate.

Professor Cynthia Estlund refers to this idea (the need for organizations to reflect the population they serve) as “external legitimacy.”²⁰⁰ External legitimacy has been referenced by courts and scholars alike, especially in the context of organizations operating within the criminal justice system.²⁰¹ For example, in *Petit v. City of Chicago*,²⁰² the United States Court of Appeals for the Seventh Circuit was faced with a § 1983 equal protection challenge against the City of Chicago, where the plaintiffs alleged that the city unlawfully discriminated against white police officer applicants by implementing an affirmative action plan for African American and Hispanic officers.²⁰³ Relying on *Grutter v. Bollinger* (the Supreme Court holding that the University of Michigan Law School’s narrowly tailored, race-based admissions program did not violate the Equal Protection Clause),²⁰⁴ the Seventh Circuit upheld the program as necessary for the effective operation of the police department.²⁰⁵ The Seventh Circuit reasoned that a more diverse police force in a racially and ethnically diverse city would enhance the public’s perception of the department, which, in turn, would enhance the department’s ability to

²⁰⁰ See Estlund, *supra* note 136, at 22.

²⁰¹ Numerous scholars have explored the concept of “external legitimacy” in the context of African Americans and the legal system. See Roscoe C. Howard, *Changing the System from Within: An Essay Calling on More African Americans to Consider Being Prosecutors*, 6 WIDENER L. SYMP. J. 139, 165–66 (2000); see also Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 101 (1997) (“[T]he absence of minority judges on state trial courts contributes to an atmosphere of racial exclusion which, at the very least, marginalizes African American lawyers, litigants and courtroom personnel in many jurisdictions.”); Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 365–66 (2006).

²⁰² *Petit v. City of Chicago*, 352 F.3d 1111 (2003).

²⁰³ *Id.* at 1111.

²⁰⁴ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

²⁰⁵ See *Petit*, 352 F.3d at 1118.

police crime.²⁰⁶ The Court recognized that the department would be more likely to gain the trust of the community if it had “‘ambassadors’ to the community of the same [race or] ethnicity.”²⁰⁷ In relevant part, the Court concluded:

It seems to us that there is [a] . . . compelling need for diversity in a large metropolitan police force charged with protecting a racially and ethnically divided major American city like Chicago. Under the *Grutter* standards, we hold, the City of Chicago has set out a compelling operational need for a diverse police department.²⁰⁸

Scholars have recognized that the “external legitimacy” of the American justice system depends, in part, on African Americans becoming a visible part of this system.²⁰⁹ For example, in “Changing the System from Within: An Essay Calling on More African Americans to Consider Being Prosecutors,” Roscoe Howard argues that many African Americans believe “a fair trial does not appear attainable” in the current system.²¹⁰ Howard argues that when African Americans “becom[e] part of the system,” it will have more legitimacy in the community, and will be “more responsive to the demands for justice.”²¹¹ Howard explains:

Minority participation provides, at the very least, an appearance of fairness. If individuals face a system that shows no reflection of who they are, their race, their culture or their neighborhood, it is difficult to insist on their respect for the system. I have argued before that diversity in our criminal justice system is needed to provide the trust in the system that is required for its operation. Black and other minority faces at the government’s table in the courtroom should provide some comfort that whatever charging decisions have been made, they have not been made strictly on account of race.

In short, appearance is important because the community must have some comfort that the system—and the organizations within the system—work the same for all.²¹²

²⁰⁶ See *id.* at 1114–15.

²⁰⁷ *Id.* at 1115 (quoting *Reynolds v. City of Chicago*, 296 F.3d 524, 529 (7th Cir. 2002)).

²⁰⁸ *Id.* at 1114.

²⁰⁹ See Howard, *supra* note 201, at 165–66; see also Stevenson, *supra* note 201, at 365–66.

²¹⁰ Howard, *supra* note 201, at 142.

²¹¹ *Id.* But see Nunn, *supra* note 199, at 1477–78 (arguing that African Americans have a moral obligation not to be prosecutors).

²¹² Howard, *supra* note 201, at 165–66 (footnote omitted).

While Howard's primary goal is to persuade more African Americans to become prosecutors, he also argues for more diversity throughout the criminal justice system.²¹³ Professor Bryan Stevenson echoes Howard's concerns in, "Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases."²¹⁴ In this article, Professor Stevenson discusses the long history of racial bias in the administration of criminal justice and observes that, "[t]he perception of unfairness [of the system] is aggravated by a lack of racial diversity among judges and prosecutors."²¹⁵ In short, the criminal justice system lacks external legitimacy because it lacks racial diversity. Similarly, legal services organizations that do not employ black attorneys lack external legitimacy. These organizations should hire African American attorneys in order to establish the external legitimacy which is necessary if they are to gain their clients' trust.

IV. WHY BLACK AMERICANS MAY NOT WANT A BLACK ATTORNEY

Some scholars have suggested that even in a two-tiered judicial system, an African American client may not want an African American attorney. Notably, these occasions arise not from a desire to strengthen the attorney-client relationship, but primarily from perceptions about the two-tiered judicial system. These situations (a few of which I discuss below) are exceptions to the rule and do not undermine my conclusion that African American attorneys may provide better representation to African American clients.

