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# Discovering Identity in Civil Procedure (Book Review)

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# DISCOVERING IDENTITY IN CIVIL PROCEDURE

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Speak up, baby.
—Reverend Dorothy Washington
"Coconut Grove Ministerial Alliance Meeting"

## I. INTRODUCTION

This Review explores the story of Floride Norelus—an undocumented Haitian immigrant—her civil rights lawyers, and the judges who did not believe them. The backdrop for Norelus's story comes out of Ariela J. Gross's new book, *What Blood Won't Tell: A History of Race on Trial in America*.[1] In *What Blood Won't Tell*, Gross, an elegant historian and eloquent storyteller, enlarges an already distinguished body of work on slavery,[2] race,[3] and antebellum trials[4] to investigate the changing meaning

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1. ARIELA J. GROSS, WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA (2008).

2. *See generally* ARIELA J. GROSS, DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM (2000) (discussing civil disputes involving slaves as property); Ariela Gross, *Slavery, Antislavery, and the Coming of the Civil War*, *in* 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 280 (Christopher Tomlins & Michael Grossberg eds., 2008) (revealing how law and legal claims shaped both slavery and antislavery views); Ariela Gross, *When Is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96 CAL. L. REV. 283 (2008) (exploring the ways in which slavery has been discussed in court opinions, political dialogues, affirmative action, and reparations); Ariela J. Gross, Book Review, 42 AM. J. LEGAL HIST. 97 (1998) (reviewing PHILIP SCHWARZ, SLAVE LAWS IN VIRGINIA (1996)); Ariela J. Gross, *The Contraction of Freedom*, 28 REVIEWS AM. HIST. 255 (2000) (reviewing AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION

of identity in law and litigation. Bridging the study of law and culture, she constructs, or rather reconstructs, identity—both race and gender—from the artifacts of local knowledge expressed in social performance and scientific expertise.[5] Gross points to two "key moments" in American history when racial and gender identity were "particularly fraught"—initially, when "racial identity trials shifted from more routine adjudications of ancestry to intense contests about science and performance," and subsequently, when jingoist and nativist movements ignited "efforts to define the boundaries of citizenship racially."[6] During these moments, she notes, the forum for the "determination of racial identity" moved to the local courthouse, "a key arena throughout the nineteenth century for struggles over identity."[7] At local courthouses, Gross explains, trials of racial and gender identity "reverberated through American culture."[8] Indeed, for Gross and others, the "cultural arena" of

(1998)).

3. *See generally* Ariela J. Gross, *"Like Master, Like Man": Constructing Whiteness in the Commercial Law of Slavery, 1800–1861*, 18 CARDOZO L. REV. 263 (1996) (describing how law helped define white masculinity in the antebellum South); Ariela Gross, *"Of Portuguese Origin": Litigating Identity and Citizenship Among the "Little Races" in Nineteenth-Century America*, 25 LAW & HIST. REV. 467 (2007) (explaining how "racially ambiguous communities" could obtain full U.S. citizenship only by abandoning self-governance and distancing themselves from people of African descent); Ariela J. Gross, Commentary, *Texas Mexicans and the Politics of Whiteness*, 21 LAW & HIST. REV. 195 (2003) (positing that Texas courts have engaged in "cultural racism" against Mexican Americans by relying on unsubstantiated cultural stereotypes); Ariela J. Gross, *"The Caucasian Cloak": Mexican Americans and The Politics of Whiteness in The Twentieth-Century Southwest*, 95 GEO. L.J. 337 (2007) (explaining that discrimination on the basis of language or culture can amount to racial discrimination); Ariela Gross, Book Review, 18 LAW & HIST. REV. 686 (2000) (reviewing MARTHA HODES, WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE NINETEENTH-CENTURY SOUTH (1997)).

4. *See generally* Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998) (examining how race was "performed," and thereby created, by trial witnesses and litigants throughout the nineteenth century); Ariela Gross, *Pandora's Box: Slave Character on Trial in the Antebellum Deep South*, 7 YALE J.L. & HUMAN. 267 (1995) (discussing how the introduction of slave testimony and the associated risk that slaves might deceive whites threatened judges' conceptual ability to see slaves as pure property).

