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Am I My Client? Revisited: The Role of Race in Intra-Race Legal Representation

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AM I MY CLIENT? REVISITED: THE ROLE OF RACE IN INTRA-RACE LEGAL REPRESENTATION

Julie D. Lawton*

This Article examines the challenges of intra-race legal representation for lawyers of color, law students of color, and those teaching law students of color by analyzing how the dynamics of the lawyer's and client's racial sameness impact legal representation. This Article brings together three strands of lawyering theory – the role of race in lawyering, critical race theory, and the role of the lawyer in intra-race legal representation. In doing so, this Article explores a number of provocative questions: Does being the same race as their clients make lawyers better legal representatives? Should lawyers of color embrace or resist race's influence on intra-race legal representation? How do lawyers balance their desire to remain representative of their race with their responsibility to their clients? This Article also scrutinizes the role of the lawyer of color in intra-race legal representation by examining questions that are under-reviewed, such as: Do lawyers of color engage in the same explicit and implicit biases against their clients of color that lawyers of color similarly suffer? Do racial stereotypes tempt the lawyer to be more sympathetic towards, and understanding of, their same-race clients, or does it cause the lawyer to view the same-race client as an 'other'? For lawyers of color and clients of color who seek same-race legal representation, this Article explores a difficult question— Is the lawyer of color representative enough of the race to be a representative for the client, particularly when the lawyer of color and the client of color live in different socio-economic environments? Given the resurgent examination of the role of race in interactions between persons of color and persons of power, this Article presents a timely opportunity to examine and question the role of race and the impact of divergent socio-economic status in intra-race legal representation.

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I enter the room and see them gazing at me. I notice the slight surprise, the pride, the relief. I am an African-American attorney working in community development in predominantly African-American communities. I am here to be their lawyer, but I am often perplexed trying to define that role. I, like many lawyers of color, struggle with the dynamics of our roles as lawyers to members of our racial community.

As attorneys of color, when we walk into community and client meetings and see the faces of color before us, we hear the murmurs. We see and hear from them the gratitude for the personification of their sacrifice—the long hours working the hardest jobs for the lowest pay; the years of enduring discrimination to give us, their children, and their unborn grandchildren, chances for better lives. The precious, hard-earned coins

dropped into collection plates to support their kids and neighbors' kids at historically black colleges and universities, often the only colleges that would admit them. Their lost hope renewed when they see those of us who "made it."

We often see in their eyes our reflection, though many of us struggle with the question of what it is that we see. Do our clients of color see an 'other' when they gaze upon us or do they see a reflection of themselves, one of their own? Do they expect more of us because we are of the same race?

We are torn by their expectations, verbal and unspoken, as well as our own. We want to be for them what we think they need. We want to fix the problems they face, in part because they endured them to enable our opportunities. We have the legal training to help them. We received this training, in part, because they fought for our right to obtain it. So, when we represent them, what do we owe? How do we retain our legal objectivity under the weight of such responsibility?

In identifying and examining the dynamics that attorneys and clients of color must contend with in intra-race legal representation, this Article not only serves as an important tool for reflection and insight for attorneys of color managing these dynamics, it will also be instructive for those teaching current and aspiring attorneys of color to help prepare them to navigate these issues in practice. Non-lawyers of color can also benefit from exposure to these issues as colleagues and opposing counsel to attorneys of color.

In 1996, Nancy Polikoff wrote a powerful article, *Am I My Client? The Role Confusion of the Lawyer Activist*.¹ In this article, Polikoff examined the conflicts she felt as a lesbian activist attorney representing clients who shared her demographics, goals, and personal challenges. Her article examined her role confusion from her work as a lesbian activist seeking to maintain her position as an insider to this demographic while also trying to remain an objective legal representative of other lesbian activists. In her article, Polikoff describes her connection to the lesbian activist community and her solidarity with their civil disobedience to fight injustices against that community. However, she struggles with how to continue her activism while simultaneously acting as an attorney to that community. Her activism for her cause requires a civil disobedience against the law that is in stark contrast to the objective analysis and often peaceful compliance required of her as an attorney. This tension reflects what she calls her role confusion between whether she can remain an 'insider' to the lesbian activist community or whether the non-activist requirements of her as an attorney will cause her to be an 'outsider' to that group. The raw honesty of her prose moved me the first time I read it ten years ago, and it contin-

1. Nancy D. Polikoff, *Am I My Client? The Role Confusion of a Lawyer Activist*, 31 HARV. C.R.-C.L. L. REV. 443 (1996).

ues to inform my thoughts on the role confusion I experience as an African-American attorney working in African-American communities.

Part I of this Article introduces the concept of intra-race legal representation and provides some background for the author's examination of this issue. Part II uses the author's experience as a framework for the attorney of color and similarly provides a framework for the client of color through the prism of the 'race client' – the attorney's race as a client of the attorney of color. This section of the Article further examines how same-race attorneys and clients pursue racial solidarity through intra-race legal representation and seek to identify with each other through their racial-sameness. Part III presents competing arguments on the role of race in inter-race legal representation, contrasting arguments for race-neutral lawyering and racially-conscious lawyering. Part IV examines whether race similarly impacts intra-race legal representation and closes with an analysis of the risks and perilous challenges lawyers and clients of color must navigate in intra-race legal representation. The Article concludes with a personal reflection of a question each attorney of color must contemplate in same-race lawyering: Am I my client?

I. INTRA-RACE LEGAL REPRESENTATION

Intra-race legal representation occurs when lawyers represent clients who share the same racial demographics as the lawyer. There are unique dynamics to intra-race legal representation that give rise to this Article. Race is a charged term even though it is considered a social construct, rather than a biological construct.² Psychologists consider race “the category to which others assign individuals on the basis of physical characteristics, such as skin color or hair type, and the generalizations and stereotypes made as a result.”³ Race, particularly for people of color, affects many aspects of life.⁴ For attorneys of color, race becomes an inextricable part of who we are, how we view the world, and how the world views us.⁵ Attorneys of color overwhelmingly descend from groups who historically have suffered racial oppression. As a result, individuals from these groups

2. Am. Psychological Ass'n, *Guidelines on Multicultural Education, Training, Research, Practice, and Organizational Change for Psychologists*, 58 AM. PSYCHOLOGIST 377, 380 (2003).

3. *Id.*

4. Shani King, *Race, Identity, and Professional Responsibility: Why Legal Services Organizations Need African American Staff Attorneys*, 18 CORNELL J.L. & PUB. POL'Y 1, 6 (“Race, especially for African Americans has a gravity that cannot be understood if taken out of its socio-political-legal and historical context.”).

5. See Russell Pearce, *Jewish Lawyering in a Multicultural Society: A Midrash on Levinson*, 14 CARDOZO L. REV. 1613, 1632 (1993) (quoting Clayton P. Alderfer & David A. Thomas, *The Significance of Race and Ethnicity for Understanding Organizational Behavior*, INT'L REV. INDUS. & ORGANIZATIONAL PSYCHOL. 1, 6–7 (Cary L. Cooper & Ivan T. Robertson eds., 1988)) (“[I]ndividuals are shaped by at least three sets of forces: their own unique personalities, the groups with whom they personally identify to a significant degree, and the groups with whom others associate them—whether or not they wish that association.”).

bonded together in resistance against this oppression.⁶ This bond continues to impact the personal and professional interactions between people of color, including between attorneys of color and clients of the same race.⁷

For many attorneys of color, this shared racial history is stained with oppression and discrimination that continues to impact our racial communities and, thus, our interactions with it.⁸ Our shared history can create a deep sense of obligation for attorneys of color to our racial communities. We must balance this sense of obligation with the ethical obligations we have sworn to uphold in a profession that encourages us to be color-blind in our legal representation. Lawyers of color must struggle with how to remain integral parts of our racial communities while practicing in a profession that is dominated by individuals who neither look like us nor generally share our life experiences. This shared history and these struggles impact how I navigate my role as a woman of color, an attorney of color, and an attorney regardless of my color. To provide perspective on these experiences, I will share some of my background and experiences and the experiences of my clients to use as a framework to examine the attorney and client of color.

II. THE ATTORNEY AND CLIENT OF COLOR

A. *Who Am I?*

I stand in the shadows and on the shoulders of giants. I am the African-American, female child of two college graduates, and the grandchild of two college graduates with graduate degrees. As such, I am no stranger to education and opportunity. I am also no stranger to privilege. Mine is not a story of a person of color rising through a low-income background of hardship to accomplishment. I was raised in an upper-middle class suburb of Atlanta, knowing neither hunger nor helplessness. I am the first lawyer in my family, but I received my undergraduate degree, my law degree, and my master of laws degree on merit scholarships. Upon graduation from law school, I practiced law at one of the country's largest law

6. King, *supra* note 4, at 10–11 (“Black Americans are ‘connected’ in 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.”).

7. Pearce, *supra* note 5, at 1633–34.

8. See, e.g., Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181, 182–83 (2008) (stating that more than one-third of Blacks and nearly 20% of Hispanics and Asians reported that they had personally been passed over for a job or promotion because of their race or ethnicity; stating that research shows that those who perceive high levels of discrimination are more likely to experience depression, anxiety, and other negative health outcomes; stating that perceived discrimination may lead to diminished effort or performance in education or the labor market).

firms, making unseemly sums of money for one so young, and I currently teach law, making unseemly sums of money for one so happy in her profession. I am, on almost every professional level, a success story.

During my early life, I never questioned my acceptance or place in the African-American community⁹ and took great comfort in this. The differences in members of my community have always paled in comparison to our shared historic struggles of slavery, racism, and discrimination and the battles against the internal pathologies we continue to face as a community.¹⁰ Because of our shared history and experiences, and my comfort in belonging, I felt this solidarity with my race as we collectively fought to support and protect each other to break from the vestiges of slavery. I never anticipated that this sense of racial solidarity would be at risk. I watched as others in my community were cast as outsiders, but I rationalized that the extremity of their behavior explained why members of my community felt the dis-ownership was necessary.¹¹ But I never felt any differences between my community and me that were significant enough to make *me* an outsider. I attended a primarily African-American elementary school, high school, college, and law school. During these early years of my life, I did not have as full an appreciation for how our divergent experiences could splinter my cherished racial solidarity. It was not until I attended law school at Howard University, a historic and predominantly African-American university, that my perspective began to change.

Howard University School of Law holds a special place in the history of African-Americans because it is the former home of John Mercer Lang-

9. See Regina Austin, "The Black Community," *Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1769 (1992) (describing "the black community," as once "a place where people both lived and worked" and now "more of an idea, or an ideal, than a reality.").

10. See, e.g., Bruce Drake, *Incarceration Gap Widens Between Whites and Blacks*, PEW RESEARCH CTR., <http://www.pewresearch.org/fact-tank/2013/09/06/incarceration-gap-between-whites-and-blacks-widens/> (stating that Black men were more than six times as likely as White men to be incarcerated in federal and state prisons, and local jails in 2010); *Economic News Release*, U.S. DEP'T OF LABOR, <http://www.bls.gov/.release/.t02.htm> (showing an 8% June 2016 unemployment rate for African-American men over the age of 20, twice that of White men over the age of 20); *Health of Black or African American non-Hispanic Population*, CTR. FOR DISEASE CONTROL AND PREVENTION: NAT'L CTR. FOR HEALTH STATISTICS, <http://www.cdc.gov/nchs/fastats/black-health.htm> (showing that almost 60% of African-American women over the age of twenty are obese); Eileen Patten & Jens Manuel Krogstad, *Black Child Poverty Rate Holds Steady, Even as Other Groups See Declines*, PEW RESEARCH CTR., <http://www.pewresearch.org//07/14/black-child-poverty-rate-holds-steady-even-as-other-groups-see-declines/> (showing that almost 40% of Black children lived in poverty and were almost four times as likely as White or Asian children to be living in poverty in 2013, and significantly more likely than Hispanic children).