A. "The Judicial System Is Racist" Situation

As I discuss throughout the Article, there is a widespread perception among African Americans that the American judicial system is racist. Thus, some people argue that a black client may feel "better off with a white lawyer precisely because racism infects the criminal justice system."²¹⁶ The argument is that the judicial system is primarily run, developed, and constructed by whites, and a black lawyer will not be given as much deference and respect within the system as a white lawyer.²¹⁷

²¹³ See *id.* at 142.

²¹⁴ See Stevenson, *supra* note 201, at 366.

²¹⁵ *Id.*; see also Bryan W. Leach, Note, *Race as Mission Critical: The Occupational Need Rationale in Military Affirmative Action and Beyond*, 113 YALE L.J. 1093, 1118 (2004) ("[T]he mere presence of African Americans in positions of leadership within the U.S. military helps to dispel perceptions of institutional bias . . ."). For a brief discussion of Leach's Note, see *infra* note 258.

²¹⁶ Troccoli, *supra* note 6, at 36.

²¹⁷ See *id.*; see also Naomi R. Cahn, *Representing Race Outside of Explicitly Racialized Contexts*, 95 MICH. L. REV. 965, 998 (1997) (noting that race plays a role in how people are

Kenneth P. Troccoli observes, “[t]he sad fact is that the system itself, and particular actors within it, do treat African Americans differently than whites. For this reason, a white lawyer may be more effective than his Black counterpart.”²¹⁸ Similarly, David Wilkins observes, “Black clients, who bear the brunt of the legal system’s racism, may find it more difficult to secure justice if they hire a black lawyer.”²¹⁹ Professor Margaret Russell explains the struggles black attorneys face when they use race as part of their trial strategy:

Black attorneys who raise such [issues of race] in court often face a heavy burden of justifying either that race really exists as an issue at all, or that they are competent to address the topic of race in a fair and reasoned manner. When Black attorneys articulate racism as a primary factor in a particular case, they may encounter fractious demands that they “prove it,” or harsh accusations that they are “playing the race card” or otherwise engaging in unprofessional behavior. . . . Unlike white attorneys, who have the relatively luxurious comfort of invisibility and transparency in raising issues of race in the lawyering process, Black attorneys must always brace themselves to have their racial, professional, and personal identities placed in issue as well.²²⁰

Thus, because the American judicial system does not always provide a level playing field for African American attorneys, some black clients may prefer not to have a black attorney.

perceived in the courtroom); Todd D. Peterson, *Studying the Impact of Race and Ethnicity in the Federal Courts*, 64 GEO. WASH. L. REV. 173, 178 (1996) (discussing the findings of a report commissioned by the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias, and noting that 40% of African American lawyers believed that they were at a disadvantage in a bench trial when compared to white attorneys, while only two percent of white attorneys believed that African American litigators suffered a disadvantage).

²¹⁸ Troccoli, *supra* note 6, at 37; *see also* Wilkins, *Straightjacketing Professionalism*, *supra* note 37, at 797 (“White clients may also be less likely to engage the services of a black lawyer if they are concerned that he or she will not be taken seriously by other important actors in the system.”).

²¹⁹ Wilkins, *Straightjacketing Professionalism*, *supra* note 37, at 797.

²²⁰ Russell, *supra* note 37, at 771–72; *see also* Troccoli, *supra* note 6, at 37; Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women’s Studies*, in CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 291, 294 (Richard Delgado & Jean Stefancic eds., 1997) (by way of illustrating the privilege she enjoys because she is Caucasian, the author observes, “If I declare there is a racial issue at hand, or there isn’t a racial issue at hand, my race will lend me more credibility for either position than a person of color will have.”).

B. “*The White Lawyer Is a Better Lawyer*” Situation

David Wilkins observes that misguided beliefs about the incompetence of African American attorneys can cause them to be seen as “less than ‘real’ lawyers.”²²¹ Wilkins further observes that African American lawyers may be treated “at best patronizingly, and at worst, as second class citizens,” which may affect black clients’ desire to have them as their representatives.²²² A special report of a task force on gender, race, and ethnic bias in the D.C. Circuit (Task Force) found that African Americans (and attorneys of color generally) have to “overcome perceptions of incompetence.”²²³ The Task Force enlisted social scientists, demographers, attorneys, academics, law students, and community members and conducted public hearings, distributed written questionnaires, conducted interviews, focus groups, breakout sessions, and roundtables.²²⁴ The Task Force’s mission was to gather information on the ways in which gender, race, and ethnicity affect the work environment of the D.C. Circuit courts.²²⁵ The Task Force found that perceptions of African American attorney incompetence are widespread:

The professional experiences of African American, Hispanic, and Asian American attorneys, while different in certain aspects, nevertheless had several strong common factors. Principal among these were the need to overcome perceptions of incompetence, the difficulty of establishing oneself in the ‘mainstream’ legal community, and a sense of exclusion from opportunities provided to serve or interact with the federal judiciary. . . . This perception [of incompetence] took a particular form with African American attorneys, according to both men and women in different focus groups, who said their achievements were often discounted as the product of “affirmative action” rather than their own ability.²²⁶

There are some black communities where there are only a few black lawyers. Some blacks have internalized negative misconceptions about their own race due to the prevalence of anti-black stereotypes in society. If, for these reasons (or for any other reason), black clients see black lawyers as incompetent, they may prefer lawyers who are not black.

²²¹ Wilkins, *Identities and Roles*, *supra* note 2, at 1514.

²²² *Id.*

²²³ Special Committee on Race and Ethnicity, *Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, 64 GEO. WASH. L. REV. 189, 228 (1996).