5. *See generally* Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640 (2001) (exploring how the field of cultural-legal history has transformed historians' understandings of slavery, race, and gender); Ariela Gross, *Reflections on Law, Culture, and Slavery*, *in* SLAVERY AND THE AMERICAN SOUTH 57 (Winthrop D. Jordan ed., 2003) (discussing both the great possibilities and potential pitfalls of the new field of cultural-legal history in analyzing how law and culture shaped racial and gendered identity in the South); Ariela Gross, *The Law and the Culture of Slavery: Natchez, Mississippi*, *in* LOCAL MATTERS: RACE, CRIME, AND JUSTICE IN THE NINETEENTH-CENTURY SOUTH 92 (Christopher Waldrep & Donald G. Nieman eds., 2001) (combining the approaches of legal and cultural historians to examine how both the courthouse and the slave market shaped Southern culture).

6. GROSS, *supra* note 1, at 13.

7. *Id.* at 14.

8. *Id.* at 12.

the courthouse and the legal case at stake "could fix the identity of an individual or an entire national group with a conclusiveness that was hard to overturn."[9]

Because of its cultural import, Gross argues that "law has been a crucial institution in the process of creating racial meaning at every level."[10] Both trials and trial transcripts, she observes, disclose "glimpses of ordinary people's, as well as lower-level legal actors', understandings of legal and racial categories and of their own places in the racial hierarchy."[11] Race trials, Gross emphasizes, "brought to the surface conflicting understandings of identity latent in the culture, and brought into confrontation everyday ways of understanding race with definitions that fit into the official, well-articulated racial ideology that supported the maintenance of slavery and postwar racial hierarchy."[12] Witnesses, lawyers, and litigants who were entangled in this cultural conflict "learned to tell stories that resonated with juries" and judges; in doing so, they actively participated in "the day-to-day creation of race."[13]

This Review extends Gross's historical scrutiny of identity trials to contemporary civil rights debates over the construction of race in law and litigation. The Review is divided into three parts. Part II maps Gross's analysis of racial identity trials, explicating her notions of racialized common sense and performance. Part III examines the trial and appellate litigation in Floride Norelus's civil rights case. Part IV considers alternative approaches to civil rights litigation embodied in identity performance and empowerment strategies.

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9. *Id. See also* Anthony V. Alfieri, *(Un)Covering Identity in Civil Rights and Poverty Law*, 121 HARV. L. REV. 805, 816–17 (2008) (explaining that the "public performance of difference" can encourage stereotyping and cultural discrimination).

10. GROSS, *supra* note 1, at 12.

11. *Id.*

12. *Id.*

13. *Id.* (commenting that "stories people told in the courtroom setting took on life, not only in future cases but in lessons learned as well by the neighbors who participated as witnesses, jurors, and audience members, and those that traveled through gossip, newspaper accounts, and literary narratives").

## II. IDENTITY TRIALS IN ANTEBELLUM AND POSTBELLUM HISTORY

> always white before the law
> —Ariela J. Gross
> *What Blood Won't Tell: A History of Race on Trial in America*

In *What Blood Won't Tell*, Gross explores the "significance of race for citizenship and equality" in American law.[14] To Gross, racial identity trials show "both the power and limits of individual action in the history of race and racism."[15] The trials, she remarks, tell "stories about the hidden marks of race" embedded in actions, demeanor, character, and the body itself.[16] Common to local American courts in the late eighteenth century through much of the twentieth century, the trials featured "people of European, African, Asian, Mexican, and Native American ancestry" and spanned the Deep South, the industrial North, and the far West.[17] In the antebellum South, Gross points out, slaves in freedom suits "put their own racial identity at issue" claiming that "they were really white."[18] Others, often free people of color, resisted private and public status-based challenges to their racial identity and social standing.[19] Animated by the ideology of white supremacy, the challenges "made it increasingly important to align the slave/free boundary with black and white, giving rise to more hotly contested trials of racial identity."[20]

Gross focuses on slave society, the Civil War era, and the postbellum South where white ideologues "redoubled their efforts to maintain white supremacy in political and social life" by inflicting state-sanctioned violence, enacting Jim Crow laws, and enforcing segregationist social practices.[21] Jim Crow laws, she comments, imposed state "limitations on sex and marriage across the color line," engendering "continued trials of racial identity."[22] Gross tracks these identity trials to chart "the changing meanings of race" and the evolution of racial categories through the twentieth century, categories that shaped "the attributes of citizenship for

