Symposium

Gideon in White/*Gideon* in Black: Race and Identity in Lawyering

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> Ye shall have one manner of law, as well for the stranger, as for one of your own country: for I am the Lord your God.[1]

INTRODUCTION

Nearly twenty years ago, when I started teaching as a young clinical instructor in New York City, I learned that John Hart Ely would be visiting the law school as a distinguished professor during the spring term. Awestruck, I considered various gambits to engage Ely in debate—perhaps a radical critique of *Democracy and Distrust*[2] or a political indictment of *The Wages of Crying Wolf: A Comment on* Roe v. Wade.[3] In time, I chanced neither. Uncharacteristically timid, I steered clear of him, fearing he would dismiss my interests in poverty law and clinical education as inconsequential, even trivial.

Years later in Miami, whenever I recounted this story, Ely jocularly upbraided me for dodging him. Naturally reticent, he seemed baffled when junior faculty retreated from him out of academic trepidation. On more than one occasion, he expressed disappointment that a young colleague here or elsewhere had passed up an opportunity to join him in a class or to share a hopeful draft of a manuscript. For Ely, junior faculty infused energy and vitality into the common academic enterprise of teaching law. Charmingly cantankerous, he mentored scores of young faculty, soliciting their participation in his work and supporting their own fledgling scholarship.

Soon after he joined the Miami faculty, on a late summer evening in August, Ely rang me up on the telephone. In the first years of our friendship, hearing from him always gave me a start. A former soldier in the Military Police Corps, he had a way of rousting attention. Struck by the lateness of the hour, I wondered aloud about the purpose of the call. Having spent two months teaching summer school in Miami, I had traveled far north for respite in New England. Ely had worked to track me down. He wanted to talk about race. He worried that he had been misunderstood.

Earlier in the year, Ely and I had started trading ideas about race. Struggling to integrate Critical Race Theory into my civil procedure, professional responsibility, and clinical courses,[4] I had sought out his

1. *Leviticus* 24:22 (capitalization altered), *quoted in* JOHN HART ELY, ON CONSTITUTIONAL GROUND 390 n.199 (1996).

2. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

3. John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

4. For works that integrate Critical Race Theory into these courses, see DOROTHY A. BROWN, CRITICAL RACE THEORY: CASES, MATERIALS, AND PROBLEMS 40-97, 312-48 (2003); and Kevin R. Johnson, *Integrating Racial Justice into the Civil Procedure Survey Course*, 54 J. LEGAL EDUC. 242 (2004).

opinions on the standard accounts of race found in constitutional litigation and procedure. More than once, I lamented the absence and distortion of race in civil procedure and professional responsibility cases, textbooks, and law review commentaries. Even clinical texts on the lawyering process, I complained, tolerate stereotype and stigma in representation, to the detriment of impoverished clients and their communities.

Ely confronted race squarely, I quickly realized, recognizing representational and remedial complexities while maintaining deep commitments to equality in law and society. Proud of his work in *Gideon v. Wainwright*[5] and his early service as a public defender, he encouraged me to tackle race on both the civil and criminal sides of the lawyering process. Moreover, he urged me to visit the egalitarian themes of his work on judicial review in *Democracy and Distrust*. Those themes, he often pointed out, informed his policy decisions as general counsel of the Department of Transportation[6] and his actions as dean of Stanford Law School.[7]

Paradoxically, Ely's commitment to equality and his profound egalitarian sensibility began to divide us during the summer, which surprised me given our mutually held convictions and shared reformist ambitions. To Ely, lawyering for the poor and the disenfranchised was tightly fastened to race and equality. Indeed, the good lawyer was race conscious (aware of racial motivation and committed to racially tailored relief) and egalitarian minded (dedicated to fair access, assistance, and opportunity in law and the legal system). For Ely, however, neither race consciousness nor racial equality fully embraced race-based identity and community.

To be sure, Ely understood racial identity and community. His analysis of racial motivation in legislation turned on the character of white and black identity. Likewise, the nature of racial community underlay his examination of racial equality in voting. But I believe the import of racial identity and community goes beyond substantive legislation and equality. In lawyering, identity and community constitute dignity-based process values that derive from fundamental notions of personhood and self-determination. These values also serve an instrumental purpose of preserving or enlarging cultural, social, and political standing. Claims of equal access, assistance,

5. 372 U.S. 335 (1963).

6. *See* William T. Coleman, Jr., *John Hart Ely: Counsel for the Situation*, 40 STAN. L. REV. 357, 357-60 (1988) (describing Ely's role as general counsel in race-based legal and policy issues).

7. Ely's decanal record included both curricular and recruitment initiatives. To obtain greater faculty diversity, for instance, he designated himself a member of the appointments committee, irking some Stanford faculty members. *See* Jack H. Friedenthal, *John Hart Ely: Dean of Stanford Law School, 1982-1985*, 40 STAN. L. REV. 370, 372-73 (1988).

and opportunity that violate this integrity or undermine this purpose run afoul of the central racial norms of the lawyering process.

Out of kindness, Ely never openly challenged this lawyering thesis, though on many occasions he seemed to struggle with its overly broad implications. Equality might not be sufficient, I might hear him say, but it is a damn good start. Besides, he might add, the lawyer's job is to protect the rights and liberties of the underdog. Let lawyers be lawyers! But Ely knew that race is different and it is everywhere. It infects law, culture, and society. It taints politics. It even contaminates the classroom. And so, many summers ago, we unexpectedly debated racial identity and community not only in law and lawyering but also in legal education, reflecting painfully on Ely's experience at Stanford Law School. We guardedly quarreled over the meaning and utility of race as an organizing principle for sociolegal analysis and political action. Fueled by a peculiar mix of historical regret, generational disagreement, and ideological divergence, that debate endured even as our friendship strengthened, often to be revisited but never resolved. Unsure that I appreciated the theoretical stakes and the practical difficulties of fulfilling a commitment to racial equality, and worried that I might judge him too harshly for hard choices he had made long ago as a public defender, agency counsel, and dean, Ely declared plaintively that night on the phone, "Now, I thought we were pretty good friends!"

This essay is about becoming friends with Ely's writing on race and lawyering. Its purpose is to situate Ely within the advocacy traditions of liberal legalism. Like Ely, liberal lawyering suffers from the tensions wrought by a dual commitment to law and moral politics. Law heralds process values, and its practice entails formal commitments to principles of neutrality, objectivity, and reason. Moral politics, in contrast, honors intrinsic norms and extrinsic results, and its performance involves instrumental commitments to principles of partisanship, subjectivity, and passion.

For four decades, Ely attempted to resolve the moral/formal tensions of liberal legalism in constitutional theory and practice. Like other liberal lawyers, he strove to balance formal commitments to legal process values with moral and, indeed, political commitments to democratic access and racial equality norms. Through the adversarial process, lawyers in the fields of criminal justice and poverty law press for open access and equal treatment on behalf of the poor and the accused. But by staying within the constraints of that process in order to deliver access and equality to their impoverished clients, these lawyers fail to appreciate the widespread institutional subordination of the poor in law, culture, and society.

Neither Ely nor liberal lawyers grasp the importance of antisubordination principles of representation, which prohibit demeaning

clients and damaging communities. Under antisubordination logic, nothing is neutral in law, and nothing is natural or necessary in lawyering. By focusing on identity, antisubordination principles affirm both subjectivity and community in client representation. Their focal point is the social and cultural identity of the client in the context of community.

From an antisubordination standpoint, the client is defined by his or her identity, best understood as an amalgam of parts fused and fragmented by class, gender, race, and more. This identity connects the client to the fabric of community through the intertwining strands of family, school, and neighborhood. Any cultural or social stigma that damages identity harms the dignity of the client and tarnishes the integrity or collective standing of her community. Remedying that harm requires a mix of law and politics in community action. Yet as this essay endeavors to show, community-based legal action is a remedy too often out of the reach of liberal lawyers.

The essay is divided into four Parts. Part I describes the history of *Gideon v. Wainwright*, documenting Clarence Earl Gideon's personal background and the procedural contours of the litigation. It chronicles Ely's participation and its continuing hold on his legal imagination.

Part II uses *Gideon* to uncover the jurisprudential roots of Ely's vision of lawyering. It shows how Ely developed a legal process conception of political access rights and minority equality rights through his writings on civil rights, constitutional law, and criminal procedure. Moreover, it explores how Ely's process vision was enlarged by the civil rights movement and, at the same time, tempered by separation-of-powers considerations of role competence, institutional function, and political legitimacy.