²²⁴ *See id.* at 204.

²²⁵ *See id.* at 204–06.

²²⁶ *Id.* at 228 (footnote omitted).

C. “*The Black Lawyer Is Not Black Enough*” Situation

A black client may not want a black lawyer if the lawyer is perceived as being “not black enough.” Black clients may have this perception because of the lawyer’s “skin color, hair texture, wealth, academic success,” social status, or speech.²²⁷ On another level, some black lawyers may have rejected their blackness, in part, due to an education that taught them to reject their culture and their history.²²⁸ If a black lawyer has any traits that are associated by some with whiteness or with what is commonly referred to as “selling out,” the lawyer may be seen as someone who is “not black enough” or alternatively, seen as someone who cannot be trusted.²²⁹

The concept of selling out can be illustrated using the civil rights movement as a reference point.²³⁰ As the civil rights movement has sped up the process of creating opportunities for upward financial mobility for blacks, some blacks have divested themselves of their own culture and “display[ed] a commitment to the values of the dominant culture.”²³¹ Similarly, the black professional of today is sometimes perceived to be “as interested in his or her class or profession as in his or her race.”²³² These scenarios may cause blacks to label some black lawyers as sell-outs.

A thorough examination of the social and psychological challenges of being black in America and how that relates to the concept of selling out is beyond the scope of this article. Suffice it to say that black Americans may not choose someone who is perceived as a sell-out to represent them.

Notwithstanding these arguments, empirical evidence suggests that more often than not, black clients prefer black lawyers.²³³ I argue that the socio-political-legal and historical environment in which blacks live has created a group identity which makes it easier for black clients to trust and communicate with African American lawyers. Furthermore,

²²⁷ Ronald F. Ferguson, *Test-Score Trends Along Racial Lines, 1971 to 1996: Popular Culture and Community Academic Standards*, in 1 AMERICA BECOMING, *supra* note 2, 348, 375–78; *see also* Kimberly Jade Norwood, *The Virulence of Blackthink™ and How Its Threat of Ostracism Shackles Those Deemed Not Black Enough*, 93 KY. L.J. 143, 149 (2005).

²²⁸ *See* ELAINE RICHARDSON, AFRICAN AMERICAN LITERACIES 10 (2003) (discussing how the African American community as a whole has been negatively affected by an education that encourages African American students to reject their culture).

²²⁹ *See* Elijah Anderson, *The Precarious Balance: Race Man or Sellout?*, in THE DARDEN DILEMMA, *supra* note 140, at 114.

²³⁰ *See id.* at 117.

²³¹ *Id.*

²³² *Id.* at 118.

²³³ *See* Troccoli, *supra* note 6, at 2; *see also* Acevedo et al., *supra* note 4, at 65; Halliday-Boykins et al., *supra* note 100, at 814; Terrell & Terrell, *supra* note 100, at 373–74; Watkins Jr. & Terrell, *supra* note 101, at 196, 448–49.

while there are exceptions to this rule, two of the three situations described above (in which a black client may prefer a white lawyer) are perpetuated by the perception of a two-tiered American judicial system. Consequently, although these situations demonstrate greater complexity in clients' responses to the American judicial system, they do not undermine the need for more black attorneys.

V. DAVID WILKINS, "BLEACHED OUT PROFESSIONALISM," AND
"PLAYING THE RACE CARD"

Since I conclude that racial identities have a place in the practice of black lawyers and that non-profit organizations that represent large populations of black Americans need black lawyers, I would be remiss not to discuss the relevance of David Wilkins' response to the normative ideal of "bleached out professionalism."²³⁴

In "Identities and Roles: Race, Recognition, and Professional Responsibility," Professor Wilkins responds to proponents of "bleached out professionalism," or the notion that, once one becomes a lawyer, "this 'professional self' . . . subsumes all other aspects of a professional's identity and . . . becomes the sole legitimate basis for actions undertaken within the professional role."²³⁵ Wilkins recognizes that some professionals strongly believe that "non-professional" aspects of an individual's identity, such as race, class, sex, and socio-economic status, are not relevant to their professional responsibilities.²³⁶ Wilkins further explains, "Many Americans equate bleached out professionalism with . . . fairness and opportunity," core concepts that are fundamental to the dominant model of American legal ethics.²³⁷ The proponents of bleached out professionalism believe that "'the quality of lawyering and of justice an individual receives does not depend on the group identity of the lawyer or judge.'"²³⁸ Professor Wilkins explains:

²³⁴ Wilkins, *Identities and Roles*, *supra* note 2, at 1503–05. In his article, "Identities and Roles," Wilkins responds to the concept of "Bleached Out Professionalism," as that term is coined by Sanford Levinson. *Id.*; see also Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1578–79 (1993). In "*Gideon in White/Gideon in Black: Race and Identity in Lawyering*," Anthony Alfieri provides a thoughtful critique of race-neutral lawyering, using the writing and lawyering of John Hart Ely as a prism through which to argue for client-centered lawyering that recognizes and incorporates diverse client identities in lieu of one "generalizable lawyer technique" that "marginalizes clients by presupposing their inferiority." 114 YALE L.J. 1459, 1476.

²³⁵ Wilkins, *Identities and Roles*, *supra* note 2, at 1503–04.

²³⁶ *Id.* at 1512.