11. See, e.g., Joan Biskupic, *For Clarence Thomas, Another Invitation and Another Flap*, WASH. POST, June 18, 1998, <http://www.washingtonpost.com/wp-srv/national//stories/wpthomas061898.htm> (noting a number of African-American organizations and a prominent African-American former U.S. Appeals Court Judge who disavow African-American U.S. Supreme Court Justice Clarence Thomas because of his views on issues seen as important to the African-American community).

ston¹² and Thurgood Marshall,¹³ amongst many others. While my decision to attend Howard was primarily a financial one,¹⁴ I expected to feel at home amongst other African-American law students. I expected that, amongst other law students of color, I would feel a kinship in striving toward the common goal of practicing law. Soon after my arrival at Howard, some students informed me that I did not “belong” there, primarily, I was told, because of my economic status. While in law school, I lived in a small, comfortable apartment in a building that was within walking distance from the law school; I had a car that, while not new, was safe; I was not required to work because what extra funds I needed, my parents could provide. Because of my economic position growing up and while in law school, I was told that I did not have the “typical black person’s experience.” I was informed that I was one of the “haves” while they were the self-designated “have-nots.” *I was not one of them.* Suddenly, in an environment where I assumed acceptance and camaraderie, fellow members of my race sought to cast me as an outsider.

Not surprisingly, I fought back against this idea of a universal or even typical “black person’s experience” or that all persons of the same race should have the same experience to belong. I objected to the idea that the absence of this singular experience delegitimizes one’s membership in that racial community. I resisted my classmates’ assumptions that their struggles made their place in our community more secure. At the time, I wondered what it was about their experiences that led them to feel the need to dictate that their experience was the only pure experience. Had my family and I not economically suffered or sacrificed enough to ‘belong’? While shared sacrifice often contributes to a sense of belonging, was it necessary for acceptance in a community suffering from oppression? If so, who determines how much sacrifice is sufficient? Whose experience establishes the metric for acceptance?

This divergence continued as I began practicing at a large law firm. The vast majority of my colleagues and clients were White and affluent. As many attorneys of color working in similar environments, I was functioning in a world of people with whom I had professional, educational, and income similarities, but no racial connection.¹⁵ I was left to navigate this

12. Active in the abolitionist movement before the Civil War, John Mercer Langston was a central figure in the struggle for gaining voting rights and other opportunities for freed slaves. He helped establish Howard University and was the inaugural dean of Howard University School of Law. *See generally* BLACK LEADERS OF THE NINETEENTH CENTURY (Leon Litwick & August Meier eds., 1988).

13. Widely known for his work as an attorney in *Brown v. Board of Education*, 349 U.S. 294 (1955), Thurgood Marshall was the first African-American U.S. Supreme Court Justice and a graduate of Howard University School of Law. *See generally* GLENN L. STARKS & F. ERIK BROOKS, THURGOOD MARSHALL: A BIOGRAPHY (2012).

14. Howard offered me a full-tuition, merit-based scholarship, plus a living stipend.

15. Pearce, *supra* note 5, at 1634 (“In contrast, in an organization or society where women or people of color are often found in low status positions and less frequently in high status

work environment and profession in which my race is an unalterable characteristic of my person, though it is expected to be an irrelevant aspect of my legal analysis and professional responsibility. It raised questions: How do we, as attorneys of color, balance our race-neutral professional obligations with a need to maintain our racial solidarity? How must we conduct ourselves to be accepted by our colleagues and our clients without being cast as an outsider to our race?

A few years after leaving my law firm job, I accepted a low-paying teaching fellowship at Georgetown University Law Center. I bought a house in the Trinidad neighborhood, a gentrifying, predominantly African-American neighborhood in Washington, D.C. I expected, as I did when matriculating into Howard's law school, a racial solidarity in my own racial community. However, soon after moving into the neighborhood, the impact of different socio-economic backgrounds became evident as my neighbors and I had opposing reactions to the pathologies of poverty in my new neighborhood. When one of my neighbors attempted to break into my home, my reaction was to call the police; my neighbors' reactions were to criticize me for potentially sending someone from the neighborhood to jail. When I caught a neighborhood teenager smoking marijuana in the alley behind my house, my reaction was to challenge him to understand the legal and health consequences of that behavior. His reaction was *genuine* confusion and indignation that he was being criticized because, as a high-school graduate working a full-time job without an arrest record, he was, he argued, a success in that neighborhood. When a large number of young men in the neighborhood were arrested for participating in a drug ring, my reaction was relief and gratitude that a source of crime was, at least temporarily, eliminated. A young neighbor's reaction was sadness at the loss of his friends who, he insisted, "were good guys." With each event, the only commonality we had in our reactions was surprise at the other's. Although I intellectually knew that my racial community was not monolithic, these experiences established my evolving understanding, though not yet acceptance, of the diverging definitions of those considered "insiders" and those cast as "outsiders" within a single community.

While living in the Trinidad neighborhood of Washington, D.C., I worked for a number of years helping low- and moderate-income tenants in multi-family apartment buildings purchase their buildings when the owners put those buildings up for sale. When tenants received notice that they could purchase their apartment buildings,¹⁶ they hired attorneys, such

position [sic], a professional woman or person of color would be incongruently embedded and therefore face greater internal and external tension between group and professional identity. . . .").

16. The D.C. Tenant Opportunity to Purchase Act, D.C. CODE §§ 42-3401-42-3405.13 (2001) (requiring landlords to provide tenants with the opportunity to purchase residential rental units and buildings when landlords put their property up for sale. This statutorily controlled

as myself, to help them navigate this legal transaction.¹⁷ As part of this process, I worked primarily in low- and moderate-income neighborhoods in mostly African-American communities. I enjoyed working in these communities because I helped residents—who were often financially unstable—to become homeowners, which could then lead to financial security. It offered renters in low- and moderate-income neighborhoods, who were often oppressed and disenfranchised, the ability to exercise some level of control over their housing and, thus, the direction of their lives. I was able to offer my skills and experience to the African-American community, who I viewed as my race client¹⁸: a community to whom I felt such a powerful sense of obligation that my obligation to it rose to that of a client.

This experience again raised some questions—my clients here, as my clients at the law firm, expected professional and objective legal counsel regardless of my race. However, does representing clients of color change the role race should play in legal representation? If so, in a country so mired in race, how does one remove the influence of race from legal analysis and representation, particularly as an attorney of color? Do we, as attorneys of color, have a greater responsibility to ensure that our representation is race-neutral or a greater responsibility to ensure that neither our colleagues, nor our same-race clients, nor we, forget the impact of race? Further, how do attorneys of color navigate the legal representation of members of our communities when there are such divergent views of who is an insider? What role should our race play in our efforts to be a lawyer for members of a community who may not even view us as one of their own?

B. *The Race Client*

For many attorneys of color, our race is an integral part of our identity.¹⁹ While some are raised to view themselves as separate and apart from their race, many of us are raised with an intense sense of connection to our racial community.²⁰ Our intense sense of connection gives rise to a per-

process begins with a notice of the landlord's intent to sell and the tenants' opportunity to purchase).

17. See generally Julie D. Lawton, *Tenant Purchase as a Means of Creating and Preserving Affordable Homeownership*, 20 GEO. J. ON POVERTY L. & POL'Y 55 (2012) (examining the DC Tenant Opportunity to Purchase Act, including the role of attorneys working with tenants associations navigating the process).

18. Julie D. Lawton, *Who Is My Client? Client Centered Lawyering with Multiple Clients*, 22 CLINICAL L. REV. 145, 176–80 (2015); see also *infra* Section II.B.

19. David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1532–33 (1998) (“Racial identity—and in particular African American racial identity—constitutes this kind of powerful social force. Race exerts a major influence over every significant aspect of the lives of black Americans The essential point is that in today's America, *race matters* in ways that inevitably structure identity.”).

20. *Id.* (“[Race] literally colors the way that we are perceived by the world at the same time that it shapes our self-perceptions. As a result, blacks are inextricably bound together, both

sonal urgency to support and serve members of our race as individuals and to protect our racial collective. For many of us, this personal duty creates what I describe as a “race client”.²¹ I have previously described a race client as follows:

As a lawyer governed by a professional code of ethics, I have a professional obligation to my clients. However, because of my ardent belief in the opportunities provided by homeownership and my personal sense of obligation to my African-American community, I also have a deep sense of obligation and personal duty to these causes as well. I remain a fervent advocate for affordable homeownership—so much so that affordable homeownership became the legal policy cause for which I advocate. Because I feel a personal duty to empower members of my race as individuals and as a group, the cause of supporting and protecting members of my racial community as individuals and as a collective became my race client. I have, in essence, 3 clients—my individual corporate client, my cause client and my race client.²²

Same-race legal representation can be an attempt by the lawyer and the client to reinforce an undeniable bond—a historic, common struggle against racial discrimination and oppression. Many attorneys of color fight against this historic oppression by serving their race client.²³ As further explained in the next section, an attorney of color’s service to the race client can be accomplished by representing individual clients of the same race or representing corporate clients whose membership, ownership, or purpose imbue the corporation with the same racial identity as the attorney of color.

1. Representing the Race by Representing the Racial Corporation

During my practice representing tenants in Washington, D.C., my clients were tenants associations, as opposed to individual tenants.²⁴ I worked with individual tenants seeking to become first-time homeowners, but they accomplished that goal by forming a tenants association, which

in the sense that the actions of individual blacks impact the opportunities of other blacks, and in the manner in which the opportunities available to all blacks are tied to the fate of the black community as a whole.”).

21. Lawton, *supra* note 18.

22. Lawton, *supra* note 18, at 146.

23. *Id.*

24. Susan Bennett, *Little Engines That Could: Community Clients, Their Lawyers, and Training in the Arts of Democracy*, 2002 WIS. L. REV. 469, 473 (2002) (“Technically, when you represent an entity, you are representing a representation: the aspirations of a created community, expressed through a mission statement necessarily made flesh through its elected or appointed articulators.”).

was my client. The tenants association was the entity through which the tenants negotiated the purchase of their apartment building, obtained loans, and received my counsel. Although these corporate entities were ostensibly race-neutral entities, these types of corporations were typically formed almost exclusively by residents of the same race to help them accomplish goals specific to the protection, support, or furtherance of members of that race. In this regard, the corporations were not race-neutral in their ownership or purpose. Rather, they were entities with a corporate race.²⁵ For many attorneys of color, these racial corporations are the vehicles through which we serve our racial communities. Community development corporations formed by residents of color to redevelop their neighborhoods or non-profits formed by members of a racial community to protest the treatment of its members are but two examples. Attorneys of color are able to serve our race clients to effect social change by representing these corporations.²⁶ Through these racial corporations, individual members are able to leverage their collective power to achieve change in communities that might otherwise suffer. In same-race legal representation, these racial corporations also create an avenue for trust. For attorneys of color, these racial corporations are not only the entities through which the individual members of our race accomplish their dreams of social change, but they are also the vehicles through which attorneys of color accomplish goals of supporting and protecting our racial communities.

2. Representing the Race by Representing the Individual

Attorneys of color most often represent a race client by representing a same-race individual client or working with the individual members of the racial corporation. The racial corporation may be the client, but the individual members of those corporations are the ones with whom the attorney interacts. Regardless of the actual form of the client, it is either the individual member of the corporation or the individual client who demonstrates the racial connection and solidarity that many of us seek in same-race legal representations. It is the individuals that pull us aside, tell us of their pride, and give us their trust.

These individuals trust us with their dreams of social or financial change. They want attorneys of color to be different from other lawyers whose racial bias²⁷ often left them disappointed and distrustful of “outsid-

25. Richard R.W. Brooks, *Incorporating Race*, 106 COLUM. L. REV. 2023, 2025 (2006); see also Lawton, *supra* note 18, at 159–60 (discussing a corporation’s racial identity).