14. *Id.* at 3.
15. *Id.* at 2–3.
16. *Id.* at 3.
17. *Id.*
18. *Id.* at 4.
19. *Id.* ("Individuals of ambiguous racial identity, especially free people of color, challenged Southerners' equation of slavery with blackness and freedom with whiteness.").
20. *Id.*
21. *Id.*
22. *Id.* at 5–6 ("Jim Crow segregation pressured people of multiple, contested, or ambiguous racial identities to come down on the white or black side of the color line.").

the men and women who were their subjects."[23]

Gross configures the attributes of citizenship in dual terms of "formal legal citizenship" and "full social and political citizenship."[24] To Gross, race stands central to "formal legal citizenship" and "to the larger sense of membership in the polity."[25] Women and people of color, she demonstrates, "were excluded from citizenship in this second, larger sense" of political and social participation.[26] As a consequence, "only white [men] could become—and were seen as *capable* of becoming—citizens."[27]

Gross locates the roots of citizenship in the widespread belief that "race is a fact of nature" or "a property of blood."[28] Put simply, she declares that "we are certain that we ought to know it when we see it."[29] Building on this intuition, Gross defines race as a form of common sense ideology, "which came into being and changed forms at particular moments in history as the product of social, economic, and psychological conditions."[30] Crucial to that common sense "racial thinking" is a "hierarchy of power" predicated on "the notion that the categories of white, black, brown, yellow, and red mark meaningful distinctions among human beings" and that such categories "reflect inferiority and superiority, a human Chain of Being, with *white* at the top and *black* on the bottom."[31]

Hierarchy notwithstanding, Gross admits that Americans "have never reached a consensus about what race means or how to discover it."[32] Instead, Gross learns, Americans deploy black and white color-coded "legal presumptions" that regulate status, experienced as freedom and enslavement.[33] She links racial status to the lived experience of individuals, groups, and whole communities, signified by "appearance, ancestry, performance, reputation, associations, science, national citizenship, and cultural practice."[34] Advancing into the mid-nineteenth century, she discovers that "both the science and the performance of race became increasingly important to the determination of racial status."[35] Even in the

23. *Id.* at 7.
24. *Id.* at 8.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 8–9.
32. *Id.* at 9.
33. *Id.*
34. *Id.*
35. *Id.*

late nineteenth century, she adds, "trials of racial identity continued to center on both medical expertise about race and community observation and retelling of racial performances."[36] Accordingly, judges, lawyers, jurors, and witnesses treated race as a "common sense" mix of "scientific fact" and social performance.[37]

Gross points to common sense as an expression of "the power of local law and local culture in creating the ideas and norms that shape our lives."[38] In this way, she cautions, neither race nor racial status was "something imposed from above, imagined by experts and acquiesced in by ordinary people."[39] Rather, she insists, "race was created and re-created every day through the workings of community institutions and individuals in daily life."[40] In race trials, she reports, "courts gave effect to communities' racial knowledge," effectively "reshap[ing] their racial order" and "reimagin[ing] the future by reinventing their pasts."[41] During the decades of Reconstruction and Jim Crow in particular, she reveals, "individuals in the courtroom increasingly emphasized race as association, an understanding of the concept that could make sense only in a segregated world, in which people associated only with those of their own race."[42] To be sure, for Gross and others, "what happened in the courtroom is not a faithful mirror of people's internal beliefs, their self-understandings, or even their interactions in the social world beyond the courtroom."[43] Nonetheless, in the instrumental context of the courtroom, "people told stories about racial identity strategically—in order to win their cases, in order to put themselves in a favorable light, in order to constitute their communities in a certain way and to ostracize outsiders."[44] Situated at the intersection of law and culture, stories in effect forged a common sense of race.

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36. *Id.* at 9–10.

37. *Id.* at 10.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* Gross mentions that litigating identity at the margins among "the smaller number of people who were not clearly marked 'white' or 'negro' mattered tremendously in the history of race and racism" both because a "significant number of people whose identity was not fixed by appearance, or even by a confluence of appearance, status, ancestry, and associations," inhabited the margins and because "the margins of a category create the core." *Id.* at 11.