²³⁷ *Id.*

²³⁸ *Id.* (quoting Russell G. Pearce, *Jewish Lawyering in a Multicultural Society: A Midrash on Levinson*, 14 CARDOZO L. REV. 1613, 1629 (1993)).

[T]he idea that lawyers should not consider their racial identities when acting in their professional role is closely linked to the understanding that the legal rules and procedures that lawyers interpret and implement are also unaffected by issues of race. The claim that “our constitution”—and indeed justice itself—“is color-blind” is taken by many to be a bedrock principle of our legal order. Lawyers who either explicitly or implicitly call attention to racial issues are frequently viewed as undermining this ideal.²³⁹

Wilkins argues that black lawyers’ racial identities have a place in the practice of black lawyers that does not undermine—but instead supports—the principles that underlie the dominant model of American legal ethics.²⁴⁰ In making this argument, Wilkins focuses primarily on the “use” of race at trial and during legal proceedings, using as examples Gil Garcetti’s decision to prosecute O. J. Simpson in Los Angeles County where it was likely that most of the jury would be black and Cochran’s strategy in the same case (for which he was accused of “playing the race card”).²⁴¹

There are many differences between using race in this context and in considering race when choosing a lawyer. For example, using race in the trial context may be characterized as offensive or as “tainting” the legal process. Some may argue that using race to influence a judge or jury is an explicit violation of the norms of fairness and opportunity that are core values of our legal system. One could argue that using race in this way runs the risk of “manipulating” otherwise unassuming judges and jurors. On the other hand, if one considers race when choosing a legal representative, it may seem less viscerally offensive, as the action may not be seen as “directly” affecting the legal process. It may be seen as a matter of personal choice, rather than as a “pull the wool over your eyes” method of legal maneuvering. However, the two may be seen as one and the same. In fact, many argued that Cochran’s race was one of the reasons that he was added to Simpson’s legal team, i.e., due to a predicted advantage that the presence of a black attorney would give Simpson with the jury.²⁴² I do not attempt to tackle these questions here. I need not do so to echo Wilkins’ argument in the context of the attorney-client relationship. I believe, as does Wilkins, that racial identity has a place in the practice of black lawyers that supports the principles that underlie the dominant model of American legal ethics. In short,

²³⁹ *Id.* at 1514–15 (footnote omitted).

²⁴⁰ *See id.* at 1515–16.

²⁴¹ *See id.* at 1515.

²⁴² *See id.*

“bleached out professionalism” is not the appropriate normative ideal for African American lawyers.

In my view, Wilkins’ assessment that proponents of bleached out professionalism “exaggerate the danger of allowing lawyers to incorporate their identity into their professional roles” is accurate.²⁴³ It is also true that considering race in a way that enhances the attorney-client relationship supports the “colorblind norm of zealous advocacy.”²⁴⁴ Similarly, Wilkins argues that if black lawyers “honor their legitimate role obligations,” as opposed to becoming “racial patriots,” “race-conscious lawyering strategies support, rather than undermine” the goals of our American legal system.²⁴⁵ This argument applies to the attorney-client relationship. As long as black American lawyers honor their professional and ethical roles as lawyers, and do not subvert these roles—and their accompanying norms and rules—to their racial identity, race-conscious lawyering can be “zealous advocacy” that supports, rather than undermines, the goals of our American legal system.²⁴⁶

The ABA Model Rules of Professional Conduct provide space for lawyers to accommodate interpretive guidelines such as race into their practice.²⁴⁷ For example, ABA Model Rule 1.3 provides “[a] lawyer shall act with reasonable diligence and promptness in representing a client,”²⁴⁸ and ABA Model Rule 1.4 provides that a lawyer shall “keep the client reasonably informed about the status of the matter.”²⁴⁹ The language and plain meaning of these rules would seem to allow African American lawyers to utilize their racial identity to enhance communication with their clients or to otherwise develop a level of trust with their clients, provided that the end goal is to provide zealous representation. An African American lawyer not using all of the tools at his disposal to represent his client diligently and competently (assuming that it is possible to not “use” one’s racial identity) would be akin to a lawyer knowing which questions she needs to ask to get important information about her client and refusing to ask these questions. Or, it would be akin to a lawyer knowing that having a child’s mother in the room will make the child more comfortable (and thus improve the representation) and still refuse to accommodate this request.

²⁴³ *Id.* at 1571.

²⁴⁴ *Id.* at 1516; *see also* Russell, *supra* note 37, at 791, n.67.

²⁴⁵ Wilkins, *Identities and Roles*, *supra* note 2, at 1584.

²⁴⁶ *See id.* at 1587. Wilkins offers four “safeguards” for consumers that lawyers must follow if race-conscious lawyering is to be seen as enhancing, rather than undermining, the legal process. *See id.* at 1590–91. I have only paraphrased Wilkins’ argument here.

²⁴⁷ *See id.* at 1567.

²⁴⁸ MODEL RULES OF PROF’L CONDUCT R. 1.3 (2007).

²⁴⁹ R. 1.4(a)(3).