26. Steve Bachman, *Lawyers, Law and Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1, 21 (1984) (“The primary motor of social change is social struggle, not legal struggle. . . . The lawyer’s role is more the oiler of the social change machine than its motor; the motor of the machine remains masses of people.”).

27. See Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Bias on the Exercise of Prosecutorial Discretion*, 39 SEATTLE U. L. REV. 795 (2012) (examining implicit bias in prosecutorial decisions and arguing that such bias skews prosecutorial decisions); cf. Jean

ers.” Our clients look to us to represent them well because of our professional responsibility, but also, I suspect, because of our racial commonality. However, should race play a role in client-attorney interaction?

III. THE ROLE OF RACE IN INTER-RACE LEGAL REPRESENTATION

A. Color-Blind Legal Representation

1. The Model Rules’ Race Neutrality

One argument is for a lawyer to be color-blind in legal representation and analysis. The American Bar Association’s Model Rules of Professional Conduct (“Model Rules”) prohibit a lawyer’s racially discriminatory behavior²⁸ and require a lawyer to offer candid advice to a client.²⁹ They are purportedly race-neutral and “are explicitly cast in universalist terms that purport to apply to all lawyers in all contexts.”³⁰ Thus, “non-professional identity” characteristics, such as race, are omitted.³¹ The Model Rules allow the lawyer’s advice to include other considerations such as “social and political factors.”³² They also recognize that “moral and ethical considerations impinge upon most legal questions”³³ and that a lawyer’s racial iden-

Braucher, Dov Cohen & Robert M. Lawless, *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 J. EMPIRICAL LEGAL STUDS., 393–429 (2012) (study showing consumer bankruptcy attorneys demonstrate racial bias against Black debtors); Theodore Eisenberg & Sheri L. Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539 (2004) (examining the implicit bias of death penalty lawyers); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012) (describing implicit bias in the courtroom, including judges and attorneys); Abigail Hauslohner, *Why a Law Meant to Protect the Poor From Gentrification Doesn’t Really Work*, WASH. POST, Feb. 6, 2016, https://www.washingtonpost.com/local/dc-politics/why-a-law-meant-to-protect-the-poor-from-gentrification-doesnt-really-work///—11e5—e2d1b4289c2f_story.html (describing how poor tenants who receive the opportunity to purchase their apartment building are often left in deplorable living conditions to coerce them to vacate the building for more profitable development).

28. MODEL RULES OF PROF’L CONDUCT r.8.4. (AM. BAR ASS’N 2016) (“It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.”).

29. *Id.* r.2.1 (“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”).

30. Wilkins, *supra* note 19, at 1504.

31. *Id.*

32. MODEL RULES OF PROF’L CONDUCT r.2.1. (AM. BAR ASS’N 2016).

33. *Id.* r.2.1. cmt. 2 (“It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.”).

tity often impacts a lawyer's morality and ethics.³⁴ However, aside from race as an ancillary consideration to these factors, the Model Rules do not expressly permit a lawyer to allow race to impact the lawyer's representation of a client.

2. Other Arguments for Race Neutrality in Legal Representation

The arguments for race neutrality are based on the idea that the rule of law is an impartial application of impartial rules.³⁵ The theory is that a judge or jury will apply the same set of rules to an objective review of the facts without regard to the parties' respective races or other personal characteristics.³⁶ In this paradigm of race neutral lawyering, the legal system would adjudicate cases based solely on the similarity of the facts of the case, with no consideration of the races of the litigants or of any implicit racial dynamics that might impact a case's outcome.

In support of color-blindness in the law, Chief Justice John Roberts argued, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."³⁷ Admittedly, this idea that race would impact a case only when the impact is intentional is appealing to a lawyer's sense of fairness and neutrality. It creates the impression that eliminating intentional and blatant racial discrimination will enable participants in the legal system to stop discriminating on the basis of race. Based on this theory of race neutrality, eradicating the impact of race is achievable if we simply choose to "stop discriminating on the basis of race," which, theoretically, means rejecting the consideration of race.³⁸

For some, eliminating the consideration of race is not only achievable, but also preferable. Years ago, William Van Alstyne, a law professor at Duke University, wrote:

Rather, one gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment *never* to tolerate . . . in the life or practices of one's government—the differential treatment of other human beings by race. Indeed, that is the great lesson for government itself to teach; in all we do in life, whatever we do in life, to treat any person less well than another or to favor any more than another for being black or

34. Wilkins, *supra* note 19, at 1508 ("[T]he obligation thesis—that is, of course, the proposition that racial identity is relevant to moral obligation.").

35. Roland Acevedo, Edward Hosp & Rachel Pomerantz, *Race and Representation: A Study of Legal Aid Attorneys and Their Perceptions of the Significance of Race*, 18 BUFF. PUB. INT. L. J. 1, 5 (1999–2000).

36. *Id.*

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

38. *Id.*

white or brown or red, is wrong. Let that be our fundamental law . . .³⁹

In his oft-quoted article about Jewish identity in lawyering, Sanford Levinson, an accomplished legal scholar, also argued for race-neutral lawyering as ideal, stating:

The triumph of what might be termed the standard version of the professional project would, I believe, be the creation, by virtue of professional education, of almost purely fungible members of the respective professional community. Such apparent aspects of the self as one's race, gender, religion, or ethnic background would become irrelevant to defining one's capacities as a lawyer.⁴⁰

Another author, Professor Russell Pearce, also describes race-neutral lawyering as “the ideal of the rule of law, with its aspiration for a legal system based on neutrality, impartiality, and the treating of like cases alike and different cases differently.”⁴¹

While race neutrality in the legal justice system and client-lawyer interaction may be appealing to those subscribing to the concept of Justice is Blind,⁴² others argue that lawyers should acknowledge the impact of race and work within those confines. The following section sets forth arguments for race consciousness in lawyering.

B. *Racially Conscious Legal Representation*

In contrast to the idea of race-neutral lawyering, some authors encourage lawyers to understand that race, whether in inter-race lawyering or, as this Article examines, in intra-race lawyering, influences the lawyer's and the client's interaction with each other and to incorporate that understanding in their lawyering.⁴³ Vanessa A. Edkins, a psychology professor,

39. William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809–10 (1979).

40. Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1578–79 (1992–93).

41. Pearce, *supra* note 5, at 1628.

42. *But see Justice Is Not Blind*, AM. C.L. UNION (May 4, 2000), <https://www.aclu.org/news/justice-not-blind>; LEADERSHIP CONFERENCE ON CIVIL RIGHTS, JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM, <http://www.protectcivilrights.org/pdf/reports/justice.pdf> (reporting the racial disparities in various aspects of the criminal justice system).

43. Deborah N. Archer, *There Is No Santa Claus: The Challenge of Teaching the Next Generation of Civil Rights Lawyers in a “Post-Racial” Society*, 4 COLUM. J. RACE & L. 55, 69 (2013) (“With the current approach to cross-cultural lawyering, the goal is to make consideration of the lawyer's and client's culture a normal part of the lawyer's thought process.”); Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 383 (2002) (“As many have written, and as the above definition of culture suggests, all counseling is

published a study suggesting that the client's race influences the lawyer's negotiations for a plea bargain for criminal offenses.⁴⁴ Writing with two other professors, Professor Alexis Anderson notes that racial similarities and differences affect how lawyers and clients perceive each other.⁴⁵ When lawyers see "sameness" in their client, whether that sameness is based on race, economic background, or life experiences, lawyers are inherently more likely to value, trust, and work with those clients more than those clients lawyers view as different.⁴⁶ This inherent preference for sameness can then impact a lawyer's intentions to be race neutral is his or her lawyering.

Instead of race-neutral lawyering, Professor Bill Ong Hing exhorts lawyers to recognize the race and other demographic traits of clients.⁴⁷ He argues that cross-cultural lawyering can be effective, but "only with full consciousness, sensitivity, and constant work."⁴⁸ Similarly, Professor Deborah Archer exhorts lawyers to become skilled cross-cultural lawyers by not only recognizing the client as a racial being, but also examining the lawyer's own views about race.⁴⁹ These views, she argues, can influence the lawyer's legal analysis, review of the facts, and assumptions of responsibility.⁵⁰ Professor David Wilkins has gone so far as to argue that not only does race play a role in lawyering, but also that African-American lawyers have a right to consider their moral responsibilities to members of the African-American community in their role as lawyers.⁵¹

Other authors also perceive a disconnect in lawyering when lawyers ignore the role of race and argue it is particularly problematic when the

cross-cultural—even an interaction between a male, WASP lawyer from Newton Centre, Massachusetts and his male, WASP client from the same city.”).

44. Vanessa A. Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 LAW & HUM. BEHAV. 413 (2011).

45. Alexis Anderson, Lynn Barenberg & Carwina Weng, *Challenges of "Sameness": Pitfalls and Benefits to Assumed Connections in Lawyering*, 18 CLINICAL L. REV. 339, 341 (2012) (“Unconsciously, we categorize people into groups—in-groups whose members share characteristics with ourselves, and out-groups whose members appear different from ourselves. This categorization affects how we perceive other people . . .”).

46. *Id.*

47. Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807, 1808 (1992) (“In teaching about good community lawyering, I stress that lawyers need to be conscious of the class, race, ethnicity, gender, sexual orientation, possible physical disability, and age of the attorney, the client, their allies, their enemies, and other institutional players.”).

48. *Id.* at 1824.

49. Archer, *supra* note 43, at 69–70 (“Moreover, a skilled cross-cultural lawyer must not only acknowledge her client's race, but also the way her own attitude about race and racism may impact her interactions with her client, her examination of the legal and factual issues presented in the case, the course of action selected, and the attribution of blame.”).

50. *Id.*

51. Wilkins, *supra* note 19, at 1521.

race of the lawyer and the client is different.⁵² In examining this issue, Professor Michelle Jacobs recognized the challenges lawyers have in communicating with clients when the race of the client is different from the race of the lawyer.⁵³ She argues that cultural differences in communication might interfere with the ability of the two to communicate.⁵⁴ Jacobs noted: “[I]f the inhibiting factor is the race of the lawyer, and/or the lawyer’s expectations regarding the client and the clients’ culture, knowledge of the facilitators will not provide the lawyer with the tools to break through the barrier.”⁵⁵ She maintains that challenges in lawyer-client communication actually occur because lawyers assume an ability to reach the client regardless of cultural differences, and the inability to do so is generally assumed to be because of the client’s insufficiencies and not because the lawyer lacks cultural sensitivity.⁵⁶

Professor Carwina Weng similarly contends that there is a need for cultural sensitivity in lawyering, because racial differences can affect how the lawyer and client interact. In a recent article, she recounts a story in which she represented a woman that had a restraining order out against her husband.⁵⁷ The client told Weng that Weng could not understand the client’s life because the client “bounced from shelter to shelter with a small bag of clothes” whereas Weng had “a loving husband and drove a new car.”⁵⁸ Weng surmised that the client equated Weng with the “other privileged and powerful service providers in her life, who were investigating and seemingly judging her life and behavior.”⁵⁹ Weng suggests that she was able to be a culturally sensitive lawyer by making an adjustment in her lawyering.⁶⁰ In this instance, she adjusts by “acknowledging explicitly the class and personal differences” between herself and her client and by ver-

52. Ong Hing, *supra* note 47, at 1809–10 (“This class difference is likely to be apparent even if I were from a poor background myself, because my poor background would likely be different from that of Ms. Pierce’s and, in reality, my education has changed me, especially in the eyes of Ms. Pierce. I must be conscious of my manner of speech and the setting in which the interview is conducted. In attempting to develop a rapport with Ms. Pierce, I must be aware of the subject matter of any small talk. The difference in our racial and ethnic backgrounds may also make it more or less likely for her to open up to me. Our gender difference is a variable in our rapport as well. However, by knowing more about her race and culture and by being cognizant of our differences, I may avoid making inappropriate assumptions and establishing false expectations and thereby improve my ability to communicate with her.”).

53. Michelle Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 357 (1997).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 376.