43. *Id.* at 12. *See also* Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2119 (1991) (lamenting that lawyer-driven narratives tend to silence or distort client voices so that "[w]hat is communicated, both publicly and privately, is a vision of the world constructed by lawyer-spoken narratives").

44. GROSS, *supra* note 1, at 12.

### A. RACE AS COMMON SENSE

Gross traces two contradictory notions of race—"race as clear-cut identity" and "race as ever-shifting category"—across three centuries of American history. Both notions, she argues, construct "our contemporary 'common sense' of race."[45] This intuitive sense—"what we know without being aware that we know it"—posits race and racial status as not only "self-evident," but also "central to people's identities and a crucial factor in determining their social lives, their economic opportunities, and the way they were perceived by others."[46] Within antebellum American law, Gross exposes two categories of race—black and white. She relates "blackness" to "absolute chattel slavery" and "whiteness" to a combination of "poor and non-slaveholding whites" and "wealthy planters and slaveholders."[47] Moreover, she connects "races" to "broad divisions of humankind marked by physiological difference and color, and organized hierarchically into a chain of being: white, brown, yellow, red, black."[48]

Gross locates these divisions in the cultural underpinnings of race trials where "[r]acial knowledge resided not in documents but in communities" and where local juries "required reputation evidence" to make status determinations.[49] Racial identity trials, Gross maintains, relied on reputation evidence and a community-based common sense of race. Carefully parsing trial transcripts, she shows that courts routinely allowed hearsay and reputation evidence as "the only way to know someone's race."[50] Race in this way evolved in antebellum America as "a matter for community consensus" and "common sense," bolstered by legal documentation, reputation, and behavior.[51] Instructively, Gross comments, "race became an essential category, an all-encompassing definition of who you were and where you belonged in the social sphere."[52]

At trial, Gross observes, "racial identity became a question of performance, reputation, and common sense."[53] Searching for "an ineffable

45. *Id.* at 16.
46. *Id.* at 16–17.
47. *Id.* at 20. More precisely, Gross writes that whiteness "served to mobilize poor and non-slaveholding whites on the side of wealthy planters and slaveholders." *Id.* In this way, racial identity transcends class and socioeconomic difference. *See* RICHARD T. FORD, RACIAL CULTURE: A CRITIQUE 59–123 (2005) (discussing identities as collective action).
48. GROSS, *supra* note 1, at 20.
49. *Id.* at 24.
50. *Id.* at 25.
51. *Id.*
52. *Id.* at 27.
53. *Id.* at 31.

something that made someone white,"[54] lay witnesses, she illustrates, "focused on [a person's] social identity, her associations with white people, and her performances."[55] Both judges and juries looked to behavior, employing "common sense to make visual inspections and hear testimony about reputation,"[56] especially "descriptions of appearance—skin color, hair, eyes, and features."[57] In this respect, Gross reiterates, courts affirmed "the community's role in determining and policing racial identity."[58] Yet, by the mid-nineteenth century, she notes, the notion of expert knowledge and "racial 'science'" became increasingly important to the adversary performance of race trials.[59]

### B. RACE AS PERFORMANCE

Gross contends that identity trials evolved from "a series of contradictions" in antebellum law and culture concerning the form and substance of racial knowledge.[60] Law, Gross points out, both recognized and created race; indeed, "the state itself—through its legal and military institutions—helped make people white."[61] To Gross, "two ways of knowing race" emerged during the antebellum era: scientific and performative.[62] Scientific knowledge hinged on expert claims of inherent or natural racial differences. Performative knowledge rested on public and private displays of racial status and citizenship.

Gross links each form of knowledge to the development of "ongoing ideologies of race."[63] Racial ideologies, she asserts, rested largely "on the antebellum notion that whiteness and blackness were self-evident qualities."[64] Whites, for example, "believed that racial identity was obvious, something that any white person should be able recognize on sight," and something often interwoven with gender.[65] Both judges and

54. *Id.* at 32.

55. *Id.* at 37. Further, Gross notes that "[l]itigants seeking to prove a person's whiteness almost always sought to exhibit him or her to the jury." *Id.* at 41.

56. *Id.* at 39 ("Sometimes, however, lay witnesses spoke in the language of science and expertise, and often doctors resorted to notions of common sense.").