Part III reexamines *Gideon* to expose the shortcomings of legal process and client-centered lawyering models erected in defense of the unrepresented. It demonstrates that these liberal-lawyering models of representation in the fields of poverty law and criminal justice focus on adversarial rights and material outcomes at the expense of democratic empowerment and minority collaboration.

Part IV integrates *Gideon* into a broader discussion about clinical legal education, criminal defense practice, and poverty law advocacy in impoverished communities of color. It seeks to discern in Ely's work a core set of democratic norms and narratives of political access and minority equality generalizable to multicultural clients and communities. Further, it sketches community-centered guidelines for lawyers laboring to advance the legal, political, and economic interests of unrepresented individuals and groups.

I. *GIDEON* IN WHITE: RACE-NEUTRAL LAWYERING

> I will not be proud of this biography, it will be no cause of pride; nor will it be the absolute truth. I can not remember or desire to remember that well.[8]

Ely got lucky in *Gideon*. He found his first client, Clarence Earl Gideon, jailed and abject. Ely, then a second-year student at Yale Law School, clerked during the summer of 1962 at Arnold, Fortas & Porter in Washington, D.C. Gideon appeared to many as "the most wretched of men."[9] He "bore the physical marks of a destitute life: a wrinkled, prematurely aged face, a voice and hands that trembled, a frail body, white hair."[10] His destitution spanned a five-decade history of gambling and imprisonment, including prior felony sentences for burglary and drunkenness.[11] Although only fifty-one years old, he appeared "tossed aside by life."[12]

Born in 1910 to a "family of factory workers [sic] class" in Hannibal, Missouri, Gideon described his early life as "miserable."[13] At age fourteen, he "ran away from home" to live "the life of a hobo and tramp."[14] At age fifteen, he was arrested for burglary and jailed in a juvenile "reformatory" prison where he received whippings. He was paroled after a year, went to work in a shoe factory, and married.[15]

Unemployed at age eighteen, Gideon was convicted and sentenced to a Missouri prison for robbery, burglary, and larceny. Released in January 1932, in the middle of the Depression, he was arrested for stealing government property and sentenced to prison at Fort Leavenworth in Kansas. Subsequently released in January 1937, he was arrested, convicted, and sentenced to Missouri prisons three additional times, escaping twice during a thirteen-year period. Released again in January 1950, he gambled, married for a second time, and returned to prison.[16]

In 1953, while working as a cook on a tugboat in Texas, Gideon contracted tuberculosis and underwent surgery. In 1955, he bought a pool hall in Texas and married for the third and fourth times in quick succession, taking custody of his last wife's three children. Between 1956 and 1959, his

8. ANTHONY LEWIS, GIDEON'S TRUMPET 65 (1964) (internal quotation marks omitted) (quoting Clarence Earl Gideon).
9. *Id.* at 6.
10. *Id.* at 5.
11. *Id.* at 5-7, 98.
12. *Id.* at 6.
13. *Id.* at 66 (internal quotation marks omitted).
14. *Id.* (internal quotation marks omitted).
15. *Id.* at 67.
16. *Id.* at 67-68.

wife gave birth to three more children. During this period, Gideon worked as a guard, a watchman, and an automobile mechanic until he was arrested and jailed for breaking and entering. The state welfare department subsequently placed the children in foster care. From 1959 to 1961, Gideon struggled to regain custody of his children while recovering from a second round of tuberculosis-related hospitalization and laboring on a barge in Louisiana. On June 3, 1961, he was arrested for breaking and entering at the Bay Harbor Poolroom in Panama City, Florida.[17]

Ely apparently learned of Gideon's case following his 1961 jury trial and conviction in county court for breaking and entering with the intent to commit larceny.[18] Despite Gideon's opening plea for state assistance, the trial judge denied his request for court-appointed counsel.[19] Sentenced to a maximum five-year term, Gideon declined to appeal his conviction and instead petitioned the Florida Supreme Court for a writ of habeas corpus. The state supreme court denied the petition, and in January 1962 Gideon filed a motion for leave to proceed *in forma pauperis* and a petition for a writ of certiorari in the U.S. Supreme Court.[20] Written in pencil, the petition urged the Supreme Court to review his state court plea for counsel.[21] Gideon contended that "all citizens tried for a felony crime should have aid of counsel."[22] His reply brief reiterated this contention, arguing "that a citizen of the state of Florida cannot get a just and fair trial without the aid of counsel."[23] Also in pencil, the brief observed, "It makes no difference how old I am or what color I am or what church I belong too [sic] if any. The question is I did not get a fair trial. The question is very simple."[24]

For two months during the summer of 1962, Ely labored to assist Abe Fortas and Abe Krash, both partners at Arnold, Fortas & Porter, in

17. *Id*. at 68-76.
18. *See id*. at 9-10, 57-62 (detailing the trial).
19. *Id*. at 9-10. The trial transcript reflects the following colloquy:

> The Defendant: Your Honor . . . : I request this Court to appoint counsel to represent me in this trial.
>
> The Court: Mr. Gideon, I am sorry, but I cannot appoint counsel to represent you in this case. Under the laws of the State of Florida, the only time the court can appoint counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint counsel to defend you in this case.
>
> The Defendant: The United States Supreme Court says I am entitled to be represented by counsel.

Id. at 10 (internal quotation marks omitted).
20. *Id*. at 3-8, 22, 62.
21. *Id*. at 4.
22. *Id*. at 8 (internal quotation marks omitted).
23. *Id*. at 37 (internal quotation marks omitted).
24. *Id*. at 37-38 (internal quotation marks omitted).

researching and preparing Gideon's Supreme Court brief.[25] The brief relied on a memorandum Ely prepared that summer, in which he painstakingly examined Gideon's trial transcript for evidence of prejudice and judicial error. Pointing to numerous errors and examples of prejudice, Ely asserted that "it would seem that there is *no* trial in which counsel is unnecessary."[26]

On March 18, 1963, the *Gideon* Court overruled *Betts v. Brady*, reversing the judgment of the Florida Supreme Court and remanding the case for further action.[27] Acknowledging Ely's premise that the trial transcript showed that Gideon had "conducted his defense about as well as could be expected from a layman,"[28] the Court nonetheless held that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[29]

Years later, Ely referred to the time spent in Washington helping Abe Fortas write the *Gideon* brief as "the best summer job ever."[30] But the *Gideon* brief turned out to be more than a summer job. Both personally and professionally, it reflected a galvanizing moment for Ely, which opened academic and advocacy opportunities "to help follow up on the promise that was made in *Gideon*."[31] Looking back, Ely remarked, "I knew I was going to be a criminal defense lawyer, at least for a while . . . ."[32] Indeed, soon after his graduation from Yale, Ely joined two other lawyers in founding Defenders, Inc., a public defender office in San Diego.[33]

From 1966 to 1968, Ely served as a public defender representing indigent defendants in federal and state criminal cases. During this period in San Diego, Ely insisted, "the best defense came from the public defenders."[34] Their mission, he explained, was to stand up for their clients' welfare while minimizing damage. Closely tailored to individual client contexts, the day-to-day arguments employed to advance this mission are largely absent from Ely's writings. Typically self-effacing, Ely explained this absence by discounting the content of his own advocacy. Instead he stressed the importance of bearing witness in representation, remarking, "I

25. *Id.* at 120, 122-26. The final draft of the brief acknowledged Ely's "'valuable assistance.'" *Id.* at 138 (quoting petitioner's brief in *Gideon*).

26. *Id.* at 126 (internal quotation marks omitted); *see also* ELY, *supra* note 1, at 199.

27. Gideon v. Wainwright, 372 U.S. 335, 339, 345 (1963). Decided by a divided Court in 1942 under distressingly similar facts, *Betts* held that the Fourteenth Amendment was not necessarily offended by a state's refusal to appoint counsel for an indigent felony defendant. Betts v. Brady, 316 U.S. 455 (1942).

28. *Gideon*, 372 U.S. at 336.

29. *Id.* at 344.

30. ELY, *supra* note 1, at 198.

31. *Id.* at 209.