58. *Id.*

59. *Id.*

60. *Id.*

bally reinforcing the client's authority in the case.⁶¹ Professor Susan Bryant similarly argues, "a competent cross-cultural lawyer acknowledges racism, power, privilege and stereotyped thinking as influencing her interactions with clients and case planning, and works to lessen the effect of these . . . influences."⁶²

Others have also argued that a refusal to recognize the impact of race makes a lawyer less effective.⁶³ Russell Pearce concludes that efforts to "bleach-out" issues of race have a significant negative impact on a lawyer's practice, particularly that of White lawyers.⁶⁴ Similarly, Paul Tremblay notes, "*all* counseling is cross-cultural".⁶⁵ Professor Shani King goes further, arguing that cross-cultural competence is an insufficient bridge in intra-race lawyering and that instead, organizations must hire same-race lawyers for clients of color to bridge the cultural divide.⁶⁶

Other professions also recognize the impact of race and culture on professional interactions.⁶⁷ The American Psychological Association encourages psychologists to recognize how their culturally based attitudes and beliefs can negatively impact their professional interactions.⁶⁸ The medical profession recognizes the impact of racial and cultural differences on the doctor-client relationship and has called for a more diverse medical workforce in an attempt to address these issues.⁶⁹ The American Dental Education Association argues that culturally sensitive patient care enables dental "providers to respond to the sensibilities of patients whose cultures and values may be very different from their own."⁷⁰

These legal scholars and other professionals provide compelling arguments for race-conscious lawyering. Another argument for the legal profession's recognition of the impact of race on lawyer-client relationships is

61. *Id.*

62. Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 55 (2001).

63. *E.g.*, Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 FORDHAM L. REV. 2081, 2089 (2005) ("Despite the persistence of racial identity group influences, white lawyers tend to deny the influence of their racial identity group on their work as lawyers. When professionalism's ideological commitment to color blindness reinforces this tendency, the resulting symbiosis undermines the capacity of white lawyers to represent clients to the best of their ability.").

64. *Id.* at 2091.

65. Tremblay, *supra* note 43, at 383.

66. King, *supra* note 4, at 5-6 ("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 words, cultural competence training in legal services organizations is not enough.").

67. *See infra* notes 69-71 and accompanying text.

68. Am. Psychol. Ass'n, *supra* note 2, at 382-85.

69. Warren J. Ferguson & Lucy M. Candib, *Culture, Language, and the Doctor-Patient Relationship*, 34 FAM. MED. & COMMUNITY HEALTH 353, 353 (2002).

70. Am. Dental Educ. Ass'n, *Need for Diversity*, DENTISTRY 101, http://www.adea.org/GoDental/Dentistry_101/Need_for_diversity.aspx (last visited Feb. 20, 2016).

how differently African-Americans and White Americans view the impact of race on the implementation of the law. For example, in an interview conducted in 2013, George Washington University Political Science Professor John Sides noted that African-Americans were “extraordinarily skeptical” of the fairness of the criminal justice system, while Whites perceived the criminal justice system as “color-blind.”⁷¹ Professor Sides notes a number of reasons for the disparity in views about the criminal justice system, including the vicarious experiences of many African-Americans with acquaintances who had negative experiences with the law.⁷²

The foregoing arguments are persuasive. Reflecting on the study by Professor Sides, it is illogical to presume that such divergence of views about the impact of race does not exist within the legal profession. Race impacts a lawyer’s representation of a client, just as race impacts a client’s interaction with the law and the lawyer. The impact of vicarious experiences is persuasive as well. It is reasonable to expect that experiences of lawyers’ acquaintances with clients of color similarly impact how lawyers view their clients of color. For example, when lawyers hear stories of their colleagues’ negative interactions with clients of color, comments by colleagues about judges’ differential treatment of white defendants and defendants of color, and vicarious experiences of colleagues’ interactions with the sheer number of people of color as defendants in criminal courts, how do these experiences not impact how a lawyer views his or her own clients of color? These experiences all likely influence a lawyer’s views of race and the law and, thus, the lawyer’s interaction with, and legal representation of, clients of color.

Professor Pearce similarly agrees that race-neutral lawyering is a fallacy.⁷³ He argues that a lawyer’s group identity will influence how the lawyer interprets the world, the lawyer’s work, and how the lawyer interacts and relates to others, including clients.⁷⁴ He thus concludes, “facially group neutral standards of conduct are not neutral” because these standards “will inevitably have group identification content, most probably the perspective of dominant identity groups.”⁷⁵ As other scholars have noted, the assumption of race neutrality in legal representation would require a shift-

71. John Sides, *White People Believe the Justice System Is Color Blind. Black People Really Don’t.*, WASH. POST: WONKBLOG, (July 22, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/07/22/white-people-believe-the-justice-system-is-color-blind-black-people-really-dont/>.

72. *Id.*

73. Pearce, *supra* note 5, at 1634.

74. *Id.*

75. *Id.* (“[I]ntergroup theory asserts that group identity influences the way we as lawyers and judges look at the world and at our work, and how we relate to other people within the legal system. Therefore, facially group neutral standards of conduct are not neutral. They will inevitably have group identification content, most probably the perspective of dominant identity groups.”).

ing of indifference to race by attorneys, clients of color, and third parties that has not, to date, been shown to exist.⁷⁶

IV. THE ROLE OF RACE IN INTRA-RACE LEGAL REPRESENTATION

A. Does Racial Sameness Matter for Effective Legal Representation?

Members of the same race identify with each other more than members of other races.⁷⁷ There is an argument that such a shared cultural heritage improves the lawyer-client connection and communication.⁷⁸ Does this, in turn, make a same-race lawyer a better lawyer for that client? Attorney Kenneth Troccoli relates a story about an African-American client represented by a White public defender, who tells the public defender that the client prefers an African-American lawyer.⁷⁹ The public defender responds that he is an experienced criminal lawyer and intends to vigorously represent the client regardless of racial similarity or differences.⁸⁰ The client persists, arguing that his experiences have shown rampant racism in the treatment of African-American men in the criminal justice system, which an African-American attorney would more clearly recognize.⁸¹ The client, adamant about the impact of race on the attorney-client representation, “explains that an African-American lawyer will be better able to understand and appreciate the circumstances that resulted in the bringing of . . . charges and that he, the client, can trust a Black lawyer more than a white one.”⁸² Does the most effective legal representation necessitate same-race lawyering?

76. Acevedo et al., *supra* note 35, at 15–19. On some level, I am intrigued by this idea of uniform treatment of individuals of different races—this idea that we, as a society, will see the individual, not the cover; that we will always evaluate each race, culture or religion the same as we do our own. However, my choice—my need—to protect and support my racial community is not unique. This self-protection over the course of history continues. As long as we are more inclined to protect our “own,” we are more likely to protect others we view as being like ourselves to the disadvantage of others we do not view as like us. *But see* RENATO ROSALDO, *CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS* 103 (1993) (“Even when they appear most subjective, thought and feeling are always culturally shaped and influenced by one’s biography, social situation, and historical context.”).

77. Anderson et al., *supra* note 45, at 341 (“[A]utomatically, we might exaggerate differences among groups and favor our in-group over any out-group. Our preference for our own in-group leads us to value, trust, and work with members of our in-group more than we do members of an out-group. Hence the seduction of sameness.”).

78. Bryant, *supra* note 62, at 41 (“As we recognize these individual differences, we also know that sharing a common cultural heritage with a client tends to improve our predictions and interpretations and to reduce the likelihood of misunderstandings.”).

79. Kenneth 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, 2 (2002).

80. *Id.*

81. *Id.*

82. *Id.*

Is a lawyer with the best experience the best lawyer for a client, even if that lawyer has no demographic similarity to, or personal understanding of, the group? Or, does a recognition that race impacts the attorney-client relationship mean that a lawyer with less experience, but who is reflective of the group's demographics, is a better lawyer for a client? Many years ago, Charles Hamilton Houston, former Dean of Howard University School of Law, noted that the "primary social justification" for the African-American lawyer in this country is "the social service he c[an] render the race as an interpreter and proponent of its rights and aspirations."⁸³ Does our shared race alone make African-American lawyers the best legal representatives for African-Americans?

A few years ago, in examining these questions, lawyers with the New York Legal Aid Society's Civil Division, studied other New York Legal Aid Society lawyers' expressed beliefs on the impact of race on attorney-client legal representation.⁸⁴ White attorneys and attorneys of color had differing views on these issues. A majority of the attorneys of color believed that clients are more open with attorneys of the same race as the client.⁸⁵ However, White attorneys overwhelmingly thought that same-race lawyering did not impact effective legal representation.⁸⁶ White attorneys argued that the skill, commitment and willingness to listen were more instrumental in effective representation; qualities, one attorney noted, not tied to race.⁸⁷

Open debate continues on this issue. Former Federal District Judge Harold Baer, Jr. supported the premise that same-race attorneys are needed for the most effective lawyering.⁸⁸ In the judiciary, however, he was virtually alone in this argument.⁸⁹ This debate became public in a recent string of cases decided by Judge Baer.⁹⁰ In *Martin v. Blessing*,⁹¹ Sirius Satellite Radio, Inc. and XM Satellite Holding, Inc. sought to merge into a larger company to be called Sirius XM Radio, Inc.⁹² Subscribers of the companies argued that the merger was an antitrust violation and, after some liti-

83. Wilkins, *supra* note 19, at 1503 (quoting GENNA RAE McNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 218 (1983)).

84. Acevedo et al., *supra* note 35, at 24–61.

85. *Id.* at 40–43 (noting that 57% of surveyed attorneys of color agreed that clients are more open with attorneys of the same race and 41% of White attorneys disagreed, and also noting that 73% of White attorneys, but only 42% of attorneys of color disagreed that attorneys of color are more effective representatives of people of color).

86. *Id.*

87. *Id.* at 42.

88. Michael H. Hurwitz, *Judge Harold Baer's Quixotic Crusade for Class Counsel Diversity*, 17 CARDOZO J. L. & GENDER 321, 324–27 (2011); *infra* note 98.

89. Hurwitz, *supra* note 88, at 327.

90. *Martin v. Blessing*, 134 S. Ct. 402 (2013); *infra* note 97.

91. 134 S. Ct. 402 (2013).

92. *Id.* at 402.

gation, sought to be certified as a federal antitrust class.⁹³ One of the requirements for certifying the class was that the class needed adequate class counsel, as determined by factors set forth in the Federal Rules of Civil Procedure.⁹⁴ The rule allowed the lower court, in addition to other determinants, to “consider any other matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class.”⁹⁵ Judge Baer, the lower court judge, required that the law firms appointed as class counsel “ensure that the lawyers staffed on the case fairly reflect the class composition in terms of relevant race and gender metrics.”⁹⁶

This was not Judge Baer’s first judicial ruling requiring class counsel to be reflective of the gender and racial dynamics of the class.⁹⁷ In a previous case involving J.P. Morgan Chase, Judge Baer also required diversity in the racial and gender demographics of the law firms representing the class.⁹⁸ Class counsel, he reasoned, was more of a “judicially appointed fiduciary” and less of a private attorney hired by the litigants and, thus, the counsel should be more representative of the class—in this case, at least one “minority” lawyer and one woman lawyer with requisite experience.⁹⁹ Judge Baer’s opinions make clear that he believed that race matters with regard to effective legal representation.¹⁰⁰

93. *Id.*

94. *Id.*

95. FED. R. CIV. P. 23(g)(1)(B).

96. *Martin*, 134 S. Ct. at 402.

97. *In re J.P. Morgan Chase Cash Balance Litigation*, 242 F.R.D. 265 (S.D.N.Y. 2007); *see also Spagnola v. Chubb Corp.*, 264 F.R.D. 76, 96 n.23 (S.D.N.Y. 2010) (noting that the proposed class counsel did not submit any information such as “firm resume, attorney biographies, or otherwise” to satisfy this requirement, and requiring counsel to submit “evidence of diversity, in terms of race and gender, of any class counsel” (citing *In re J.P. Morgan*, 242 F.R.D. at 277)).