57. *Id.* at 41. Gross reveals that courts allowed juries "to see and hear the widest array of evidence" and granted "great discretion in finding the 'facts' of race." *Id.* at 44.

58. *Id.* at 44.

59. *Id.* at 38–39.

60. *Id.* at 48.

61. *Id.* at 54.

62. *Id.* at 48.

63. *Id.* at 57.

64. *Id.* at 54.

65. *Id.* at 48.

juries in racial identity trials, she remarks, "gave special weight to the civic performance of white manhood" embodied in the exercise of the political rights and social privileges of public citizenship.[66] In this way, civic rights and privileges arose "as particularly strong markers of white manhood," that is, as "something" white men "did" in the public sphere of culture and society.[67]

Gross finds similar forms of cultural performance among white women. For women, however, "claims of whiteness also rested on honor" garnered from sexual "purity" and "moral virtue."[68] Trials of freedom suits as well as divorce, rape, and inheritance suits, she demonstrates, "required" performances of the "qualities" of "pure white womanhood."[69] For Gross, these qualities—"frail, virtuous, and sexually pure"—constituted "the feminine equivalent of performing white male citizenship."[70] Exhibited in a score of cases, black, white, and mixed litigants "performed white womanhood by showing their beauty and whiteness in court and by demonstrating purity and moral goodness to their neighbors."[71] The "practical effect" of such performances, Gross observes, was to "make white identity equal to a set of moral and civic virtues."[72]

The antebellum equation of race, morality, and civic virtue or sexual purity in racial identity trials, Gross stresses, gradually changed in the Jim Crow era. Gross traces the growth of Jim Crow segregationist ideology and laws among the Southern and Western states, elucidating efforts to "erase[] an earlier history of race mixing" and to "den[y] an earlier understanding of race as more fluid, variable, and mixed."[73] Instead of the performance of "white identity,"[74] she observes, Jim Crow era race trials advocated white "separation," carving "a clear delineation between the capacities and 'natures' of whites and blacks" based on a belief in racial "incompatibility" and black "inferiority."[75]

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66. *Id.* at 49.

67. *Id.* at 56.

68. *Id.* at 58.

69. *Id.* (commenting that "women won their cases by creating campaigns to demonstrate their feminine whiteness in the public eye and in the popular press").

70. *Id.*

71. *Id.* at 70–71 (adding that "women of ambiguous racial identity found ways to call on the state's protection by convincing the court that they, too, fit this feminine ideal").

72. *Id.* at 71 (noting that "racial ideology insisted that such virtues could be performed only by white people").

73. *Id.* at 100.

74. *Id.* at 78 (noting that "participants in Jim Crow–era trials described a world of extensive race mixing even as whites sought to demonstrate that race mixing had never occurred").

75. *Id.* at 96. Accordingly, Gross cites race trials as "a significant part of the process by which

Despite their broad acquiescence to increasing state subjugation and segregation, Jim Crow–era courts, Gross asserts, "continued to insist that racial identity was a question for a jury" in its exercise of "racial common sense," contingent on evidence and testimony drawn from "reputation, associations, and appearance."[76] Enmeshed in racial associations and performances, litigants, Gross shows, waged "struggles to reimagine racial relations in the past as more separate than they had been, by rewriting individuals as purely black or white."[77] Today, she adds, courts "continue to shape narratives about the meaning of racial identity and its connections to citizenship," thus echoing the historic binary categories of racial identity trials.[78] The next part considers those identity narratives in the trial and appellate contexts of Floride Norelus's civil rights litigation.

## III. IDENTITY TRIALS IN CIVIL RIGHTS LITIGATION

> the degraded sexuality of a black "Jezebel"
> —Ariela J. Gross
> *What Blood Won't Tell: A History of Race on Trial in America*

In May 1994, Floride Norelus, a Haitian immigrant,[79] confided to Miami attorney Debra Valladares "that she had suffered a horrific pattern of sexual harassment, rape, and assault at the hands of Asif Jawaid, the manager of a Denny's restaurant where she worked."[80] Norelus informed Valladares that "Jawaid repeatedly forced her to have oral, vaginal, and anal sex with him in the Denny's restaurant and at his home."[81] Norelus reported "that when she refused Jawaid's sexual demands, Jawaid assigned her unpleasant duties or otherwise punished her."[82] She recounted that Jawaid "extracted sexual favors in exchange for job advantages, refused to

segregation was established as natural." *Id.* at 78.