32. *Id.*

33. *Id.*

34. *Id.* at 205.

think it did my clients some good to see me actually standing up and taking some shots for them."[35]

For Ely, the act of standing up in defense of the disadvantaged and the underrepresented in the lawyering process was fundamental to liberal legalism. Indeed, it defined the mission of liberal lawyers. Ely conceded, however, that standing alone in a courthouse was insufficient. At Stanford, for example, he supported the founding and eventual underwriting of the East Palo Alto Community Law Project to provide student-directed legal services to surrounding low-income neighborhoods.[36] Likewise, he supported clinical teaching of both trial and community advocacy skills, albeit as a "mode of teaching" rather than an "ideological outlook."[37] More broadly, he championed democratic commitments to political access and minority equality rights in the interlocking forums of advocacy, adjudication, and legislation.

Ely's evolution from trial advocate to community-based counsel stemmed from his gradual and ultimately incomplete recognition that the liberal-lawyering tradition of narrowly representing jailed and wretched defendants fails to adequately address the racial subordination of the poor and the accused. The liberal tradition of representation proffers claims of fair access, equal justice, and effective assistance. These are the color-blind claims of race-neutral lawyering. They are claims of reasonable access and competent assistance—objective claims of *Gideon* in white. Their proffer, however zealously made, overlooks the pervasiveness of racial subordination and the centrality of racial identity for clients and communities of color in law and lawyering. Gradually, Ely tried to enlarge the legal process framework of liberal lawyering to take account of color.

II. *GIDEON* IN COLOR: RACE-CODED LAWYERING

I am a outcast.[38]

35. *Id*. at 210; *see also id*. at 431 n.8 ("The sight of an appointed lawyer actually fighting for his client so shocked local juries that a number of them actually acquitted.").

36. *See* John Hart Ely, *From the (Old) Dean*, STAN. LAW., Spring 1987, at 3, 4; John Hart Ely, *Our Students: Do the Stereotypes Fit?*, STAN. LAW., Fall 1984, at 2, 3 (endorsing "[c]ombining a legal aid clinic with community education components"); *see also* Steven Dinkelspel & Peggy Russell, *The Making of a Community Law Project*, STAN. LAW., Spring 1986, at 8 (describing the development of the East Palo Alto Community Law Project). Without formal faculty consultation, Ely committed $150,000 per year for a ten-year period to the project, a decision that rankled some faculty. *See* Friedenthal, *supra* note 7, at 373.

37. John Hart Ely, *Business Law vs. Public Interest Law: A False Dichotomy*, STAN. LAW., Fall 1983, at 2, 3 (emphasis omitted); *see also id*. ("Skills learned clinically are transferable skills."). Ely counted many clinical law teachers as allies and friends, among them Dennis Curtis, Bill Hing, and Gerald López.

38. LEWIS, *supra* note 8, at 68 (internal quotation marks omitted) (quoting a letter from Gideon to Fortas).

At the outset of *Gideon*, Ely and the Arnold, Fortas & Porter defense team imagined Gideon in color. Referring to Gideon, Fortas admitted, "I specifically wanted to find out . . . whether he was a Negro."[39] From a litigation stance, that information might have proven useful in investigating discriminatory practices by Florida police officers, prosecutors, and jurors, or alternatively, in buttressing the claim of an equal protection violation, or simply in evoking sympathy. But Ely and Fortas misapprehended the meaning of "Negro" color. Well-trained liberal lawyers, they construed color in customarily formal and instrumental terms.[40] Lawyer formalism, exemplified by the Scottsboro capital trial in *Powell v. Alabama*,[41] defines color in terms of black ignorance, feeble-mindedness, and illiteracy.[42] Lawyer instrumentalism, displayed in *Brown v. Board of Education*,[43] denotes color in terms of white pity.

Both formal and instrumental constructions of color under race-coded lawyering demean black identity and damage black community. For formalists, the colored client is incompetent and requires lawyer direction rather than consultation and collaboration. For instrumentalists, the colored client evokes historical sympathy and is a passive object of discrimination rather than a moral subject capable of resistance.

Uncomfortable with the distortions of racial privilege implicit in Fortas's remark, Ely resisted the demeaning classifications of race-coded formalism and instrumentalism in favor of the term "underdog." In Ely's view, liberal lawyers mounted legal and political battles on behalf of underdogs like Clarence Gideon. Used frequently by Ely during our eight-year debate over lawyers and liberalism, the term underdog described for him the powerless and the disenfranchised.[44] In fact, the term described Gideon exactly. For chroniclers of the case, Gideon himself "seem[ed] a man whose own private hopes and fears ha[d] long since been deadened by adversity—a used-up man, looking fifteen years older than his actual age of

39. *Id.* at 63 (internal quotation marks omitted).

40. *See* IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 138-46 (1996); Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 123-76 (1998); Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213, 1239-52 (1997).

41. 287 U.S. 45 (1932); *see* DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (rev. ed. 1979).

42. *See Powell*, 287 U.S. at 72 (evoking imagery of black deviance and inferiority through depiction of the ignorance, feeble-mindedness, and illiteracy of the accused).

43. 347 U.S. 483 (1954).

44. For the roots of our debate, see Anthony V. Alfieri, *John Hart Ely: Fathers and Sons*, 58 U. MIAMI L. REV. 953 (2004).

fifty-two."[45] His figure appeared "gaunt, a stooped six feet, one hundred and forty pounds."[46] He spoke "in a slow, sad, defeated voice."[47]

Ely recognized that underdog battles erupt daily in law, politics, and society, often in impoverished communities of color and in the criminal justice system. Waged by poverty lawyers and criminal defenders, the battles highlight the strengths and weaknesses of the traditional liberal conception of the advocate's role, function, and legitimacy. Our longstanding debate over the competing strengths and weaknesses of liberal lawyering is echoed in the current literature on clinical education, criminal defense practice, and poverty law advocacy. Much of that literature shares jurisprudential roots with the legal process movement. Legal process scholars[48] endorse neutrality, institutional fidelity, and reasoned elaboration in constitutional decisionmaking.[49] They claim that these objective norms confer wide legitimacy on the agents (administrators, lawyers, and judges) and institutions (administrative agencies, courts, and legislatures) of liberal legalism.[50]

Yet legal process theories harbor mistaken objective judgments and misplaced institutional fidelity. Further, their claims presuppose a stable juridical universe free of race-motivated coercion. As Ely's friend Robert Cover observed in the antebellum context of Fugitive Slave Law enforcement proceedings, resisting such claims by "refus[ing] to abide the results of the formal apparatus was a threat to the viability of that structure and a direct assertion that the moral values of antislavery were of higher priority than those underlying fidelity to legal process."[51]

The liberal commitments of legal process engender moral/formal dilemmas in adjudication and advocacy. The justification for traditional advocacy tactics and strategies conforms to the adversarial process norms

45. LEWIS, *supra* note 8, at 96.

46. *Id.*

47. *Id.*

48. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953).

49. *See* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997); Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503 (1997); Gary Peller, Neutral Principles *in the 1950's*, 21 U. MICH. J.L. REFORM 561 (1988).

50. Legal process analysis continues across numerous fields. *See* Karen A. Jordan, *The Complete Preemption Dilemma: A Legal Process Perspective*, 31 WAKE FOREST L. REV. 927 (1996); Harold A. McDougall, *Social Movements, Law, and Implementation: A Clinical Dimension for the New Legal Process*, 75 CORNELL L. REV. 83 (1989); Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213 (1983).

51. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 214 (1975).

of partisanship and moral nonaccountability.[52] Instead of promoting client democratic access rights or commanding minority group equality rights, the norms emphasize individual results obtained in isolation from politics, culture, and society.

Rather than upend legal process norms, Ely set out to embolden them with democratic access rights and minority equality principles, albeit within separation-of-powers limits. Ely's legal embrace of political liberalism involved both rights-based, representation-reinforcing principles (which animate his democratic access and minority equality claims)[53] and role-specific, institution-limiting principles (which inform his institutional competence and legitimacy concerns).[54]

The notion of representation-reinforcing principles emerges from Ely's celebrated theory of judicial review. For Ely, judicial review operates to promote representative democracy by correcting malfunctions in the political process.[55] Structural malfunctions occur when dominant groups ("the ins") block subordinate groups ("the outs") from obtaining access to "channels of political change" or when legitimate representatives beholden to a dominant majority group engage in practices that prove "systematically disadvantaging" to subordinate minority groups "out of simple hostility or a prejudiced refusal to recognize commonalities of interest."[56] Their corrosive effect, according to Ely, denies subordinate minority groups equal protection and, thus, a fair opportunity to participate in the political process.[57]

Cast at the intersection of constitutional jurisprudence and democratic political theory, Ely's conception of the affirmative, representation-reinforcing function of judicial review is grounded in the values of political access and minority inclusion.[58] Fashioned from the text, structure, and history of the Constitution, effective access rights fulfill the purpose of safeguarding minority participation in the political process. In fact, the Constitution itself facilitates this purpose, endowing courts with a complementary performative role.