98. *In re J.P. Morgan*, 242 F.R.D. at 277. (“The proposed class includes thousands of Plan participants, both male and female, arguably from diverse racial and ethnic backgrounds. Therefore, I believe it is important to all concerned that there is evidence of diversity, in terms of race and gender, of any class counsel I appoint. A review of the firm biographies provides some information on this score. Here, it appears that gender and racial diversity exists, to a limited extent, with respect to the principal attorneys involved in the case. Co-lead counsel has met this Court’s diversity requirement—i.e., that at least one minority lawyer and one woman lawyer with requisite experience at the firm be assigned to this matter.”).

99. *Id.* (“Appointment of class counsel is an extraordinary practice with respect to dictating and limiting the class members’ control over the attorney-client relationship and thus requires a heightened level of scrutiny to ensure that the interests of the class members are adequately represented and protected. Judge Jack Weinstein of the Eastern District has aptly compared the role of class counsel to that of ‘a judicially appointed fiduciary, not that of a privately retained counsel.’” (quoting *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1106–07 (E.D.N.Y. 2006))).

100. *See Hurwitz*, *supra* note 88, at 328 (“It is unclear why Judge Baer believes that the counsel’s racial and gender diversity would facilitate his or her ability to represent the class, but perhaps it is because Judge Baer believes that a minority or female counsel would be better able

The lawyers in *Martin v. Blessing* sought a writ of certiorari to the U.S. Supreme Court, which was denied. However, Judge Baer's insistence on gender and racial diversity spurred a written opinion supporting the denial of certiorari, although opposing Judge Baer's reasoning. In his response to the writ of certiorari, Justice Alito vehemently rejected the argument that race matters in how effectively a lawyer can represent a client.¹⁰¹ To the contrary, Justice Alito cast Judge Baer's practices of requiring racial diversity as unconstitutional racial and gender discrimination.¹⁰²

The New York Legal Aid Society's lawyers, Judge Baer's opinions, and Justice Alito's responses to those opinions are just some examples illustrating a question that many lawyers of color struggle with: Does being the same race as one's client improve a lawyer's effectiveness?¹⁰³ Professor Mortazavi supports this proposition.¹⁰⁴ In response to Justice Alito's position, Professor Mortazavi argues that "[l]awyers are more likely to serve clients fairly and adequately when there is some overlap between the race and gender of the class and of the representative legal team."¹⁰⁵ She reasons that a shared race between the lawyer and client impacts their communication and spurs a lawyer's empathy and loyalty.¹⁰⁶ Loyalty, she proposes, "requires trust, a relationship, and candor,"¹⁰⁷ traits she argues are more present when the lawyer and client are of the same race. She promotes the idea of considering demographic similarities in determining whether a lawyer "is more likely to adequately and fairly consider" the interests of the clients.¹⁰⁸

to empathize or communicate with class members who share his or her racial background or gender. But why should that be so?").

101. *Martin*, 134 S. Ct. at 403 ("It seems quite farfetched to argue that class counsel cannot fairly and adequately represent a class unless the race and gender of counsel mirror the demographics of the class.").

102. *Id.* ("Based on the materials now before us, I am hard-pressed to see any ground on which Judge Baer's practice can be defended. This Court has often stressed that '[r]acial discrimination has no place in the courtroom, whether the proceeding is civil or criminal.' Court-approved discrimination based on gender is similarly objectionable, and therefore it is doubtful that the practice in question could survive a constitutional challenge." (citation omitted)).

103. King, *supra* note 4 (arguing that legal services organizations that serve large populations of African-American clients should employ African-American attorneys).

104. Melissa Mortazavi, *Blind Spot: The Inadequacy of Neutral Partisanship*, 63 UCLA L. REV. DISCOURSE 16, 21–22 (2015).

105. *Id.* at 21 ("As an initial matter, clients may trust their lawyers more and therefore be more forthcoming and candid about relevant facts and concerns. Moreover, such lawyers have cultural knowledge that allows them to communicate effectively with clients and anticipate concerns and roadblocks. Lawyers that share demographic qualities with their clients are also more likely to have empathy for their clients and substantive loyalty to their interests.").

106. *Id.*

107. *Id.* at 23.

108. *Id.* at 23–24.

After reviewing the various arguments, the notion that race does not impact an attorney's representation of a client of color is unpersuasive. While same-race lawyering might not be mandatory for the most effective representation, the existence of race-neutral lawyering remains elusive. Race-neutral lawyering may be an ideal goal to some, but arguing that race is currently irrelevant to a professional interaction suggests a level of racial objectivity that our country has yet to achieve. Lawyers should recognize that race matters, but so does adhering to the professional requirements of zealous representation, regardless of racial identity.¹⁰⁹ As Professor Wilkins noted:

[L]awyers are more than ordinary citizens; they have been given a monopoly by the state to occupy a position of trust both with respect to the interests of their clients and the public purposes of the legal framework. This status is a part of the moral identity of black lawyers.¹¹⁰

Building on the conclusion that racial sameness impacts intra-race legal representation but does not necessitate same-race lawyering for effective representation, this Article will next examine the expectations of lawyers and clients of color in intra-legal representations. Then, it will evaluate the attorney of color's role confusion in intra-race legal representation. It will conclude with an examination of the risks and resultant unhappy truths of intra-race legal representation.

B. *Lawyer's Expectations*

Any lawyer approaches legal representation with some expectation of how the representation will unfold. For attorneys of color, intra-race legal representation can be fraught with expectations. When same-race lawyers and clients meet, the history of our race is there. Some hope to ignore it and others embrace it, but it remains. This Article will identify and examine the dynamics that the attorney of color often expects from these moments of intra-race legal representation.

1. Lawyer's Heightened Expectations of Self

Attorneys of color may have heightened expectations of self when representing members of their own race. The sacrifices of our ancestors can weigh on attorneys of color, spurring us to greater levels of excellence.

109. Cf. Pearce, *supra* note 5, at 1635 ("First, as a general matter, explicit conflict between group identity and the professional role is relatively limited. Most lawyers, whatever their group identification, generally accept professional norms—including the goal of rule of law—even where they might conflict with group identification."); Wilkins, *supra* note 19, at 1538 ("[T]he sad fact that the United States is far from achieving the ideal of 'colorblind' justice does not demonstrate that the American legal system is so racist that black attorneys and other participants in the legal system should consider themselves excused from legitimate role obligations.").

110. Wilkins, *supra* note 19, at 1539–40.

For African-American attorneys, it is hard to ignore that we are but a few generations from slavery and even fewer from the ravages of the Jim Crow era.¹¹¹ The recent police killings of unarmed African-American men are a potent reminder of how close we are to some of the most trying periods in our nation's racial history.¹¹² These reminders can prompt lawyers of color to pursue a higher level of excellence to protect fellow members of our race without consciously providing lesser service to nonmembers.

Many attorneys of color feel a responsibility to help others of our race, as many of us have been given so much, and we are often humbled by the opportunity to serve. While there is debate as to whether our race alone makes us a better lawyer for them, our same-race clients' beliefs in us spur us to be better lawyers.¹¹³ However, this self-imposed heightened responsibility can also create a crisis of confidence.¹¹⁴ The desire to excel in light of such history can undermine the lawyer's confidence in her ability to succeed. Karen Thompson, a lawyer with the Innocence Project, describes representing a client of the same race as making the attorney of color feel at once both fearless and incompetent because this trust, while an empowering endorsement from one's own community, can be terrifying in its responsibility.¹¹⁵ Lawyers of color must manage our expectations to prevent them from overwhelming us and impacting our legal judgment. Our clients, regardless of our expectations of self, deserve a lawyer who can detangle their personal challenges from their lawyering.

2. Conflict Between Racial Solidarity and Professional Obligations

For many attorneys of color, when we meet with same-race clients, we often seek, and sometimes obtain, a needed racial solidarity.¹¹⁶ I never

111. *White Only: Jim Crow in America*, SMITHSONIAN NAT'L MUSEUM AM. HIST., <http://si.edu/history/1-segregated/white-only-1.html> (last visited Sept. 14, 2016) (describing legislation known as Jim Crow laws, which permitted segregation in schools, housing, jobs, the right to vote, and public gathering places).

112. Camila Domonoske & Bill Chappell, *Minnesota Gov. Calls Traffic Stop Shooting 'Absolutely Appalling at All Levels'*, NPR, (July 7, 2016, 7:19 AM), <http://www.npr.org/sections/thetwo-way/2016/07/07/485066807/police-stop-ends-in-black-mans-death-aftermath-is-live-streamed-online-video>.

113. Karen Thompson, *Creating Context Through Representation: When the Lawyer Looks like the Client*, INNOCENCE PROJECT (May 4, 2015, 5:20 PM) <http://innocenceproject.org/-through-representation-when-the-lawyer-looks-like-the-client/> (describing how both she and her clients can briefly succumb to an ingrained societal belief that because African Americans are inferior they are therefore less capable of performing certain skilled professions).

114. Lynda D. Field et al., *No Hay Rosas sin Espinas: Conceptualizing Latina-Latina Supervision from a Multicultural Developmental Supervisory Model*, 4 TRAINING & EDUC. PROF. PSYCHOL., 47, 49 (2010) ("Role shock is characterized by 'the imposter phenomenon' in which the supervisor does not identify as a supervisor, experiences a crisis of confidence and competence, and is sensitive to perceived criticism.").

115. *Id.*; Thompson, *supra* note 113.

116. Wilkins, *supra* note 19, at 1535 ("For many blacks, membership in the black community is an important source of human flourishing."); *see also* Field et al., *supra* note 114 (examin-

discouraged my clients from looking to me to be a better lawyer for them because of my race. I never encouraged them to instead trust more in my skills and experience than in our shared race. I let those expressions of trust linger unchecked. I was their lawyer and in that role, I needed them to trust me. Our sense of solidarity facilitated trust.

In these moments of trust with our clients, attorneys of color can temporarily forget about the differences that separate us from our community. These moments remind us that we are a part of something greater. In meetings with our same-race clients, there is a familiarity in our conversations because of our shared history and racial experiences.

For attorneys of color who seek racial solidarity from intra-race legal representation, a conflict will emerge: the attorney of color's sworn ethical obligation to the client will inevitably conflict with the sense of racial solidarity that the attorney of color seeks.¹¹⁷ The client's wishes will not always coincide with the attorney's ethical obligation and that can, in turn, conflict with the sense of racial solidarity the attorney of color may have felt with the same-race client. However, the lawyer's legal objectivity must remain. The need to preserve racial solidarity cannot lessen the objectivity the lawyer requires for representation. The client, regardless of the client's race, comes to the lawyer for guidance and good lawyering. The same-race client may have heightened levels of trust and greater expectations. Those expectations and our sense of responsibility to our race may tempt us to lose objectivity, but we serve our clients best when we give them the best lawyering we can—sensitive to the racial commonality, yes, but not blinded by it.

C. *Client's Expectations*

In intra-race legal representations, what are some of our clients' expectations?

1. Client's Heightened Expectations of Lawyer

In my last article, I recounted an experience from a number of years ago when I met with a group of tenants about the prospect of representing them in their efforts to purchase their mid-rise apartment building.¹¹⁸ Entering with a White female colleague into a room filled with African-

ing a similar need for same-race support in clinical psychology supervision between Latina supervisors and supervisees, and describing the resultant challenges).

117. The Model Rules of Professional Conduct do not expressly permit an attorney to make legal decisions on the basis of race, so inevitably, a lawyer's actions on behalf of a client will turn more on the lawyer's ethical obligation instead of the lawyer's racial solidarity. MODEL RULES OF PROF'L. CONDUCT r. 2.1 (AM. BAR ASS'N 2016). For instance, a criminal attorney's racial solidarity might tempt the lawyer to protest police brutality against men of color at the courthouse, but the lawyer's professional obligation to his clients to be seen as a race-neutral criminal prosecutor might require the lawyer to avoid such public protests.