76. *Id.* at 101–02. Gross explains that "[c]ourts continued to permit juries to hear and see evidence of individuals' and their ancestors' associations, performances, and appearance, and to use that evidence to decide whether an ancestor was in fact a 'negro.'" *Id.* at 106.

77. *Id.* at 110. Gross notes that the last racial identity suit to be appealed to a state court occurred in Louisiana in 1983. *Id.* at 294.

78. *Id.* at 295.

79. Amlong & Amlong v. Denny's, Inc., 500 F.3d 1230, 1234 (11th Cir. 2007). For background on Haitian immigrants, see Alex Stepick & Alejandro Portes, *Flight into Despair: A Profile of Recent Haitian Refugees in South Florida*, 20 INT'L MIGRATION REV. 329, 345 (1986) (using a random sample survey of recently arrived Haitians to conclude that "[f]ew immigrant groups in recent history have suffered unemployment, downward occupational mobility and poverty to the extent that Haitians have").

80. *Amlong*, 500 F.3d at 1234.

81. *Id.*

82. *Id.* Jawaid allegedly additionally "retaliated by reducing Norelus's work hours and changing her work schedule." *Id.*

file paperwork reflecting her alien status, and threatened to report her to the immigration authorities."[83] Norelus also related that "Jawaid forced her to have sex with his roommate, Raheel Hameed, at their home and at another Denny's restaurant that Hameed managed."[84] She described one occasion when "Jawaid and Hameed took her to their home, restrained her, repeatedly raped her, and penetrated her vagina with an object."[85]

In December 1994, Valladares and a second Miami attorney, Joseph Chambrot, with the assistance of two experienced South Florida employment discrimination lawyers, Karen and William Amlong, filed a civil complaint on behalf of Norelus—under Title VII of the Civil Rights Act of 1964,[86] the Equal Pay Act,[87] and the Florida Civil Rights Act of 1992[88]—against Denny's, Jawaid, Hameed, and others in the United States District Court for the Southern District of Florida.[89] Subsequently, in July and December 1995, the Amlongs filed two amended complaints.[90]

During more than eight days of depositions in August 1995[91] and in January and February 1996, Norelus reportedly demonstrated "only limited facility with English" and behaved in a "highly emotional and erratic"

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83. *Id.* The district court found that Norelus illegally entered the United States in 1993, noting that she "admitted to completing a false Immigration and Naturalization Service I-9 Employment Eligibility Form using the name of a cousin, 'Lavictore Remy,'" and "admitted to filing false 1993 and 1994 income tax returns under the same name." Norelus v. Denny's Inc., No. 94CV2680, 2000 WL 33541630, at *2 n.1 (S.D. Fla. Mar. 21, 2000) (sanctions order), *rev'd sub nom.* Amlong & Amlong v. Denny's, Inc., 500 F.3d 1230 (11th Cir. 2007). *See generally* Katherine E. Melloy, *Telling Truths: How the Real ID Act's Credibility Provisions Affect Women Asylum Seekers*, 92 IOWA L. REV. 637 (2007) (explaining how cultural and psychological barriers may prohibit women refugees from effectively telling their stories and thereby unfairly tarnishing their credibility).

84. *Amlong*, 500 F.3d at 1234.

85. *Id.* Valladares testified that Norelus's brother "told [her] that Jawaid had personally confessed to having abused Norelus" and that "a Denny's employee told her . . . that Jawaid 'definitely had a thing for [Norelus] and that she was like his property.'" *Id.*

86. 42 U.S.C. § 2000e (2006). Norelus also sought damages for common law battery, invasion of privacy, false imprisonment, intentional and negligent infliction of emotional distress, as well as for negligent training, retention, and supervision. *Norelus*, 2000 WL 33541630, at *2. In addition, she sought declaratory relief, compensatory damages, punitive damages, and costs, including attorney's fees. *Id.*

87. 29 U.S.C. § 206(d) (2006).