Designed to regulate the democratic process, Ely's "participation-oriented, representation-reinforcing" theory of judicial review[59] not only

52. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 7, 50-66 (1988).
53. *See* ELY, *supra* note 2, at 87-104.
54. *See id*. at 43-72.
55. *See id*. at 102-03.
56. *Id*. at 103.
57. *See id*.
58. Ely's search for constitutional values pervades his work. *See* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); John Hart Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978).
59. ELY, *supra* note 2, at 87.

safeguards the minority participation rights of the disenfranchised and the powerless but also preserves the integrity of the political process from majority corruption. Ely condemned multifarious state policies and practices that threatened minority electoral participation through voter eligibility restrictions and voting district gerrymandering.[60] Alert to pernicious stereotypes[61] and group harm,[62] he urged representation-reinforcing rights principles tailored to shelter democratic institutions and procedures.[63]

Ely's passion for preserving democratic safeguards is traceable to the civil rights movement of the 1950s and 1960s and his experience as a Warren clerk and public defender, which stirred him to recognize the consequences of inequality in law, politics, and society. Indeed, inequality served as the springboard for much of our decade-long lawyering conversation about voting rights, poverty law, and affirmative action. His amicus brief in *City of Richmond v. J.A. Croson Co*., for example, demonstrates a broad commitment to equal treatment and affirmative relief.[64] Despite its legacy of white resistance and violence, the civil rights movement exemplified for Ely the importance of representation-reinforcing advocacy and interracial collaboration in the fight for equality.

Ely defined equality primarily in terms of access and treatment. He advocated open access and evenhanded treatment for minorities in civil as well as criminal justice systems. When he discovered impediments to economic access or incidents of unequal opportunity, Ely searched out evidence of unlawful racial motivation and unwarranted discrimination.[65] He denounced racially motivated discrimination in publicly regulated areas, such as school systems.[66] Likewise, he supported state enactment and

60. *See* John Hart Ely, *Confounded by* Cromartie*: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders?*, 56 U. MIAMI. L. REV. 489 (2002); John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607 (1998); John Hart Ely, *Standing To Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576 (1997).

61. Ely's race-conscious approach continues to influence voting rights scholarship. *See, e.g*., John O. Calmore, *Race-Conscious Voting Rights and the New Demography in a Multiracing America*, 79 N.C. L. REV. 1253, 1257-73 (2001); Walter C. Farrell, Jr. & James H. Johnson, Jr., *Minority Political Participation in the New Millennium: The New Demographics and the Voting Rights Act*, 79 N.C. L. REV. 1215, 1237-42 (2001); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 631-45 (2002).

62. *See* John Hart Ely, *If at First You Don't Succeed, Ignore the Question Next Time? Group Harm in* Brown v. Board of Education *and* Loving v. Virginia, 15 CONST. COMMENT. 215 (1998).

63. *See* John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978).

64. Brief Amicus Curiae ACLU et al., City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (No. 87-998).

65. *See* ELY, *supra* note 1, at 247-78; John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974).

66. *See* ELY, *supra* note 1, at 254-61.

enforcement of antidiscrimination laws in private market transactions, such as in housing,[67] and understood that procedural due process values proved vital to administrative fairness, as in disability and welfare hearings.

Moreover, Ely recognized that equal justice in criminal law required equal access to counsel and equality of treatment.[68] Like many defenders today,[69] Ely defined access to counsel in terms of effective representation. He demanded equitable treatment of the accused in police targeting and prosecutorial charging as well as in the conduct of trial and sentencing. Skeptical of race-infected trial strategy[70] and cognizant of the constitutional mission of criminal defenders,[71] he insisted on the fair treatment and zealous representation of criminal defendants both to avert discrimination and to preserve liberty. To Ely, liberty carved a pathway to democratic participation coextensive with dignity. That pathway, however, was narrowed by separation-of-powers limits.

Reasoning from settled traditions of democratic governance, Ely deduced process limits from principles of institutional function, power, and legitimacy.[72] To Ely, the agents and institutions of democratic governance in adjudication, legislation, and regulation carried discrete functions and implementing powers.[73] Their political legitimacy depended on the proper

67. *See id*. at 275-78.

68. *See id*. at 211-32 (critiquing Harris v. New York, 401 U.S. 222 (1971)).

69. *See* William S. Geimer, *A Decade of* Strickland*'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 92-97 (1995); Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 433 (1993); Note, Gideon*'s Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062 (2000).

70. *See* John Hart Ely, Op-Ed, *Murder Trials and Other Spectator Sports*, MIAMI HERALD, June 8, 1997, at L1; *see also* Anthony V. Alfieri, *(Er)Race-ing an Ethic of Justice*, 51 STAN. L. REV. 935 (1999); Anthony V. Alfieri, *Race-ing Legal Ethics*, 96 COLUM. L. REV. 800 (1996).

71. *See generally* Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175 (1983) (examining traditional justifications of criminal defense practice); David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993) (testing the legitimacy of the ideology of aggressive advocacy in criminal defense practice).

72. The 1960s antiwar movement pushed Ely to critically examine both congressional and presidential war powers. Initially prompted by objections to the Vietnam War, Ely's study of congressional and presidential war powers gradually expanded to include wider conflicts in Europe, Latin America, and the Middle East. His writings signal an abiding concern for democratic governance and responsibility in times of war. Equally noteworthy, they reveal growing apprehension about the institutional limits of the Supreme Court's role as a bulwark against the unchecked exercise of executive and legislative powers. *See* ELY, *supra* note 1, at 143-51; JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 105-14 (1993).

73. *See generally* John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833 (1991) (advocating a judicial role in prodding Congress to perform its constitutionally contemplated policymaking functions to counterbalance presidential power); John Hart Ely, *The Apparent Inevitability of Mixed Government*, 16 CONST. COMMENT. 283 (1999) (assailing dominant academic theories of judicial review for permitting judges to evaluate the wisdom of legislative choices).

discharge of those functions and the reasoned exercise of delegated powers. Legitimacy failed when institutions abandoned their functions, exceeded their roles, or abused their powers.[74] In a searing constitutional analysis, Ely documented this abandonment and abuse, and the concomitant loss of political legitimacy, in the American prosecution of the Vietnam War.[75]

Ely's constitutional commitments to racial equality, institutional function, and political legitimacy were tested by his experience as general counsel at the Department of Transportation. As before, the commitments engendered institutional tensions and strained efforts to reconcile competing remedial values. Recalling that experience, former Secretary of Transportation William Coleman explained that when President Ford's cabinet debated the remedial policy of school busing in school desegregation cases, Ely "seized on busing as a transportation issue."[76] Coleman wrote that, for Ely, school busing served as "an essential tool in redressing the wrongs perpetrated by school segregation."[77] Both Ely and Coleman surely realized that the Department of Transportation's endorsement of busing as a means of redress brought the norms of equality, function, and legitimacy into sharp conflict inside and outside the Ford Cabinet. Coleman noted that Ely "felt so strongly about the civil rights policies at stake that he submitted . . . , with no threat of publicity, a letter of resignation that would be effective if the President were to side with busing opponents."[78]

Ely's preference for an act of private conscience over a moment of public protest is unsurprising given his constitutional temperament and natural disposition. This is not to say that Ely held the norms of institutional function and political legitimacy inviolate. To the contrary. For Ely, neither institutional function nor political legitimacy trumped equality. The moral character of his constitutional commitments precluded the easy subordination of equality to higher structural values. At the same time, as Ely demonstrated in *Gideon* and in his public defender practice, the balancing of constitutional commitments to individuals and institutions inevitably shapes both the form and substance of equality-based advocacy, including the role of community organization and political action in the lawyering process. In this way, Ely's federal regulatory experience at the

74. *See* Ely, *supra* note 3, at 922-26.

75. *See* ELY, *supra* note 72, at 12-46. *See generally* John Hart Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877 (1990) (urging congressional adoption of a bright-line test of war powers authorization); John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379 (1988) (proposing amendment of accountability-enhancing provisions of the War Powers Resolution of 1973).