118. Lawton, *supra* note 18, at 177.

American women, an elderly African-American female resident shouted, “I want the black lawyer!”¹¹⁹ She knew no more about me than she did my White counterpart, yet she immediately decided that she wanted me as her lawyer based on nothing more than my race. What is it that she saw in our racial connection that made her conclude that I was her preferred choice? Maybe she wanted to support my practice by ensuring that her business would go to an attorney of color, but given the importance of the legal transaction for which her group sought assistance, I find this conclusion unlikely. In her utterance, the elderly tenant expressed an assumption that I was a better lawyer for her as opposed to my White counterpart for no other apparent reason than our racial commonality. Ultimately, we did not represent her group. Therefore, I am left to surmise her contemplations. I assume she expected better representation from me because of our racial commonality, or expected me to interact with her differently than a non-African-American attorney would. She wanted me to be her representative based on our shared race, but our shared race does not in itself indicate shared values or shared goals. I could have been, like so many others, one of the attorneys seeking to take advantage of what is often seen as a vulnerable group. However, because of our racial commonality, she assumed I am trustworthy and expected me to be worthy of that trust.

Our same-race clients are the fellow members of our communities who often expect us to be different than non-members because we are of the same race. Many clients of color tell us how proud they are of our accomplishments and how glad they are to see those of us who “made it.” Some talk about missed opportunities and unfortunate choices that kept them from achieving their professional goals. Clients will pull us aside during and after meetings to share how much better they feel about the legal issue on which we are assisting now that they have one of their “own” on their side.¹²⁰ Phrases such as, “you’re one of us so I know I can trust you,” or “I know you got us,” remind us of their willingness, their need, to believe that having a same-race lawyer on their team makes them more secure.¹²¹

This heightened level of trust is beyond the basic trust that we as lawyers receive from our non-clients of color – there is the additional weight of the history and continued oppression, segregation, and discrimination that pulls on attorneys of color. This expectation that we *can* help

119. *Id.*

120. King, *supra* note 4, at 16 (“Black group identity includes a particular sensitivity to issues of racism and oppression, 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.’”).

121. *Id.* at 15–16 (“Under these circumstances, many 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. In short, many blacks would want their case in the hands of an African-American.”).

more is intertwined with this expectation that we *should* help more. And that can be overwhelming, particularly for newer attorneys who are also learning how to navigate their new role in the profession. Each attorney of color should work to understand the role they want to assume in their respective racial communities and retain that as a guide to navigate these experiences.

2. Racial Betrayal

Intra-race legal representation can also be difficult in that attorneys of color are expected to conduct ourselves in a manner that does not appear as a “racial betrayal” or, as Professor Russell described, being viewed as “sellouts who have abandoned their communities.”¹²² Same-race clients often initially look at us as one of their own. Their comments and behavior suggest that they see in us someone who could feel their pain and solve their problems for them because of the assumption that *of course* we understand their pain because we are of the same race. The unspoken threat (and fear) is the expectation that we will protect “our own” against non-members lest we be viewed as betraying our racial community. Take the story of Michael Greene, an African-American lawyer in Charlotte, North Carolina, and presumably an insider to members of our race until late 2015, when he represented White police officer Randall “Wes” Kerrick on charges of voluntary manslaughter for shooting an unarmed black man ten times.¹²³ After Greene’s defense and the jury’s inability to agree on a verdict, the judge declared a hung jury.¹²⁴ The N.C. Attorney’s office subsequently announced they would not seek a new trial and, in September 2015, the charges against Greene’s client, Officer Kerrick, were officially dropped.¹²⁵ During trial, some alleged that Greene’s defense of Kerrick did not focus on the actions of Greene’s client—a police officer shooting an unarmed man—but, instead, turned into creating a stereotype of the victim to justify the killing.¹²⁶ Fellow African-Americans expressed concern that Greene’s defense tactics intentionally caricatured the victim as “the big, hulking, angry, scary, black man” to rationalize his client’s shooting behavior.¹²⁷ But instead of questioning Greene’s choices as a lawyer, the critics questioned his loyalty to his race.¹²⁸ “I question his black

122. Margaret M. Russell, *Beyond “Sellout” and “Race Cards”: Black Attorneys and the Strait-jacket of Legal Practice*, 95 MICH. L. REV. 766, 771–72 (1997). This article also provides a similar analysis of the criticisms of African-American attorney Christopher Darden as a result of his prosecution of O.J. Simpson.

123. Michael Gordon, *The Law, Race and Michael Greene*, CHARLOTTE OBSERVER, Sept. 19, 2015, <http://www.charlotteobserver.com//local//article35733399.html>.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

experience in America, his ability to connect with it,” one person stated.¹²⁹ “I just think he is a black man who does not want to be black,” said another.¹³⁰ “It made me question his upbringing, where he grew up, how he lived.”¹³¹ Suddenly, fellow members of his community who, prior to this representation, may have thought of him with pride as one of their own, began to splinter from him—cast him off. In the course of a single representation, Greene became an outsider.

While Greene argues that he was simply representing his client,¹³² other members of his community view his behavior as racially traitorous. The racial solidarity with his community that may have existed prior to his representation of Officer Kerrick quickly dissipated. Fellow African-Americans cast him as an outsider because he had, in their eyes, demonstrated that he did not share the attributes they view as necessary to remain an insider, in this case: loyalty to the race.

As an attorney, Greene had an obligation to zealously represent his client,¹³³ but how does that representation coexist with the obligations that members of our community feel he owes? Within a group, particularly one as diverse as a racial community, differences will occur.¹³⁴ How a lawyer navigates those differences can be a perilous journey of self-awareness and, at times, a willingness to let go of the comforts of group identity.

D. *The Attorney of Color’s Role Confusion*

1. Representative of the Race

In intra-race legal representation, how do lawyers and clients determine whether that lawyer or client is truly one of their own? If racial sameness does play a role in choosing legal representation, harkening back to what those students at Howard Law suggested, is there a basis for determining whether a chosen person is a true representative of the race? For each lawyer of color, we often ask ourselves – are we representative enough to be representative of the race?

During the Civil Rights Movement, African-Americans, and those external to the civil rights struggle, sought to have African-American leaders who were “representative” of their race.¹³⁵ At a time when the major-

129. *Id.*

130. *Id.*

131. *Id.*

132. *See id.* (“‘The evidence is what the evidence is,’ he says. ‘These are the facts of the case. These were Jonathan Ferrell’s actions, not stereotypes about him as a black male.’” (quoting Michael Greene)).

133. MODEL RULES OF PROF’L CONDUCT r. 1.3 (1983).

134. *See* Anderson et al., *supra* note 45, at 389 (“To meet the challenges inherent in sameness, we must first acknowledge that we, and our clients, have multiple identities, some of which will raise issues of sameness and some, issues of difference.”).

135. KENNETH WALTER MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER 5 (2012) (“Both blacks and whites were unsure of exactly what they

ity of African-Americans had similar backgrounds and experiences,¹³⁶ having a person who was representative of the race might have been easier to find. But, now, when we as a people have such varied life experiences and backgrounds, finding a person who is representative of our race is as difficult as defining what that would be.¹³⁷ Like those students at Howard Law attempting to define their experience as a “typically black person’s experience,” it is a task with perilous metrics because no singular experience exists to define as representative.¹³⁸ Does being representative of the race require demonstrated racial solidarity, such as publicly supporting a cause important to the race, regardless of whether the individual lawyer personally and privately supports the cause?¹³⁹

Ultimately, attorneys of color must accept that “representative enough” is a fiction and a false dichotomy between two illusions – “representative enough” and not. It is difficult to balance the responsibilities one feels to one’s race, particularly when trying to balance professional obligations with racial obligations, and the goals of professional achievement.

meant when they demanded that civil rights lawyers be ‘representatives’ of the minority group. In an era when segregation limited what most African Americans could accomplish in the world, a representative black person often had to be as unlike most members of the minority group as possible. . . . At the same time, however, both blacks and whites often demanded that the representative be an ‘authentic’ black person—someone as much like the masses of black people as possible.”). *But see* Bennett, *supra* note 24, at 477 (“Something we commonly presume about ‘representativeness’ is that we can gauge it by examining the fit between the composition of an organization’s leadership and the demography of its neighborhood. In fact, researchers have taken great care to distinguish ‘substantive representation’—a similarity between an organization’s and its constituents’ perceptions of the neighborhood’s needs—from ‘descriptive representation’— a similarity between an organization’s and its constituents’ demographic and socioeconomic characteristics.”).

136. *See* MACK, *supra* note 135, at 20 (“These were the lucky few who had attained enough education and training to become doctors, dentists, schoolteachers, ministers, and lawyers.”).

137. King, *supra* note 4, at 43; Wilkins, *supra* note 19, at 1534 (“Although discrimination and segregation are still rampant in late twentieth century America, black Americans can now be found in virtually every occupation, interest group, and geographic region in the country. Given this variation, the claim that ‘race’ constitutes a ‘master identity’ that necessarily structures and defines the lives of all blacks in equivalent and predictable ways is no longer plausible.”).

138. Wilkins, *supra* note 19, at 1534 (“Race constitutes a significant aspect of our identity without there being any consistent set of narratives that constitute black identity.”). *See* Kimbriell Kelly et al., *Broken by the Bubble*, WASH. POST, Jan. 25, 2015, <http://www.washingtonpost.com/sf/investigative/2015/01/25/in-fairwood-dreams-of-black-wealth-founded-amid-the-mortgage-meltdown/> (describing the experiences of an upper-income African-American community in Prince George’s County, Maryland, which was besieged by predatory lending practices).

139. Levinson, *supra* note 40, at 1592 (relating a story by Alan Dershowitz, a Jewish law professor, about Dershowitz’s refusal to teach on Saturdays when he arrived at Harvard Law School). Dershowitz had become nonobservant, but his refusal to work on Saturday was more akin to “ethnic solidarity.” *Id.* Levinson argues that this action may have protected Dershowitz’s relationships with the Jewish community or protected Jewish students at Harvard who may have felt otherwise compelled to attend Saturday classes. *Id.*

There is no uniformity to being representative enough in our communities. The struggle to represent and be representative enough can interfere with the objectivity so many lawyers of color need to fulfill their professional obligations. In *Representing the Race*, Kenneth Mack references John Mercer Langston and what Langston had in common with others of his race.¹⁴⁰ Am I, as Mack discusses in his introduction, representative enough to be their representative?¹⁴¹ Am I representative enough for my African-American clients? The unsatisfying conclusion for the attorney of color is that there is no clear metric to determine whether a lawyer of color is representative enough and there is no single answer.

2. Risks in Intra-Race Legal Representation

a. The Risk of Race Manipulation of the Client

For attorneys of color and clients of color, there is often an initial mutual assumption of trust. Trust between a lawyer and a client is the cornerstone of effective counsel.¹⁴² When there is mutual trust, clients are best able to make informed legal decisions and lawyers are most effective.¹⁴³ Clients may expect that attorneys of color are more trustworthy because they are of the same race, and attorneys of color may expect that clients of color will trust attorneys of color more for that same reason.¹⁴⁴

Members within the same race trust each other more and are more likely to work together.¹⁴⁵ Shared experiences and shared personal characteristics facilitate a connection between people. Traumatic shared exper-

140. Mack, *supra* note 135, at 13–15.

141. Anderson et al., *supra* note 45, at 339 (“Untested assumptions, whatever their source, can impair lawyering judgments. In our collective experience, we have found that assumptions rooted in sameness are particularly seductive and bring unique challenges to our work.”).

142. *Morris v. Slappy*, 461 U.S. 1, 21 n.4 (1983) (Brennan, J. and Marshall, J., concurring) (quoting *Linton v. Perini*, 656 F.2d 207 (6th Cir. 1981)) (“[Basic] trust between counsel and defendant is the cornerstone of the adversary system and effective assistance of counsel.”).