88. FLA. STAT. ANN. § 760.10 (1998).

89. The complaint alleged that Norelus "was the target of sexual harassment, battery, rape, unequal pay and negligent and intentional infliction of emotional distress by managers of two Denny's restaurants over a period of several months." *Norelus*, 2000 WL 33541630, at *1. The complaint also alleged that "both of the men used their authority as Denny's managers to extort her into having unwilling sex with them and to otherwise sexually demean and discriminate her, and that when she complained to her supervisors, her supervisors did nothing to protect her or to prevent the conduct from continuing." *Id.*

90. *Amlong*, 500 F.3d at 1234.

91. The 1995 deposition produced a transcript of more than 1200 pages. *Id.* at 1235.

manner.[92] At times, "she answered questions sarcastically or otherwise failed to respond properly" and, moreover, "lied about matters related to her immigration status."[93] Often she "forgot key details" and offered "inconsistent versions of the events or outright falsehoods"[94]—for example, regarding "oral, vaginal and anal intercourse in a walk-in freezer," "sexual intercourse inside the [Denny's] restaurant," workplace retaliation, and post-rape medical treatment.[95] The district court found Norelus's deposition to be "replete with falsities, misrepresentations, and contradictions,"[96] and thus discounted a sixty-three-page errata sheet containing 868 corrections to her deposition testimony prepared by the Amlongs as "a spurious document."[97] At the February 1996 witness depositions of ten Denny's employees, none corroborated Norelus's story.[98]

Nonetheless, Karen Amlong testified that she remained convinced that Norelus was telling the truth,[99] explaining that the absence of corroborating witness testimony was not unusual in cases of sexual harassment and assault.[100] Chambrot echoed this testimony, asserting his belief in the credibility of her allegations, based in part on her look of "fear."[101] For

92. *Id.* at 1234–35 (explaining that "an interpreter translated the questions into Haitian French Creole and translated Norelus's answers back into English").

93. *Id.* at 1235 (noting that Norelus "claimed that she did not know Lavictore Remy, the person whose name she had falsely used to secure employment").

94. *Norelus*, 2000 WL 33541630, at *2.

95. *Id.* at *2. The district court adverted to Norelus's testimony that she had "slept with 1,000 men." *Id.* at *4 n.4.

96. *Id.* at *1.

97. *Id.* at *4 n.3. The appellate court observed, "[I]t is unclear . . . whether Plaintiff's original or revised version of the facts constitutes the truth." *Amlong*, 500 F.3d at 1236.

98. *Amlong*, 500 F.3d at 1235.

99. *Id.* Karen Amlong testified:

> "[W]e were convinced that our client, based on all the evidence—my own assessment of her, her passing the polygraph examination, Ms. Stern's assessment of her after several days of deposition testimony—that even though she may have lacked candor on peripheral issues, on the central issues of this case she was telling the truth, and just because somebody came into the country illegally doesn't mean that she can be raped and exploited, and that does not take that away from her."

*Id.* at 1247.

100. On the absence of corroborating witness testimony in cases of sexual harassment and assault, see Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 977–86, 1017 (2004).

101. *Norelus*, 2000 WL 33541630, at *6. At the magistrate hearing, when asked for the basis of his belief in Norelus's account of sexual harassment, Chambrot testified: "Ms. Norelus' appearance. You can't fake fear and she had it in her voice in the way she talked. She looked like someone who had been raped. She looked like a victim, and I see them all the time . . . ." *Id.* at *6 n.8. Note, however, the court's observation that "Chambrot explained that his belief in the validity of the allegations was *based solely* on Plaintiff's look of 'fear,' because she 'looked like a victim.'" *Id.* at *6 (emphasis added).

corroboration, the Amlongs retained the services of George Slattery, a respected polygraph expert, to conduct examinations of Norelus in January and April 1996. Slattery twice "unambiguously concluded . . . that Norelus was telling the truth about her core allegations of sexual abuse, rape, and assault."[102] For further corroboration, the Amlongs consulted with Dr. Astrid Schutt-Aine, a Creole-speaking psychologist, who opined that Norelus "appeared to suffer from post-traumatic stress disorder."[103]

Norelus's second deposition spanned three days in September 1996. Once again, she reportedly displayed "erratic and at times inappropriate" behavior.[104] As a consequence, the defendants' attorneys adjourned the deposition. In December 1996, following a battery of discovery disputes, the district court dismissed the action to punish Norelus for failing to comply with the court's discovery orders. In January 1997, four of the defendants moved for sanctions against Norelus and the Amlongs. The district court referred the sanctions motion to a magistrate for a report and recommendation.[105]

In February 1998, after an extensive hearing, the magistrate issued a report finding that the Amlongs "genuinely believed" in the merits of Norelus's claims in spite of her "inability to testify completely and truthfully about several aspects of her case."[106] The report also found that the Amlongs "did not ignore [Norelus]'s propensity to exaggerate or lie during her deposition," pointing to the results of the polygraph

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Contrary to the court's assertion, Chambrot did not state that his belief was based *solely* on Norelus's look of fear.