76. Coleman, *supra* note 6, at 358.

77. *Id.*

78. *Id.*

Department of Transportation intensified his struggle to differentiate political and legal forms of permissible advocacy, especially in racially inflammatory policy contexts.

Grafting Ely's separation-of-powers principles onto the lawyering process may strike some as attenuated. Yet founded on the structural logic of institutional role, function, and legitimacy, the principles apply with equal force to advocacy. Engrained in that logic is a deep-seated notion of constraint on roles. To his credit, Ely rejected the notion of a fixed or rigid sense of constraint. His concept of constraint resembled a field of channeled discretion that afforded institutional agents—lawyers, judges, and administrators—room to maneuver in the exercise of advocacy, adjudication, and regulation.

The notions of constrained juridical roles and relationships, limited institutional competencies and functions, and contingent claims to political legitimacy correspond with a conventional understanding of liberal lawyering. Most poverty lawyers and criminal defenders view the lawyering process as constrained by the roles and relationships of adversary and administrative systems. Those systems assign identities and allocate functions. The performance of lawyer identity and function occurs through narrative embodied in symbolic, written, and social texts, which brings logic and order to the lawyering process. Absent from this logic of lawyering and its natural or necessary order is a collaborative or participatory ethic or narrative.

Ely's separation-of-powers principles link lawyer ethics and narratives to institutional competence and political legitimacy, channeling the lawyering process toward constricted adversarial roles and relationships. Unfortunately, this consigns democratic access and minority equality considerations to political and social spheres outside law. Both poverty law and criminal justice thus narrow the range of lawyer competence and tighten the ambit of lawyer institutional function in the interests of political legitimacy. This obscures the vision of *Gideon* in black.

III. *GIDEON* IN BLACK: RACE-CONSCIOUS LAWYERING

> I have no illusions about law and courts or the people who are involved in them.[79]

It seems likely that neither Ely nor the Arnold, Fortas & Porter defense team saw Gideon in black. They saw no identity and no community. They saw no power and no useful class or culture. They saw no sign of moral

79. LEWIS, *supra* note 8, at 78 (internal quotation marks omitted) (quoting Gideon).

agency and no opportunity for political mobilization. Trapped in the legal process prism of liberal lawyering, they saw only wretchedness.

Too white for race-ing, Gideon offered a color-blind slate to inscribe a neutral claim for an objective measure of effective assistance in criminal cases. Beyond pity, his identity bore little consequence to the litigation, and his historical community of "factory workers" gained little recompense. Gauged by its progress in affirming the subjective dignity of client identity or in combating Southern class-based deprivation, the *Gideon* litigation accomplished less than its reformist efforts promised. To imagine Gideon in black is to see him in the fullness of social and cultural identity and to situate his case in its broader legal-political context. For poverty lawyers and criminal defenders schooled in the color-blind traditions of clinical education, client-centered representation paradoxically blunts that vision.

A. *Poverty Lawyers*

The notion of client-centered representation dominates clinical legal education in both poverty law and criminal justice.[80] This method of representation typically constructs stereotypical identities for the lawyer and the client based on generalized traits.[81] The lawyer's identity is characterized by the loyal, zealous advocacy of partisanship and the best-interest calculations of paternalism. The client's identity, by contrast, is viewed simply as an instrument of partisanship and an object of paternalism to be exploited in pursuit of material goals. These identity constructions are widespread and occur throughout law offices, jails, and courtrooms.[82] Social construction of this sort hinges on the multiple categories of client identity, including class, ethnicity, gender, and race. Lawyer constructions of client identity are embodied in trial narratives heard in opening statements and closing arguments.

Too often unmindful of these identity constructions in advocacy, clinical teachers describe the lawyering process as a bundle of objective technical skills that can be applied across interviewing, counseling, and trial advocacy. Ely, for example, alluded to clinically "learned" skills as "transferable" and nonideological.[83] But the notion that there exists a

80. By clinical education, I mean externship, live-client, and simulation (pretrial, trial, and appellate) programs.

81. *See* Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731 (1993).

82. *See* William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447, 1459-66 (1992); Austin Sarat, *". . . The Law Is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343 (1990).

83. Ely, *supra* note 37, at 3.

generalizable lawyer technique capable of universal application overlooks the diverse configurations of client identity. In the *Gideon* brief, for example, we never hear of Gideon's struggle to regain custody of his children from the Florida foster care system[84] or of his religious faith.[85]

The failure to recognize diverse client identities has a number of consequences. As my discussion in Part II articulates, there are inherent tensions between process considerations of role, function, and legitimacy and axioms of democratic politics and rights mobilization, tensions that are evident in client-centered representation of the indigent.[86]

Those who advocate the traditional client-centered process defend its methods as driven by the demands of the adversary system. Clinical teachers and lawyers frequently assert that these techniques are neutral and objective. In fact, such techniques often depend on construing client identity in terms of dependence or deviance, character traits commonly associated with historically subordinated groups, such as Gideon's class of impoverished factory workers. Gideon exhibited signs of both dependence and deviance. His illness and the abandonment of his children showed him to be dependent on the largesse of the state, and his history of drunkenness, gambling, and imprisonment showed him to be prone to deviance.

Construing clients like Gideon as dependent or deviant implies that they are incapable of collaborative legal advocacy and political organizing. As a result of this overbroad implication, clients appear incompetent, their families dysfunctional, and their communities chaotic. This corrosive character assignment occurs continuously, initially during the interviewing and counseling process when lawyers first name clients—here in the guise of drunkenness and wretchedness—and subsequently during trial and on appeal.

Naming is an act of interpretive authority and translation that comes instinctively to lawyers through pre-understanding. This act marginalizes clients by presupposing their inferiority and then by suppressing alternative client identities and excluding competing client narratives. Client

84. Gideon asserted, "I do not intend to let anyone take my children away from me and I will fight it ever [sic] way I know how. I hope to be able to get my children into a home someplace somehow, until I am able to take care of them myself." LEWIS, *supra* note 8, at 77 (internal quotation marks omitted).

85. Gideon explained, "I do not like the idea of forcing my children are [sic] enticing them to believe in any certain religion but I have always wanted them to learn the moral respect that the people of this country has and of all the great religions I have pick the christian religion because it is based on love." *Id.* at 71 (internal quotation marks omitted).

86. This account amplifies my earlier critiques of poverty-law-practice traditions. *See* Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659 (1987-1988); Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769 (1992); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991).

subordination and discipline of this kind operates through the basic conventions of the lawyering process, such as interviewing and fact investigation. That process silences opposition, excludes options, and compels obedience to the narratives of lawyer-decreed story and the tactics of lawyer-designed strategy. Disciplinary conventions create the expectation of client acquiescence to lawyer storytelling and litigation strategy as the product of rational choice and self-interest. Gideon's acquiescence to the Arnold, Fortas & Porter briefing strategy, for example, confirmed the litigation team's expectation that he had nothing to offer—no insight, no history, and no power to speak.

The marginalization of the client's role in poverty law practice also occurs when lawyers use victimization strategies to present their client in a sympathetic light. Poverty lawyers rationalize these victimization strategies with the ideals of benevolence and paternalism, and they disavow any implied devaluation of client capacity or competence. They insist on an intrinsic state of dependence or a necessary portrait of helplessness drawn to conform to the expectations of administrative decisionmakers and adjudicators. Yet such victimization strategies reproduce narratives of dependence and incompetence.

In poverty law, victimization strategies are prevalent in both direct-service and law reform advocacy. The direct-service tradition treats poor clients as isolated and passive individuals, which undercuts the common experiences of impoverishment in areas such as education, health care, and housing. Disaggregating these common experiences into discrete disputes unrelated to larger classwide continuities inhibits the politicization and mobilization of client communities. The routinization of cases into formulaic practice patterns also encourages the disaggregation of disputes. Driven by rising poverty rates, marginalizing traditions, and the institutional economics of escalating caseloads and inadequate resources, case routinization and standardization stunt client and community empowerment. The slotting of cases and the shunning of community mobilization find only modest relief in law reform advocacy.