The anecdote in the beginning of the Article illustrates my point. Did I violate the rules of ethics by using my “race-based communication” to effectively communicate with my new clients? Did I violate the rules of ethics when I looked into my client’s grandmother’s eyes and let her know that “I knew what she meant,” and therefore, that she could feel comfortable talking to me? Or, did I give special meaning to Rule 1.1, which provides that “a lawyer shall provide competent representation to a client?”²⁵⁰

VI. WHEN AND WHERE DOES THE LAW ALLOW COLOR-CONSCIOUSNESS?

For many legal services organizations, an obligation to hire African American attorneys would implicate Title VII of the Civil Rights Act of 1964 (Title VII).²⁵¹ Under Title VII, organizations can engage in preferential hiring in some circumstances to improve the economic and social conditions of minorities and women.²⁵² Title VII provides:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin²⁵³

In passing Title VII, “Congress recognized that employers were discriminating against employees and potential employees based on characteristics such as race and sex,”²⁵⁴ that such practices were harmful to individuals and the economy,²⁵⁵ and that sometimes organizations should be able to engage in preferential hiring to improve the economic and social condition of traditionally underserved populations.²⁵⁶ Through the bona fide occupational qualification exception (BFOQ), Congress permitted covered employers to discriminate intentionally in narrowly defined circumstances.²⁵⁷ Race, however, cannot be a BFOQ.²⁵⁸

²⁵⁰ R. 1.1.

²⁵¹ 42 U.S.C. § 2000e (2000).

²⁵² See Michael J. Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?*, 35 U.S.F. L. REV. 473, 476 (2001).

²⁵³ 42 U.S.C. § 2000e-2(a)(1).

²⁵⁴ Frank, *supra* note 252, at 475.

²⁵⁵ See *id.*

²⁵⁶ See *id.* at 476.

²⁵⁷ See *id.*

²⁵⁸ See *id.* Gender is the most commonly asserted bona fide occupational qualification exception (BFOQ), along with age in the ADA context. See *id.* National origin is almost never proffered as a BFOQ. See *id.* at 476–77; see also George Rutherglen, *Discrimination*

However, in its parallel constitutional affirmative action jurisprudence, the Supreme Court found in *Grutter* that the attainment of racial diversity in a public university body can, under certain circumstances, be sufficiently compelling to survive strict scrutiny under the Equal Protection Clause.²⁵⁹ Although *Grutter*'s "diversity rationale" was implemented in the context of race-influenced admissions decisions at a public university, Justice O'Connor's opinion speaks to a potentially expansive diversity rationale that may be applicable to the workplace (in both the public and private sectors) and thus applicable to legal services organizations.²⁶⁰ It appears this application of *Grutter* will likely be used as courts continue to recognize the permeability of the line between Title VII and constitutional affirmative action jurisprudence.²⁶¹ Tellingly, in *Grutter*, the Court found that the benefits of affirmative action are "not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."²⁶²

The Court's language in *Grutter* suggests that its "diversity rationale" is applicable in the employment context.²⁶³ While the Supreme Court has yet to evaluate an affirmative action plan which was instituted pursuant to a diversity rationale under Title VII, there is reason to believe that such a plan would pass judicial scrutiny.²⁶⁴ Courts have applied *Grutter* in circumstances that are akin to the circumstances faced by many legal services organizations that serve large populations of African

and Its Discontents, 81 VA. L. REV. 117, 140 (1995). While race cannot be a BFOQ, Brian Leach makes a persuasive argument that we should revisit the proper place of occupational need arguments within anti-discrimination law, and that if this is done, taking into consideration the public's interest in the continued viability of certain occupations as well as the importance of racial and ethnic diversity to these occupations, such as the United States military, Congress should remove the statutory barrier against race-based occupational need defenses. See Leach, *supra* note 215, at 1094–96. Mr. Leach argues that this would bring greater intellectual coherence to this area of the law. See *id.* While I agree with Mr. Leach, an in-depth exploration of this argument is beyond the scope of this Article.

²⁵⁹ See *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

²⁶⁰ See *id.* at 330–33; see also Michael L. Foreman et al., *The Continuing Relevance of Race-Conscious Remedies and Programs in Integrating the Nation's Workforce*, 22 HOFSTRA LAB. & EMP. L.J. 81, 101–03 (2004).

²⁶¹ See *Grutter*, 539 U.S. at 330–33 (explaining how promoting diversity through a narrowly tailored race-conscious admission program aids in preparing students to compete in an increasingly diverse workforce); see also Forman et al., *supra* note 260, at 82.

²⁶² *Grutter*, 539 U.S. at 330 (citations omitted).

²⁶³ See N. Jeremi Duru, *Fielding A Team For The Fans: The Societal Consequences and Title VII Implications Of Race-Based Roster Construction in Professional Sport*, 84 WASH. U. L. REV. 375, 413–14 (2006); see also Foreman et al., *supra* note 260, at 101–02; Rebecca Hanner White, *Affirmative Action in the Workplace: The Significance of Grutter?*, 92 KY. L.J. 263, 270 (2003–2004).

²⁶⁴ See Foreman et al., *supra* note 260, at 101–02; see also White, *supra* note 263, at 270.