143. *Id.* at 21 (“Moreover, counsel is likely to have to make a number of crucial decisions throughout the proceedings on a range of subjects that may require consultation with the defendant. These decisions can best be made, and counsel’s duties most effectively discharged, if the attorney and the defendant have a relationship characterized by trust and confidence.”).

144. King, *supra* note 4, at 4 (“(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; (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.’”).

145. Anderson et al., *supra* note 45, at 341 (“Our preference for our own in-group leads us to value, trust, and work with members of our in-group more than we do members of an out-group.”).

iences, such as racism,¹⁴⁶ can also create a connection.¹⁴⁷ Racism is a pervasive ill that affects individuals and groups, continues for generations, and insidiously infects multiple aspects of victims' psyches.¹⁴⁸ The shared history and personal experiences of members within a group offer an opportunity to empathize; in this case, it is an opportunity for empathy between a lawyer and a client.

Lawyers use multiple tactics to engender trust and stimulate client disclosure.¹⁴⁹ Lawyers endeavor to create connections with their clients to engender trust and encourage their clients to trust them.¹⁵⁰ Lawyers must remember that clients, particularly low- and moderate-income clients, often seek out lawyers in times of difficulty and need. This need creates a vulnerability that can inhibit the client's willingness to trust and, thus, the client's willingness to share information in a manner that will enable the attorney to effectively represent the client.¹⁵¹ Although some clients are forthcoming about their legal issues, other clients are resistant to sharing the details of their legal issues or their complicity in creating their legal issues.¹⁵²

In other settings, such as when clients are general counsels who have similar backgrounds to the lawyer, the lawyer might facilitate trust through demonstrations of competence; for example, by discussing previous transactions, previous employment, or the lawyer's educational background. In intra-race lawyering, as Professor Mortazavi noted, the shared race often facilitates an initial trust.¹⁵³ Recognizing that clients of color may initially trust attorneys of color, not *in spite of* our race but *because of* it, attorneys of color are left with a question: if being the same race creates, in our same-race clients, a sense of connection, implicit trust, and allows them to assume similar values,¹⁵⁴ do attorneys of color use our shared race to manipulate a connection with our clients?

146. Suzette Speight, *Internalized Racism: One More Piece of the Puzzle*, 35 COUNSELING PSYCHOLOGIST, 126, 127 (2007) ("Racism is a process, a condition, a relationship that violates its victims physically, socially, spiritually, materially, and psychologically.").

147. Anderson et al., *supra* note 45, at 340–41.

148. Speight, *supra* note 146, at 126–27 ("Because racism is pervasive, operating at the interpersonal and institutional levels simultaneously, its effects are cumulative, spanning generations, individuals, time, and place—encompassing much more than discrete acts. Consequently, psychological injury that is due to racism is not limited to that caused directly by one perpetrator, at one time, in one place.").

149. ALICIA ALVAREZ & PAUL R. TREMBLAY, INTRODUCTION TO TRANSACTIONAL LAWYERING PRACTICE 58–65 (2013) (discussing the use of listening techniques and other inhibitors and facilitators to client-lawyer communication).

150. *Id.*

151. *Id.*

152. *Id.*

153. Mortazavi, *supra* note 104, at 21.

154. Anderson et al., *supra* note 45 ("Similar characteristics create feelings of connection, trust, and assumptions of similar values.").

For attorneys of color, there is a risk that we use our racial connection to enable our clients' trust. Attorneys of color may intentionally utter familiar phrases or change the cadence of our speech to that typically used only within our racial community. Further, we may rely on our shared history to create a sense of familiarity. Upon reflection, to create connections with my low- and moderate-income clients of color, am I more likely to share stories of spending my summers in the South Carolina countryside eating fruit off of the tree and hanging laundry outside on clotheslines? Do I more frequently talk about how my grandfather was the first in his family to attend college, but strategically exclude that this very same grandfather's brother received his PhD and was a Dean at a major university? Do we, as attorneys of color, pick and choose portions of our stories that foster a sense of racial connection with the client with whom we seek to connect? The answer is "yes."

These choices are trust facilitators – a means to form an initial bond to create a basis for service of a client's legal needs. One can argue that lawyers of *all* races use various techniques to engender trust with their clients. There is, however, something duplicitous in using a client's implicit trust in same-race dynamics to effectively manipulate the client into trusting the lawyer. This is a risk of which the attorney of color must take note, as that manipulation, in itself, can be a breach of the very trust we, as same-race lawyers, seek to establish.

b. The Risk of Over-Identification

Another challenge is the risk of over-identifying with the client, clouding the lawyer's objectivity. For attorneys of color representing same-race clients, it is tempting for both parties to assume shared injuries from assumptions of shared racial experiences. Nevertheless, there is a risk of over-identifying with fellow members of the same race that might endanger the objectivity a lawyer needs to be an effective counselor.¹⁵⁵ The lawyer of color risks making assumptions about the client's needs, preferences, and reactions based on the lawyer's over-identification with the client. For example, the lawyer's assumptions about how his African-American male client reacted to an unwarranted police search can unwittingly be based on the lawyer's experience as an African-American man subjected to unwarranted police searches.

This over-identification risks the lawyer's objectivity and the client's decision-making autonomy. In these instances, attorneys of color must separate ourselves from our racial assumptions to make room for the client's independent thought and unimpeded decisions. Sadly, this risks lessening the very racial solidarity that the attorney of color originally may

155. Anderson et al., *supra* note 45, at 347 ("In the context of a professional relationship, if we overidentify with a client, we run the risk of making inappropriate assumptions, and our professional judgment and professional boundaries can become clouded.")

have sought in the intra-race legal representation. However, if the lawyer understands the importance of recognizing the differences with a client, despite overt similarities, lawyers can avoid “[substituting] their own judgment for the client’s as a result of over-identification or transference.”¹⁵⁶

The other over-identification risk is the risk of an assumed familiarity. Our shared histories, our shared struggles, and our common experiences with discrimination create an assumption of sameness and facilitate extensions of trust.¹⁵⁷ For those of us within a group, such as persons of color, we often assume a familiarity with the cultural norms of that group solely from our membership in that group and from participating as a member of that group. Many attorneys of color would never think to attend training on how to interact with members of our own demographic; we assume, by virtue of our membership in that demographic, that we know the cultural norms and understand many of those norms’ nuances.¹⁵⁸ However, it is important to recognize our differences, which within a race can still be stark, as well as the uniqueness of each individual and her history and circumstance.¹⁵⁹ Race alone does not create a sustainable bridge. The initial connection we make in intra-race legal representation may be based on race, but that is not enough for the connection to endure.

c. The Risk of Power Imbalance

If you can control a man’s thinking you do not have to worry about his action. When you determine what a man shall think you do not have to concern yourself about what he will do. If you make a man feel that he is inferior, you do not have to compel him to accept an inferior status, for he will seek it himself. If you make a man think that he is justly an outcast, you do not have to order him to the back door. He will go without being told; and if there is no back door, his very nature will demand one.¹⁶⁰

156. Bryant, *supra* note 62, at 42.

157. Anderson et al., *supra* note 45, at 340–41 (“Additionally, on a more personal level, individuals are drawn to connect with other people because of shared experiences and personal characteristics. These connections often help people establish rapport, trust, and engagement. Surely these same benefits would apply in the lawyer-client relationship, where a lawyer’s ability to find common links with her client would facilitate the lawyering process.”).

158. ROSALDO, *supra* note 76, at 26 (“Human beings cannot help but learn the culture or cultures of the communities within which they grow up. . . Cultures are learned, not genetically encoded.”).

159. Anderson et al., *supra* note 45, at 372–73 (“Understanding multiple identities, intra-group differences, and the fact that each of us within any one of our group affiliations is uniquely situated, is critical to understanding the complexities of connection and divide.”).

160. Carter Godwin Woodson, *The Mis-Education of the Negro*, THE ASSOCIATED PUBLISHERS INC. at 84–85 (1933).

A lawyer must be wary when creating trust with a client, for with trust comes power.¹⁶¹ If clients of color trust attorneys of color more because of their shared race, that higher level of trust creates the risk of a greater power imbalance in intra-race legal representation. For example, although the client might attend the negotiations, they will often defer to the attorney's expertise during the negotiation.¹⁶² Attorneys of color must exercise greater caution in respecting the power balance. Many attorneys of color are painfully aware of the dangers of uncontrolled exercise of power given our racial histories. As such, it is important to be sensitive to the power we, as attorneys of color, have in the lives of our same-race clients and the responsibilities we have to maintain a healthy power balance with our clients.¹⁶³

d. The Risk of Intra-Race Bias

There are many studies evaluating the roles that explicit and implicit bias play in how we interact with each other when respondents are of different races.¹⁶⁴ There is less evaluation of how implicit bias affects respondents of the same race. Explicit bias "reflects the attitudes or beliefs that one endorses at a conscious level" while implicit bias is much more subtle, reflecting implicit attitudes and stereotypes individuals may not consciously recognize.¹⁶⁵

Individuals tend to hold positive attitudes about themselves and transfer those positive feelings to others who share the same attributes.¹⁶⁶ Conversely, the positive feelings about members of one's own group create intergroup bias, or less favorable feelings, about members of another

161. Weng, *supra* note 45, at 380 ("Even though client-centered lawyering focuses on respecting and empowering the client, it does not address the dynamics of power and subordination (historical, actual or perceived) in the attorney-client interaction.").

162. Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L. J. 947, 952 (1992) ("Lawyers see clients as persons to be *helped*, as powerless persons who need to have problems solved through the intervention of the lawyer and her skills. Even if the result of such intervention were good for the client's material existence, that gain might come at the expense of the client's sense of control over her life, her self-esteem, her *power*.").

163. See Ascanio Piomelli, *Foucault's Approach to Power: Its Allure and Limits for Collaborative Lawyering*, 2004 UTAH L. R. 395 (2004), for a more expansive view of the power balance between lawyers and clients.

164. See, e.g., *Helping Courts Address Implicit Bias*, NAT'L CTR. FOR STATE COURTS, <http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/Implicit%20Bias%20FAQs%20rev.ashx>.

165. *Id.* at 1 ("Unlike *explicit bias* (which reflects the attitudes or beliefs that one endorses at a conscious level), *implicit bias* is the bias in judgment and/or behavior that results from subtle cognitive processes (e.g., implicit attitudes and implicit stereotypes) that often operate at a level below conscious awareness and without intentional control.").

166. *Id.* at 4 ("People tend to possess consistent and strongly positive attitudes toward themselves, and this positive attitude about the self can transfer very easily to other things, people, and groups that share attributes with the self . . .").

group.¹⁶⁷ Part of the challenge regarding intra-race legal representation is when lawyers of color do not view their clients of color as members of the lawyer's self-defined 'group'. This separation might be based on differences in the lawyer's and client's economic status, education status, or social status. If the lawyer views the client as an "other" and fears being associated in that "other" group, there is a risk that the lawyer could exhibit bias against the client, to reinforce the lawyer's inclusion in the lawyer's group, or more caustically, to demonstrate the lawyer's exclusion from the client's group.¹⁶⁸

In intra-race legal representation, this can translate to "representative acquiescence"¹⁶⁹ where the attorney exhibits bias to the client in an attempt to distance the lawyer from the ugly stereotypes plaguing the lawyer's race. As Professor Margaret M. Russell stated, "[a]ttorneys of color often find that they are identified, categorized, and evaluated first as members of their racial group, and only secondarily – if at all – as lawyers."¹⁷⁰ When walking through a courtroom or negotiating a plea bargain, does that lawyer's need to avoid association with racial stereotypes create a need to establish that the lawyer is not like "them?"¹⁷¹

As a repeat player in a predominantly white, male profession, it is not unexpected that an attorney of color may feel compelled to talk or dress in a manner to demonstrate to external parties the attorney's separation from the client. I contend that we, as lawyers of color, cannot state absolutely that we are still not affected by the stereotypes cast upon our racial communities, especially when we represent members of our race and *especially* when a client exhibits traits of racial stereotypes.¹⁷² We must recognize that we are not immune from exhibiting the same implicit bias against our own clients that we, as attorneys of color, have experienced.