Law reform advocacy also fails to break free of the constraints of the hierarchical lawyer-client relationship. The law reform tradition, embodied by test case and institutional reform litigation, attacks the laws and institutional policies undergirding poverty. However, such advocacy stifles the indigenous growth of grass-roots community leadership by centralizing case design and decisionmaking authority in lawyers' hands. The tradition also hinders grass-roots organizing campaigns by focusing energies on the judicial branch instead of the executive and legislative branches. Although law reform initiatives may activate political consciousness, their reliance on dependent constructions of client identity and their adherence to the

hierarchical organization of lawyer-client divisions of labor reinforce the constraints of role, function, and legitimacy instilled by the legal process tradition.

Viewing clients and their communities as powerless demeans them and distorts social reality,[87] yet this presumption pervades clinical education, poverty law, and criminal defense practice. Practitioners in each field deny the imputation of dependent or deviant infirmities, instead citing either a natural client character or the instrumental necessity of proffering evidence of such character to curry sympathy.

The denial of dignity in client-centered representation damages the identity of the client subject and thereby inhibits the democratic politics of civic association and political mobilization. Clients and communities draw power from the internal resources of individuals and groups rather than from the external interventions of lawyers. The frequent absence in advocacy of narratives of local power drawn from individual and collective action signals the abandonment of interpretive struggle over the alternative depiction of client and community dependency in lawyer storytelling and in lawyer-client roles, tactics, and strategies. Fundamental to that alternative depiction is resistance. The same struggle over client identity and community power occurs in the field of criminal justice.

B. *Criminal Defenders*

The representation of accused clients like Gideon in the criminal justice system further exposes the tensions between process considerations and rights mobilization. Both clinical and criminal defender traditions ignore the extent to which legal process conventions harmfully construct client-community identity and cultural meaning in criminal cases.[88] Legal process norms urge the race-neutral representation of accused clients. Consistent with adversarial commitments, race-neutral representation imbues the defense function with the moral obligation to shield the accused from state-

87. For discussions of essentialist presumptions of gender and race in law, culture, and society, see generally ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988); and Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

88. This account augments my earlier critiques of criminal defender traditions. *See* Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995); Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063 (1997); Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293 (1998). For criticism, see Robin D. Barnes, *Interracial Violence and Racialized Narratives: Discovering the Road Less Traveled*, 96 COLUM. L. REV. 788, 788-91 (1996); Christopher Slobogin, *Race-Based Defenses—The Insights of Traditional Analysis*, 54 ARK. L. REV. 739, 739-49 (2002); and Abbe Smith, *Burdening the Least of Us: "Race-Conscious" Ethics in Criminal Defense*, 77 TEX. L. REV. 1585, 1585-91 (1999).

inflicted violence whether she is guilty or innocent. The historical inequity and rationing of state defense resources relative to prosecutorial powers and assets further encourages indigent defender systems to embrace partisan zeal in advocacy and plea bargaining, as displayed in *Gideon* and during Ely's short-lived career at Defenders, Inc.

This elevation of liberty interests under the mandate of effective representation jeopardizes a defendant's dignitary and community interests. Dignitary interests become dangerously entangled in defense representation when the cultural artifacts of caste and color as well as the social norms of character and community come into play. The artifacts and norms combine discursively in legal narratives. This defender-guided process translates social meaning into law and extracts social meaning out of law. Functionally, defenders occupy the role of interpretive agents engaged in the construction of race and legal violence.[89]

Criminal trials provide a forum for identity construction and the sociolegal translation of violence. The trials shape identity and mold narrative. The mutability of identity and the plasticity of narrative coincide with several variables encompassing procedural and substantive laws, judges and juries, and defendants and victims. Although prone to alterations in cultural and social meaning, the variables establish a stable context for the construction of identity and the translation of narrative. That stability rests on stereotype.

Historical stereotypes of caste and color situate the racial status of the accused and the accuser in law, culture, and society. Defenders cull such stereotypes to mount color-coded defenses in their pretrial tactics (venue transfer) and trial strategies (jury selection). Normative degradation circulates throughout the defender discourses of constitutional, statutory, and common law innocence and excuse. Directly and inferentially, those discourses naturalize color-coded stereotypes of racial inferiority.

For example, in cases of black-on-white violence, the subordinating narratives of color-coded stereotypes construct the identity of black males in the antebellum terms of bestial pathology. This image of the black male sociopath creates an objective impression of cognitive, volitional, and moral incapacity. By contrast, in cases of white-on-black violence, subordinating narratives restate black racial inferiority through the defender tactics of jury nullification, victim denigration, and diminished capacity. Jury nullification reflects the racial supremacy of white jurors urged to override evidence of white offender responsibility for black victim harm in

89. *See* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983); Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986); Anthony V. Alfieri, *The Ethics of Violence: Necessity, Excess, and Opposition*, 94 COLUM. L. REV. 1721 (1994) (book review).

crimes of racial violence. Victim denigration reproduces racial status hierarchy by proclaiming narratives of black deviance and devaluation. Diminished capacity reiterates hierarchy by declaiming the exculpatory narrative of distraught white innocence, thereby absolving white lawbreakers of moral and criminal culpability.[90]

Antisubordination principles offer remedial regulation of racialized criminal defense practices. Advancing beyond Ely-derived norms of political access and minority equality, these principles suggest a race-conscious, community-regarding ethic of political empowerment and minority collaboration. This alternative ethic challenges the necessity of inflicting racial harm that disfigures the character of individual defendants and tarnishes the integrity of their victims and communities. A strong version of this ethic requires criminal defense lawyers to renounce unilaterally the deployment of deviance-based, racialized strategies. A weak version encourages lawyer-client dialogue about the contested meaning of racial identity and collective political harm risked by racialized defense strategies. Departing from conventions of liberal lawyering, both remedial prescriptions recognize the danger of identity harm to dignitary and community interests. Moreover, both abandon the public/private distinction in evaluating the political consequences of such stigma harm.

The ethic of race-conscious political empowerment and minority collaboration transforms the legal process regime dominating criminal defense practice. Institutionally rooted, that traditional regime depends on a fixed, rigid conception of lawyer role, function, and legitimacy. But the lawyer-client relationship also contains background regulatory norms such as consensus and reciprocity, which furnish opportunities for moral and political dialogue in advocacy. Converting criminal defenders into political advocates entails race-conscious dialogue with clients and communities in jointly opposing racial violence.

Daily opposition organized in local contexts brings empathy and solidarity to the criminal defense process by encouraging a sense of client belonging and group membership through shared norms and narratives. In

90. Defenders tolerate color-coded criminal defense narratives of black-on-white and white-on-black violence concurrent with legal process theories of liberal agency. Liberalism posits the defendant-client as a subjective moral agent capable of assenting to racialized narratives depicting a naturally or necessarily defective black or white moral character. Under the contractarian account of moral agency, client assent demonstrates the rational and voluntary logic of liberal individualism. Under a communitarian account of agency, assent results from deliberative dialogue weighing client, public, and third-party interests. Contingent on assent, both accounts condone the deformity of defendant-client, victim, and community identity constructions through self-abasing racial narrative. Defender tolerance of client self-abasement is masked by the legal process rhetoric of color-blind neutrality and by the partition of the public/private spheres of society and law. For defender adherents of legal process, that separation prevents the legal desecration of racial identity from contaminating culture, society, or politics.

the mixed context of race, poverty, and crime, community lawyers must be responsive to individual identity, group self-determination, and interracial reconciliation and strongly committed to empowerment and collaboration norms. The norms of democratic citizenship push for inclusive deliberative dialogue that garners consent from, and grants legitimacy to, rebellious forms of legal-political organization. Antisubordination principles connect individual civic identity and self-realization to collective political identity and democratic citizenship. The principles posit in clients and communities the capacity for moral decisionmaking and self-direction in law, politics, and society. Sensitive to the complications of difference, they outline community-based advocacy practices that may seize on the memory of race-conscious collective action and unity. With these commitments, lawyers can help build a model of collaborative lawyering that represents *Gideon* in community.

IV. *GIDEON* IN COMMUNITY: COLLABORATIVE LAWYERING

> I am not proud of this biography. I hope that it may help you in preparing this case, I am sorry I could not write better I have done the best I could.[91]

Locating *Gideon* in class-based community builds on Ely's core set of democratic norms and narratives of political access and equality sufficient to advance the legal, political, and economic interests of unrepresented individuals and groups. Further, it discerns opportunities for democratic empowerment and minority collaboration in the ordinary routines of criminal defense and poverty law practice. Implemented alone or in tandem, client-centered and community-centered models present complementary strategies of client empowerment and community mobilization.