American clients.²⁶⁵ Similarly, in the case of legal services organizations that desire to engage in preferential hiring for African American attorneys, *Grutter*'s diversity rationale could be used in the Title VII context to expand the analysis under the *Weber/Johnson* line of cases.²⁶⁶ Currently this line of cases allows for affirmative action plans under Title VII, provided that they are instituted with the purpose of eliminating a conspicuous or manifest racial imbalance within an organization.²⁶⁷ While *Grutter*'s civic rationale for diversity (i.e., student diversity promotes "'cross-racial' understanding, helps to break down racial stereotypes, and enables students to better understand others of different races"²⁶⁸) does not apply directly to the employment context, *Grutter*'s discussion of the importance of diversity in the private workplace is compelling.²⁶⁹

Diversity is an important consideration for legal services organizations looking to employ staff attorneys who are most likely to engender trust and to facilitate communication with their clients. As recognized by the Seventh Circuit in *Petit*,²⁷⁰ employers believe external legitimacy is a particularly important business purpose. As discussed above, external legitimacy is particularly important for legal services organizations that work in a legal system that is perceived as racist against blacks.²⁷¹ While such a rationale for diversity would seem to run contrary to the

²⁶⁵ In *Petit*, for example, the Court of Appeals for the Seventh Circuit found racial diversity to be a compelling interest for a police force charged with protecting a racially and ethnically diverse Chicago. See *Petit v. City of Chicago*, 352 F.3d 1111, 1114 (7th Cir. 2003).

²⁶⁶ See *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007). As I discuss throughout this section, this, of course, would be a novel application of *Grutter*.

²⁶⁷ See Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031, 1051–52 (2004). This is true even if the employer did not contribute to the imbalance. See *id.* at 1048. The Court has further explained that such a plan is lawful only when "[it does] not unduly trammel the interests of majority group members," indicating that such a situation might arise if an affirmative action plan presented an absolute bar to white employment advancement, or was permanent. *Id.* at 1052 (quoting *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208 (1979)). In tailoring its jurisprudence narrowly, the Court has acknowledged that Title VII protects members of all races, including whites. See e.g., *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279–80 (1976) (acknowledging Title VII's applicability to whites).

²⁶⁸ *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

²⁶⁹ See *Duru*, *supra* note 263, at 413–14.

²⁷⁰ See *Petit*, 352 F.3d. at 1111.

²⁷¹ See Howard, *supra* note 201, at 165 ("Minority participation provides, at the very least, an appearance of fairness."); see also Ifill, *supra* note 201, at 101 ("[T]he absence of minority judges on state trial courts contributes to an atmosphere of racial exclusion which, at the very least, marginalizes African American lawyers, litigants and courtroom personnel in many jurisdictions."); Stevenson, *supra* note 201, at 366 ("The perception of unfairness [of the criminal justice system] is aggravated by a lack of racial diversity among judges and prosecutors, which itself exacerbates courts' tolerance of unremediated illegal discrimination."). Brian Leach argues that "the mere presence of African Americans in positions of leadership within the U.S. military helps to dispel perceptions of institutional bias" and that "minority police

Court's long-standing refusal²⁷² under Title VII to permit companies to compose their workforce based on customer preferences,²⁷³ this rationale embodies the purpose of Title VII. In fact, "[i]t does not offend Title VII's heritage; it relies upon it. It would seem that external legitimacy could further Title VII's purposes and could gain traction under Title VII jurisprudence in the event of a *Grutter*-inspired expansion."²⁷⁴

Any such expansion, of course, would have to wrestle with the implications of a Supreme Court case (originally two cases, but consolidated into one) that was decided in 2006, *Parents Involved in Community Schools v. Seattle School District No. 1*.²⁷⁵ As discussed below, the *Parents* decision limits the ability of certain organizations to engage in color-conscious actions.²⁷⁶ In *Parents*, the Court issued competing opinions invoking the mantle of *Brown v. Board of Education*²⁷⁷ and restricted the means by which school districts can racially integrate their student bodies.²⁷⁸ At this point, it is unclear if these cases will affect the ability of legal services organizations to preferentially hire African American attorneys.

In a 5–4 decision, the *Parents* Court ruled that the use of race in student-assignment policies by the Seattle and Louisville School Districts violated the rights of the white petitioners whose children were denied admission to the school of their choice.²⁷⁹ Chief Justice Roberts declared that such plans were “directed only to racial balance, pure and simple.”²⁸⁰ The Court did not find it necessary to directly address its previous holding in *Grutter*, as the Court found that the notion of diversity asserted by the schools in these cases was a more “limited notion of diversity”²⁸¹ than was involved in *Grutter*. In addition, the majority found that the plans in *Parents* relied on race in a “nonindividualized, mechanical” way.²⁸²

The Court's conservative members argued that the school assignment programs at issue were in conflict with the premise of *Brown*,

representation dispels public skepticism of law enforcement.” Leach, *supra* note 215, at 1118–27.

²⁷² See *Duru*, *supra* note 263, at 417.

²⁷³ See *id.* at 416.

²⁷⁴ *Id.* at 417.

²⁷⁵ See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2768 (2007) (consolidating two cases brought by parents challenging the integration programs in school districts in Jefferson County, Kentucky, and Seattle, Washington).

²⁷⁶ See *id.*

²⁷⁷ 347 U.S. 483 (1954).

²⁷⁸ See *id.* at 2767 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

²⁷⁹ See *id.*

²⁸⁰ *Id.* at 2755; see also Linda Greenhouse, *Justices, Voting 5-4, Limit the Use of Race in Integration Plans*, N.Y. TIMES, June 29, 2007, at A1.

²⁸¹ *Parents*, 127 S. Ct. at 2754.