167. Miles Hewstone et al., *Intergroup Bias*, 53 ANN. REV. PSYCHOL. 575, 576 (2002) ("Intergroup bias refers generally to the systematic tendency to evaluate one's own membership group (the in-group) or its members more favorably than a nonmembership group (the out-group) or its members.").

168. Weng, *supra* note 45, at 394 ("Based on one's own characteristics, a person sorts others into 'in-groups' sharing characteristics with the perceiver and 'out-groups' that do not. The separation of others into in-groups and out-groups further influences the way in which the perceiver views others.").

169. Lisa T. Alexander, *Stakeholder Participation in New Governance: Lessons from Chicago's Public Housing Reform Experiment*, 16 GEO. J. ON POVERTY L. & POL'Y 117, 141–42 (2012) ("[B]oth individual and organizational stakeholder representatives may also unwittingly act opportunistically. Chicago's original public housing residents. . . have been vilified. . . as lazy, undeserving and prone to manipulating public resources. . . In order to counteract such narratives and improve their social status in the network, public housing resident representatives may unintentionally acquiesce in decisions that further the interests of the wealthier or more empowered stakeholders . . .").

170. Russell, *supra* note 122, at 767.

171. See Polikoff, *supra* note 1, 449–50.

172. Laura Padilla, *But, You're Not a Dirty Mexican: Internalized Oppression, Latinos and the Law*, 7 TEX. HISP. J. L. & POL'Y 59 (2001).

3. Unhappy Truths

a. Being Accepted versus Being Acceptable

Listen – Being a Mexican-American is tough. “Anglos” jump all over you if you don’t speak English perfectly. Mexicans jump all over you if you don’t speak Spanish perfectly. We gotta be twice as perfect as anybody else. . . . Our family has been here for centuries and yet they treat us as if we just swam across the Rio Grande. . . . we gotta prove to the Mexicans how Mexican we are and we gotta prove to the Americans how American we are. We gotta be more Mexican than the Mexicans and more American than the Americans both at the same time. It’s exhausting!¹⁷³

Attorneys of color are faced with the overwhelming task of: 1) trying to be an objective lawyer, 2) while remaining equally faithful to our clients and our racial representativeness, while 3) also trying to work in, and be an integral part of, a White-dominated profession.¹⁷⁴ Professor Wilkins argues that attorneys of color, who are often subjected to discrimination based on their non-professional racial identities, are thus incentivized to be “viewed as lawyers *simpliciter*” – a lawyer separate from their racial identities– to free them from the pervasive negative stereotypes that accompanies their non-professional identities.¹⁷⁵

Earlier generations of African-American professionals arguably had more challenge in proving worthiness while combating stereotypes from slavery.¹⁷⁶ In the early years after slavery, African-American intellectuals shared a sense of responsibility for disproving racist assertions that African-Americans lacked the intellectual prowess of other races.¹⁷⁷ It was challenging for African American scholars to “represent” for their race when they felt forced to thread the needle between pursuits of their intellect and

173. SELENA (Q-Productions 1997).

174. MACK, *supra* note 135, at 6 (“But to be a successful lawyer, one had to also represent the core identity of what was a white-dominated profession.”); *see also* Corey S. Shdaimah, *Lawyers and the Power of Community: The Story of South Ardmore*, 42 J. MARSHALL L. REV. 595, 599 (2009) (“[Lawyers] are also tied to the establishment in various ways, which can make their motivation (and advice) suspect. Lawyers need to be seen as “normal” to establishment figures.”).

175. Wilkins, *supra* note 19, at 1505 (“The universalizing claims made on behalf of the professional self suggest that differences among lawyers that might matter outside the professional sphere are irrelevant when evaluating the professional practices of lawyers. This universalizing tendency is arguably particularly important for new entrants into the legal profession, who are frequently subject to discrimination on the basis of certain aspects of their non-professional identities.”).

176. JOHN HOPE FRANKLIN, *The Dilemma of the American Negro Scholar*, in RACE AND HISTORY: SELECTED ESSAYS 1938–1988, 295, 299 (1989).

177. *Id.*

advocating for their race.¹⁷⁸ As John Hope Franklin noted so many years ago: “It must have been a most unrewarding experience for the Negro scholar to answer those who said that he was inferior by declaring: ‘I am indeed *not inferior*.’ For such a dialogue left little or no time for the pursuit of knowledge as one really desired to pursue it.”¹⁷⁹ Some intellectuals, like W.E.B. Dubois, responded to this challenge by moving beyond their preferred profession to become a scholar.¹⁸⁰ Others moved beyond their preferred profession to become advocates of their race.¹⁸¹

b. Insider to Outsider

Much has been written about the challenges of cross-cultural lawyering and how a lawyer’s own cultural biases will impact how the lawyer interacts with, understands, and counsels the client.¹⁸² Professor Michelle Jacobs notes that lawyers and clients may have difficulty communicating when they are of different races because of the vast cultural differences between them.¹⁸³ This cross-cultural bias is easier to understand when the lawyer and the client have different cultures. Attorneys of color with same-race clients but different socio-economic backgrounds exist in a strange world: our common race creates a comfortable starting point to establish trust; however, our different socio-economic background and life experiences mean our shared race is often where the commonality ends. We, as attorneys of color, must accept a strange insight—cross-culture lawyering is not solely for those of different races, cultures or religions. Those of us who are of the same race and culture as our clients may have many of the same differences that inhibit connection and communication.

When attorneys of color consider same-race clients, do we truly see ourselves in them? We are separate—our opportunities, how we view the law, how the judicial system views us as professionals—we are impacted by how we want the client to view us, how we need external parties to view us, and how we view our clients. We, as attorneys of color, must recognize these factors to prevent us from being bound by them.

As a lawyer, I try to determine how best to serve my clients’ interests. And, as with many lawyers, that requires trying to understand the needs of my clients when their needs are generally so different from my own. In my

178. *Id.* at 305–06 (“He must therefore, be permitted to function as vigorously as his energies and resources allow, in order to elevate himself and those of his group to a position where they will be accepted and respected in the American social order.”).

179. *Id.* at 299.

180. *See generally* DAVID LEVERING LEWIS, W.E.B. DU BOIS, 1868–1919: BIOGRAPHY OF RACE (1993).

181. Franklin, *supra* note 176, at 299.

182. Bryant, *supra* note 62 at 40–41 (“Cross-cultural lawyering occurs when lawyers and clients have different ethnic or cultural heritages and when they are socialized by different subsets within ethnic groups.”).

183. *See generally* Jacobs, *supra* note 53.

practice, I represent low- and moderate-income individuals when I have never been either of those. I am working to help them purchase their first home when every direct family member from my formerly enslaved great-great-great grandmother to, and including myself, has owned a home. We are of one race, but of two worlds. The individual members of the tenants associations with whom I worked, often women of color, frequently spoke of feelings of helplessness. I, however, have rarely felt disempowered—neither as a person of color, nor as a female, two groups that historically have been oppressed and devalued. When I talked with residents about the ability to purchase their apartment buildings and to become first-time homeowners, the residents were so often skeptical. Initially, this surprised me. I recognized the challenges of trying to purchase their apartment buildings, but I was confused by their unwillingness to try. When asked, they would tell me story after story of their efforts to change their lives with little success. With each setback, the residents' willingness to believe in their ability to change their lives decreased. The feelings of helplessness and powerlessness took hold. I have neither experienced these feelings of powerlessness nor doubted my ability to effect change in my life.

Low- and moderate-income same-race clients and attorneys are of the same race, but often their experiences are very different. It is likely that our legal training and financial stability provide us a greater sense of power and confidence in our ability to navigate life's challenges. However, our legal training alone is unlikely to account for *such* a divergent sense of power. Rather, part of the sense of power comes from our differing educational backgrounds, upbringings, and income levels. We must acknowledge that as attorneys, society often does not treat us as helpless. This impacts our reaction to situations that might otherwise disempower us.¹⁸⁴ We, as attorneys of color, must appreciate the differences in our experiences and our clients' experiences that lead us to these very different conclusions about our ability to effect change in our lives.

CONCLUSION: AM I MY CLIENT?

After considering the dynamics, the risks, and the unhappy truths about intra-race legal representations, attorneys of color are left to ponder whether we see ourselves in our clients.

My clients often look to me to help them through their legal issues, assuming that our cultural differences are minimal. My clients tell me that they trust my counsel more because I can better understand their issues. For many years, I shared that sentiment and, to a certain extent, I still cling to it.

184. ROSALDO, *supra* note 76, at xii ("When people become accustomed to privilege, it appears to be a vested right, a status that is natural and well deserved, a part of the order of things.").

But, my community—my race—is no longer monolithic. The divergence of our lives after slavery and Jim Crow created chasms between us that can be as great as those of different races. I cling to our sameness, for their sacrifices made my successes possible. But, this dishonesty endangers my ability to be an objective lawyer. My clients do not accept my counsel with the same skepticism they do of outsiders. I understand the argument that I should disabuse them of this trust because it is based on a similarity that does not exist. I have been unable to separate myself from my clients in this manner. I do not want that division, for I value the warmth of belonging. With that though, I am left with uncomfortable questions: If I use our shared race to connect with my clients, is that an abusive manipulation? Am I the fox in the very hen house I seek to protect? I am left wondering whether my unwillingness to separate myself makes me as dangerous as those from whom I seek to protect my clients.

Representing my low- and moderate-income clients of color has been difficult at times because, in many ways, I still see shadows of myself in my clients and I still feel such a sense of responsibility to honor their sacrifices and fight the biases that oppressed them. I look at our history and it is wrought with countless stories of fights and pleas for civil rights for African-Americans. Stories abound of protests for desegregation of universities, neighborhoods, and public facilities. As a member of the recipient generation—those of us in the post-Civil Rights Movement generation—I, and others, feel the weight of the debt owed to those whose fights won our natural-born freedom. When I began my legal career practicing at a large law firm, I felt a need to prove my worth. Not solely my worth as a practicing attorney, but actually my worth of the sacrifices made on my behalf, and my worth of the opportunities afforded me. I needed to be one of those who “made it.” I needed to show that the sacrifices made by African-Americans before me were justified. I needed to prove my worth. I *still* feel the urgency to prove that we, the recipient generation, are worthy of our ancestors’ sacrifices.

I struggle with how to bridge the cross-cultural divide with my clients because we share such history. But with so many of my clients of color, we hail from vastly different experiences. I accept that we, as lawyers, are better able to serve *all* our clients when we are honest about how race impacts our legal representation. Upon reflection, the fragility of the racial connection I felt to my clients has deepened. Yet my sense of obligation to them never wanes. Despite the truth of our differences, I still see glimpses of myself in my clients. Ultimately, neither racial commonalities, nor shared histories, nor years of working in the same community can bridge the gaps between me, as the lawyer, and my clients.

My clients may want to trust me more because they see racial familiarity when they look upon me, but the differences between us create a gap that is insurmountable. I remain the person they seek for guidance and

counsel. I must remain the objective lawyer. In that moment of seeking my legal assistance, I am the other.¹⁸⁵ It is not I who I see when I look at them. I am not my client.¹⁸⁶

185. Shdaimah, *supra* note 174, at 599 (“Lawyers’ professional role, one that must be assumed in order to be of value to the clients, alienates them from these groups in a way that is often distressing to lawyers who align themselves with their clients politically and philosophically.”).

186. Polikoff, *supra* note 1, at 470 (Polikoff concludes: “Am I my client? The answer is a resounding, and sometimes agonizing, ‘No.’”).