Ely's devotion to democratic empowerment provides poverty lawyers and criminal defenders with a valuable starting point for an integrated strategy of advocacy and organizing. But in order to transform traditional client victimization practices, we will have to experiment with advocacy roles and relationships, as well as our notions of lawyer-client roles, identities, and narratives. At Stanford, Ely's support for community-based clinical initiatives demonstrated the promise of open-ended experimentation.

Rising in part out of the emergence of the National Welfare Rights Organization and the Poor People's Campaign of 1968,[92] community-based

91. LEWIS, *supra* note 8, at 78 (internal quotation marks omitted) (quoting Gideon).

92. For helpful accounts of the welfare rights movement, see MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973, at 40-132 (1993); LARRY

initiatives attempted to join legal rights advocacy[93] and local neighborhood political action.[94] Although thwarted by inadequate resources[95] and ongoing political harassment,[96] these initiatives continue the crucial fusion of legal-political strategies and advocacy-organizing tactics in fostering democratic accountability and participation. As Ely's decanal stewardship of Stanford Law School's East Palo Alto Community Law Project showed, the lawyer-facilitated participation of indigent clients in the legal-political process engenders grass-roots leadership and popular resistance through rights education and outreach.

Ely's defense of democracy-inspired community outreach shaped his dedication to minority equality rights. The defense of democratic roles and functions affirms client competence and independence. Moreover, democratic identities and narratives support powerful oppositional voices of community and solidarity and promote political participation and self-determination.[97] Political rights promotion also inspires collective client action and dilutes lawyer authority.

The subversion of lawyer privilege requires contextualized, experiential reasoning oriented toward social justice, and this relies on lawyer-client and client-community collaboration.[98] Collaboration in client-centered and community-centered representation helps mitigate the continuing lawyering tensions between institutional role, functional competence, and legitimacy

R. JACKSON & WILLIAM A. JOHNSON, PROTEST BY THE POOR: THE WELFARE RIGHTS MOVEMENT IN NEW YORK CITY 31-66 (1974); and FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 264-361 (1977).

93. *See* JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (1974); Ann Southworth, *Lawyers and the "Myth of Rights" in Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469 (1999).

94. *See* HARRY P. STUMPF, COMMUNITY POLITICS AND LEGAL SERVICES: THE OTHER SIDE OF THE LAW (1975); Harry P. Stumpf, *Law and Poverty: A Political Perspective*, 1968 WIS. L. REV. 694.

95. *See* JACK KATZ, POOR PEOPLE'S LAWYERS IN TRANSITION 180 (1982).

96. *See* Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic*, 4 WASH. U. J.L. & POL'Y 33, 51-96 (2000); David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209, 220-40 (2003).

97. On narrative authority, see generally ROBIN WEST, NARRATIVE, AUTHORITY, AND LAW (1993); and Susan Bandes, *Searching for Worlds Beyond the Canon: Narrative, Rhetoric, and Legal Change*, 28 LAW & SOC. INQUIRY 271, 275-76, 280-84 (2003) (book review).

98. *See* Susan Bryant, *Collaboration in Law Practice: A Satisfying and Productive Process for a Diverse Profession*, 17 VT. L. REV. 459, 462-91 (1993) (outlining arguments for collaboration and its effect on the profession); Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 CLINICAL L. REV. 157, 160 (1994) (describing the author's project of "examin[ing] opportunities for collaborative lawyering work on a local level").

and between democratic politics and minority rights mobilization.[99] Other poverty lawyers and clinical teachers have espoused theories of community-centered representation,[100] and their endorsement comports with liberal autonomy norms and associated dignitary interests. It is necessary to encourage autonomy before collective determination and the solidarity of community organizations can be achieved.[101]

The improved efficacy of grass-roots legal-political integration strategies hinges on lawyer understanding of community. The practical knowledge useful to community-based campaigns comes from experiential collaboration between lawyers and clients working jointly and locally. Practical knowledge draws on the alternative ways of knowing, seeing, and speaking that are accessible in subordinated communities, and it acquires these alternative worldviews from observing the multiple problem-solving approaches of clients participating in the lawyering process. Individual and group participation in the process of strategic planning, remedial negotiation, and coalition building enables lawyers to reassess the delivery of legal services without instinctively exerting unilateral discretionary judgments.

Experimental forms of individual and group client participation in community-based advocacy are demonstrated in the Community Health Rights Education (CHRE) clinic at the University of Miami School of Law. CHRE is an interdisciplinary teaching, research, and community service clinic providing health rights representation in public benefits (Medicaid, KidCare, food stamps), permanency planning (guardianship), and immigration cases to underserved communities in cooperation with the schools of nursing and medicine. Because of the needs and demands of clients, CHRE clinical students and faculty recently developed self-help tenant rights workshops for clients attending university-based medical outpatient clinics as well as for elementary school sites served by the pediatric mobile clinic. By combining multiservice forms of medical-legal

99. This account builds on my earlier treatment of community-based poverty lawyering. *See* Anthony V. Alfieri, *Impoverished Practices*, 81 GEO. L.J. 2567 (1993); Anthony V. Alfieri, *Speaking out of Turn: The Story of Josephine V.*, 4 GEO. J. LEGAL ETHICS 619 (1991); Anthony V. Alfieri, *Stances*, 77 CORNELL L. REV. 1233 (1992); Anthony V. Alfieri, *Practicing Community*, 107 HARV. L. REV. 1747 (1994) (book review).

100. *See* GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 11-82 (1992) (describing the dominant public-interest-lawyering model and advocating alternatives); Shin Imai, *A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering*, 9 CLINICAL L. REV. 195, 201-25 (2002) (arguing that concepts of community should be integrated with the pedagogy of lawyering); Daniel S. Shah, *Lawyering for Empowerment: Community Development and Social Change*, 6 CLINICAL L. REV. 217 (1999) (advocating "lay lawyering").

101. On autonomy in group representation, see Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103 (1992).

advocacy in individual and group cross-disciplinary contexts, clinical students and faculty have begun to bridge the boundaries of knowledge and problem solving that traditionally divide poverty lawyers and impoverished clients.

The transformations of role, function, and competence in community-centered representation repudiate the heroic tradition of poverty lawyers enmeshed in the conventional pre-understanding of legal rights advocacy. Because participation amplifies client voices and engages legal-political discourse, it enlarges mutual understanding and builds solidarity. The commonality of indigent political, legal, and socioeconomic statuses encourages alliances around community protests and electoral campaigns. The merging of protest and campaign tactics into standard direct-service and law reform litigation strategies marks the democratic renewal of community-centered representation. This renewal shifts the focus of litigation strategies from rights-based protection to rights-promoting organization. This tactical swing toward mobilizing the independent formation of subordinate client groups lays the groundwork for leadership development and political empowerment.

Mobilization against racially motivated political repression promises neither plural tolerance nor interracial conciliation, but it does foster collaboration and dialogue. Collaboration permits clients to use their own experiences to inform the representation process and empowers client-centered and community-centered advocacy. Dialogue enables clients to burnish liberal notions of autonomy, duty, and deliberation with the feminist gloss of agency, trust, and reciprocity. This creates a feminist ethic of care vital to group formation and coalescence.[102]

Both the clinical and the defender literatures register increasing calls for a community-centered advocacy process in crime-infected neighborhoods.[103] Close reading of that literature documents the growing effectiveness of numerous local community defender programs.[104] Nonetheless, community defender roles and strategies struggle to remedy neighborhood crime and to resolve neighborhood conflict. This struggle is displayed in the Community Economic Development and Design (CEDAD)

102. For a discussion of the unique contributions of female lawyers, see Naomi R. Cahn, *Styles of Lawyering*, 43 HASTINGS L.J. 1039 (1992). For an analysis of the importance of critical feminist theory, see Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990).

103. This account extends my earlier treatment of community-based practices in the criminal justice system. *See* Anthony V. Alfieri, *Community Prosecutors*, 90 CAL. L. REV. 1465 (2002); Anthony V. Alfieri, *Prosecuting Violence/Reconstructing Community*, 52 STAN. L. REV. 809 (2000).

104. *See* Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401 (2001); Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419 (1996).

clinic at the University of Miami School of Law. CEDAD is a community-based education and technical assistance clinic furnishing economic development and self-help advocacy training to residents of low-income neighborhoods in collaboration with the school of architecture. The clinic provides rights education workshops for low-income homeowners, tenant groups, and neighborhood associations on fair housing, land trusts, and predatory lending. It also assists in self-help advocacy training related to community reinvestment, municipal equity, and public safety.