²⁸² *Id.* (quoting *Gratz v. Bollinger*, 539 U.S. 244, 276 (2003)).

which in their view requires an adherence to colorblindness.²⁸³ The majority's view is that even benign racial classifications should be struck down, as the use of race in classification is always invidious.²⁸⁴ Or in the words of Chief Justice Roberts, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."²⁸⁵

The Roberts opinion and Justice Thomas' concurrence (which together would have effectively outlawed the explicit consideration of race when addressing de facto segregation in schools) represented a plurality of the Court.²⁸⁶ While Justice Breyer provided an impassioned dissent—"It is not often in the law that so few have so quickly changed so much"²⁸⁷—Justice Kennedy provided the fifth vote to overturn the assignment programs at issue. Nonetheless, Justice Kennedy distanced himself from the majority and joined the dissent in ruling that the use of race is permissible in certain circumstances, provided that the programs are narrowly tailored.²⁸⁸

In his concurring opinion, Justice Kennedy gave some suggestions on how school districts can constitutionally use race-conscious measures to achieve diversity.²⁸⁹ In rejecting the plurality's complete embrace of a colorblind constitution, Justice Kennedy criticized the Chief Justice's "all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account."²⁹⁰

Civil rights advocates have rightly decried this opinion as an abandonment of the "aspiration of integration and equal life chances manifest in *Brown*,"²⁹¹ but Justice Kennedy's concurrence shows that race-consciousness has not been completely laid to rest by the Court. While an in-depth discussion of the implications of this decision for affirmative action programs in hiring is beyond the scope of this Article, any such programs will likely hinge, in part, on Justice Kennedy's concurrence. A concurrence in which Justice Kennedy recognizes that (1) "[t]he enduring hope is that race should not matter; the reality is that too often it

²⁸³ See *id.* at 2768; see also Jess Bravin & Daniel Golden, *Court Limits How Districts Integrate Schools—Race-Based Policy Ban Augurs Broad Changes; Clash Over Brown Case*, WALL ST. J., June 29, 2007, at A1.

²⁸⁴ See *Parents*, 127 S. Ct. at 2774; see also Bravin & Golden, *supra* note 283, at A1.

²⁸⁵ *Parents*, 127 S. Ct. at 2768.

²⁸⁶ See *id.* at 2746.

²⁸⁷ These words were not included in Justice Breyer's written opinion, but rather, are statements that the Justice made from the bench during the *Parents* oral argument. Greenhouse, *supra* note 280, at A1.

²⁸⁸ See *id.* at 2792 (Kennedy, J., concurring).

²⁸⁹ See *id.* at 2788–97.

²⁹⁰ *Id.* at 2791.

²⁹¹ Charles J. Ogletree, Jr., *The Demise of Brown vs. Board of Education?: Creating a Blueprint to Achieving Racial Justice in the 21st Century*, NAACP SPEC. ED. 4 (Jan./Feb. 2007), http://www.naacp.org/advocacy/theadvocate/sped_0107.pdf.

does,”²⁹² (2) the plurality is “too dismissive of the legitimate interest government has in ensuring that all people have equal opportunity regardless of their race,”²⁹³ and (3) in the real world, colorblindness “cannot be a universal constitutional principle.”²⁹⁴ In short, *Grutter* is still good law and its “diversity rationale” seems to be intact.

CONCLUSION

The Supreme Court’s decision in *Parents* is relevant to my argument for a reason other than a strictly legal one. The *Parents* decision will affect how my argument is received. In response to *Parents*, the American Civil Rights Union²⁹⁵ issued a press release, stating that the “‘ruling narrowly upheld the colorblind principle that all Americans regardless of race are equal under the law. But there’s clearly more work to be done until at least . . . [five] members of the Supreme Court acknowledge that just as our Constitution is colorblind, our public schools should be as well.’”²⁹⁶ Similarly, Ward Connerly of the American Civil Rights Institute declared,

The Supreme Court today made a glorious decision that directly fits with our plans to eliminate race in all facets of American public life This Supreme Court decision shows that the era of race preferences is quickly coming to an end. The Court is finally starting to catch up with what the American people have known for years: Race has no place in American public life.²⁹⁷

The *Parents* decision provided a victory to the ideology of colorblindness. Consequently, calls to get beyond race now have the cover of the Supreme Court.²⁹⁸ Justice Harlan’s famous pronouncement in *Plessy*

²⁹² *Parents*, 127 S. Ct. at 2791 (Kennedy, J., concurring).

²⁹³ *Id.*

²⁹⁴ *Id.* at 2792.

²⁹⁵ Despite its name, the American Civil Rights Union (ACRU) is not in any way affiliated with the American Civil Liberties Union (ACLU). The ACRU is a non-profit organization that differentiates itself from the ACLU, an organization that it criticizes for selectively supporting the Bill of Rights. See Center for Corporate Policy, <http://www.corporatepolicy.org/issues/ACRU.htm> (last visited Oct. 3, 2008).

²⁹⁶ Press Release, America Civil Rights Union, ACRU Applauds Another Step Towards a Colorblind Society (June 28, 2007), http://www.theacru.org/blog/2007/06/press_release_acru_applauds_another_step_towards_a_colorblind_society/ (last visited Nov. 29, 2008) (quoting Horace Cooper, ACRU Senior Fellow and constitutional law expert).

²⁹⁷ Press Release, American Civil Rights Institute, Connerly Declares Supreme Court Decision “Glorious Victory” (June 28, 2007), http://www.acri.org/pr_062807.html (last visited Nov. 29, 2008) (quoting Ward Connerly of the American Civil Rights Institute).