Despite the widespread emergence of community-based public safety programs around the nation, a crime-fighting initiative spearheaded by the Miami-Dade County and City of Miami police departments to combat suspected drug dealing among young black male residents recently embroiled CEDAD's clinical students and low-income communities in controversy over both lawyer-client roles and crime-control strategies. The ongoing controversy stemmed from the selective, race-based enforcement of a county public safety ordinance regulating the operation and impounding of bicycles. Typically, police officers on patrol targeted young black males, stopping them on roadways, searching their belongings, and seizing their bicycles. This apparent racial profiling was alternately praised and condemned by community residents. Proponents lauded the benefits of enhanced public safety, particularly in relation to children and schools. Opponents assailed the costs of civil rights incursions, especially in stigmatizing young black males. Erupting at community meetings and on street corners, the controversy stymied remedial efforts by clinical students unsure of their appropriate roles in mediating racially charged community conflicts.

Because of the uncertainty of racial motive and the ambiguity of racial outcome in CEDAD's public-safety-inspired organizing efforts around the bicycle ordinance, our clinical students have struggled to counsel affected individuals, their families, and their neighbors. Their struggle involves the search for both efficacy and neutrality. Driven by that search, they seek racial objectivity but discover their own bias. They strive for competence in community-oriented counseling but find their advisory role elusive. They aspire to institutional fidelity but find their loyalties to client, community, and law divided. Although confounded by their roles and relationships to client and community, CEDAD's clinical students openly reject the discriminatory logic of color-blind classifications and color-coded stereotypes. Their candor admits to the limits of lawyer understanding and power in community advocacy.

Community-centered theories of representation reject this discriminatory logic because of the expressive harm of stigma. Instead, these theories proffer a sweeping community ethic that binds racial groups

together in a dignity-based social contract of mutual respect. Such an ethic also respects the racial dignity of the accused, as well as the victim, and honors the integrity of racial community. Deliberative democracy relies on dialogue, pluralism, and reciprocity to mediate client-community and community-state conflicts. The mediated exchange of reciprocal dialogue restores community bonds.[105]

In contrast, the color-blind rhetoric of community-centered representation summoned in defense of racially motivated violence splinters collective bonds. Compelled by the neutral objectivity of the adversary function, the rhetoric invokes a profoundly contested vision of racial identity and community. Departing from that rhetoric demands renewed emphasis on citizen participation, institutional decentralization, and local accountability in the defender function. Participation in decentralized defender institutions responsive to citizen collaboration and equality initiatives revises defender roles.

The redefinition of role and function enables defenders to grasp the contingency of racial identity, the multiplicity of racial narrative, and the stigma of racial stereotype. Racial identity is contingent on the cultural and social location of the defendant. Racial narrative is fueled by this location and its diversity. Racial stereotype involves public stigma confronted on the street, in school, and out in the marketplace. Grasping these historical continuities allows the use of the criminal justice system as a public forum for racial contest over poverty, disempowerment, and segregation. Public contest entails a collective accounting of the civic harm inflicted on communities of color by race-tainted adversarial practices. This democratic accounting enhances racial dignity and empowerment. Civic empowerment promotes criminal justice reform campaigns aimed at ameliorating inequality.

The reconfigured civic competence and function of community-centered defenders encourage attendance at community meetings; decentralization of neighborhood offices; coordination with faith-based institutions and social services agencies; and participation in neighborhood crime prevention and urban revitalization partnerships with for-profit entities, nonprofit organizations, and governmental branches. These collaborative practices of citizenship correspond with an antisubordination model of democratic participation and accountability. On this account, the community defender movement offers a democratic rights-promoting

105. *See* Raymond H. Brescia et al., *Who's in Charge, Anyway? A Proposal for Community-Based Legal Services*, 25 FORDHAM URB. L.J. 831, 848-60 (1998); Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67, 101-30 (2000); Ann Southworth, *Collective Representation for the Disadvantaged: Variations in Problems of Accountability*, 67 FORDHAM L. REV. 2449, 2455-64 (1999).

approach to neighborhood defense and reclamation intended to alleviate poverty, powerlessness, and racial violence. This alternative citizen-participatory approach invigorates the civic obligation of criminal defenders to the accused and the public. It also encourages civic collaboration and accountability in the criminal justice system, which enlarges democratic engagement in the struggle to expand minority political and socioeconomic equality.

Equality-compelled resistance to racial hierarchy and racist ideology in civil and criminal justice systems informs cultural interpretation, social struggle, and political protest. Eschewing accommodation, resistance exploits institutional animus to unify relationships and forge common alliances against private and public racial inequities ranging from community economic development to neighborhood environmental justice.[106] The relationships assemble the particularized narratives drawn from individuals and communities of color into an oppositional voice of civil rights and political reform.

The rise of transitional forms of rights organization and mobilization in impoverished communities redistributes the labor of the lawyering process by shifting advocacy and organizing functions to clients where plausible and productive.[107] Functional shifts in lawyer-client routines and relationships open up space for the fuller expression of client identity and narrative in advocacy. The same shifts narrow the space available for lawyer privilege and paternalism. This cabining consigns the lawyer to a more technical role in the advocacy process. Reducing the role of lawyer leadership in democratic rights mobilization advances the goal of client and community empowerment.

Weakening lawyer standing in the legal process also strengthens the conditions for attaining client autonomy in the political process. In impoverished communities, especially communities of color, political autonomy arises from the transformation of community-centered campaigns against crime and blight into wider electoral campaigns against racist and subordinating public policies. In that transition, citizenship is realized. The result may prove imperfect, offering a collective example of citizenship

106. *See* Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 5 CLINICAL L. REV. 557 (1999); Eric K. Yamamoto & Jen-L W. Lyman, *Racializing Environmental Justice*, 72 U. COLO. L. REV. 311 (2001).

107. *See* Ann Southworth, *Business Planning for the Destitute? Lawyers as Facilitators in Civil Rights and Poverty Practice*, 1996 WIS. L. REV. 1121, 1132-47; *see also* Steve Bachmann, *Lawyers, Law, and Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1, 21-29 (1984-1985); Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 395-410 (1982-1983).

marred by poor judgment,[108] uncertain accountability,[109] and uneven democratic commitment.[110] Nevertheless, it remains a moment of citizenship, of demonstrated civic engagement and collective deliberation.

Ely celebrated democratic engagement, however muted and short lived. His enduring embrace of liberalism and ongoing effort to enlarge its egalitarian boundaries demonstrate his institutional fidelity and his democratic commitment to minority inclusion in the political process. For Ely, the race-conscious politics of minority inclusion and equality preserved rather than breached the legitimacy of American constitutional democracy.

CONCLUSION

Culled from considerations of lawyer role, institutional function, and political legitimacy, legal process traditions limit the reach of client-centered and community-centered lawyering models. Unsurprisingly, Ely's defense of political access and minority equality rights extended that reach, implying antisubordination axioms of democratic empowerment and minority collaboration. Contextually applied, the axioms offer the promise of safeguarding the legal, political, and economic interests of unrepresented individuals and communities.

Ely's fusion of democracy and equality in legal process bridges constitutional theory and clinical practice to offer a worthy vision of progressive lawyering. That vision holds significant, albeit unexplored, consequences for clinical education and training as well as for lawyer ethical roles and responsibilities. Under its guiding principles, client empowerment and lawyer-client collaboration rise to prominence as much for their transformative potential as for their democratic commitment. By turns race conscious and civic conscious, this commitment reconceives the nature of the lawyering process in impoverished and crime-ridden communities. All his life, Ely spoke of that process with reverence, defending its mission and deepening its devotion to equal justice. Even now his voice rings out.

108. *See* Peter Margulies, *The Mother with Poor Judgment and Other Tales of the Unexpected: A Civic Republican View of Difference and Clinical Legal Education*, 88 NW. U. L. REV. 695, 707-08 (1994).

109. *See* Southworth, *supra* note 105, at 2451-55.

110. *See* Michael Diamond & Aaron O'Toole, *Leaders, Followers, and Free Riders: The Community Lawyer's Dilemma When Representing Non-Democratic Client Organizations*, 31 FORDHAM URB. L.J. 481, 540-44 (2004).