²⁹⁸ See Ian F. Haney López, *Colorblind to the Reality of Race in America*, 53 CHRON. HIGHER EDUC., Nov. 3, 2006, at B6, available at <http://chronicle.com/weekly/v53/i11/11b00601.htm> (last visited Nov. 29, 2008) (discussing the possible societal implications of the color-

v. Ferguson—“Our Constitution is color-blind, and neither knows nor tolerates classes among citizens”²⁹⁹—has now moved beyond the ideal, to become the reality, of American society.³⁰⁰ Since some people genuinely believe that the best way to get beyond racism is to get beyond race, my argument may be seen as part of the problem.

For Thurgood Marshall, as counsel for the NAACP legal defense fund, colorblindness represented the dismantling of de jure segregation.³⁰¹ However, “[i]n the wake of the civil-rights movement’s limited but significant triumphs, the relationship between colorblindness and racial reform changed markedly.”³⁰² As legal victories did not directly translate into the eradication of inequality, progressives increasingly pushed for “affirmative race-conscious remedies.”³⁰³ Ironically, in this environment, the ideology of colorblindness could now safely be used by those who were resistant to racial progress, as it now had the “cover” of having been previously advocated by those in the civil rights movement.³⁰⁴

In the 1970s, the Supreme Court’s belief in equality made it impossible to adhere to the ideology of colorblindness.³⁰⁵ However, in the 1980s “the [C]ourt presented race as a phenomenon called into existence just when someone employed a racial term.”³⁰⁶ Unfortunately, “[t]hat approach ignores the continuing power of race as a society-altering category.”³⁰⁷

Thus, in response to the advocates of colorblindness who would identify color consciousness as part of the problem, it is important to recognize that there is still racial hierarchy in this country.³⁰⁸ The elimination of affirmative action programs in the employment context should

blind ideology espoused by the majority and arguing that the use of this ideology should depend on the remediation of racial hierarchy).

²⁹⁹ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

³⁰⁰ The ideal of colorblindness has been traced to Justice Harlan’s dissent in *Plessy v. Ferguson*, but this ideology may have existed in the 1840s before *Plessy* was decided, when black children in Massachusetts challenged so-called separate but equal schools. See ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 40–52 (1992) (discussing *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849)).

³⁰¹ See López, *supra* note 298.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ See *id.*

³⁰⁵ See *id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ See *id.* In 1998, the American Anthropological Association counseled the federal government to phase out the use of the term “race” in the collection of data because the concept has no scientific justification in human biology. See American Anthropological Association, Statement on “Race” (May 17, 1998), <http://www.aaanet.org/stmts/racepp.htm> (last visited Nov. 29, 2008). The problem with this recommendation is that social concepts of race are still linked to forms of discrimination.

be conditioned on the elimination of racial hierarchy.³⁰⁹ A careful distinction should be made between the moral superiority of colorblindness as policy and the lure of colorblindness as an ideal for American society.³¹⁰ As Professor Ian F. Haney López provides:

Contemporary colorblindness is a set of understandings—buttressed by law and the courts, and reinforcing racial patterns of white dominance—that define how people comprehend, rationalize, and act on race. As applied, however much some people genuinely believe that the best way to get beyond racism is to get beyond race, colorblindness continues to retard racial progress. It does so for a simple reason: It focuses on the surface, on the bare fact of racial classification, rather than looking down into the nature of social practices. It gets racism and racial remediation exactly backward, and insulates new forms of race baiting

Colorblindness badly errs when it excuses racially correlated inequality in our society as unproblematic so long as no one uses a racial epithet. It also egregiously fails when it tars every explicit reference to race. To break the interlocking patterns of racial hierarchy, there is no other way but to focus on, talk about, and put into effect constructive policies explicitly engaged with race.³¹¹

My ode then to Justice Roberts, and to those proponents of colorblindness as a policy prescription in today's society, is Justice Blackmun's statement "in defending affirmative action in [*Regents of the University of California v.*] *Bakke*: 'In order to get beyond racism, we must first take account of race. There is no other way.'"³¹²

The underlying theme of this Article is that the problems of blacks cannot be solved by removing race-consciousness from the dialogue about diversity in the legal profession. In short, legal services organizations that represent large populations of black Americans should be race

³⁰⁹ See López, *supra* note 298.

³¹⁰ See *id.*

³¹¹ *Id.*

³¹² *Id.* (quoting Justice Blackmun in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring)); see also Bobo, *supra* note 25, at 284–85. Bobo suggests that talking about race and racism may be a difficult endeavor in a society in which there is such a divergence of opinion as to the importance of race. Bobo, *supra* note 25, at 284–85. In part, Bobo suggests that

[s]ustained and constructive discourse about matters of race will surely remain difficult insofar as Blacks are (1) more likely than Whites to see discrimination in particular domains and situations; (2) more likely to see discrimination as institutional rather than episodic; (3) more likely to see discrimination as a central factor in larger patterns of racial inequality; and (4) more likely to regard racial discrimination as personally important and emotionally involving. *Id.*

conscious and hire more black lawyers. This country's socio-political-legal and historical environment has made blacks uniquely able to communicate with and gain the trust and confidence of their black American clients.

My goal in writing this Article is not only to make a normative statement as to whether legal services organizations should engage in preferential hiring. My intention is also to contribute to the intellectual discourse as to whether black lawyers bring unique benefits to black clients. While we may be uncomfortable talking about race, we cannot let shame silence us as a society. We owe each other at least this much.