102. *Amlong*, 500 F.3d at 1235. The legal system is largely insensitive to women who have been raped at work. *See generally* Martha S. Davis, *Rape in the Workplace*, 41 S.D. L. REV. 411 (1996) (revealing that Title VII, the Worker's Compensation Act, and common law tort actions do not provide a suitable remedy for women who have been raped in the workplace and noting courts' inconsistent treatment of rape claims); Andrea Giampetro-Martin, M. Neil Browne & Kathleen Maloy, *Rape at Work: Just Another Slip, Twist, and Fall Case?*, 11 UCLA WOMEN'S L.J. 67 (2000) (asserting that the Worker's Compensation Act's failure to provide an adequate remedy to women who have been raped at work is a reflection of gender bias in the legal system). Thus, the *Norelus* court's dismissive treatment of Norelus's claims is unfortunately not entirely surprising.

103. *Amlong*, 500 F.3d at 1235. On posttraumatic stress disorder among victims of sexual abuse, rape, and assault, see Arthur H. Garrison, *Rape Trauma Syndrome: A Review of a Behavioral Science Theory and Its Admissibility in Criminal Trials*, 23 AM. J. TRIAL ADVOC. 591 (2000) (discussing the history and psychology of rape trauma syndrome and courts' misunderstanding of the syndrome), and David P. Valentiner et al., *Coping Strategies and Posttraumatic Stress Disorder in Female Victims of Sexual and Nonsexual Assault*, 105 J. ABNORMAL PSYCHOL. 455 (1996) (studying the use and effect of coping strategies by female assault victims).

104. *Amlong*, 500 F.3d at 1236.

105. *Id.*

106. *Id.* at 1243.

examinations.[107] Additionally, the report found that the "care and detail" reflected in the Amlongs' preparation of the deposition errata sheet signaled "grave concern to tell an accurate story," confirming their "legitimate desire to present their client's case truthfully and accurately."[108] On these facts, the magistrate reasoned that the Amlongs "did the best they could with a most difficult client and did not try to prolong the case or multiply these proceeding[s] to gain a tactical advantage over their adversaries."[109] To the contrary, he credited Karen Amlong's testimony that Norelus proved a "difficult client because of language barriers and because of the degree to which she had been traumatized."[110] Lacking evidence of "willful abuse of the judicial process" or "reckless disregard of duty," the magistrate concluded that the Amlongs' litigation conduct did not amount to bad faith sufficient to justify sanctions.[111] Accordingly, he recommended that the court assess attorney's fees against Norelus alone.[112]

The district court rejected the magistrate's factual findings and legal conclusions without a hearing and rendered supplemental findings based on the court's own independent interpretation of the record. The district court described the case as "replete with lewd, lascivious and sexually graphic allegations that find no evidentiary support whatsoever in the record."[113] Specifically, the court found that the Amlongs failed to "conduct a reasonable investigation of the facts" and prepared the errata sheet "in an effort to cover up flaws and inconsistencies in [Norelus]'s account of events," thereby demonstrating "unreasonable, vexatious behavior that unnecessarily multiplied [the] proceedings."[114] Hence, the district court ordered the Amlongs to pay the defendants' attorney's fees and costs in the

107. *Id.*

108. *Id.* at 1236, 1244.

109. *Id.* at 1244.

110. *Id.* at 1248. The court of appeals noted that "[t]he magistrate judge was plainly troubled by the reported language and cultural difficulties. Indeed, he found that the errata sheet showed 'the difficulty plaintiff had in dealing with the discovery process including her deposition.'" *Id.* ("Once, the plaintiff apparently used a Creole idiom, 'tous les jours,' to communicate that Jawaid forced her to perform oral sex 'many times' or 'all the time,' but the interpreter translated the idiom literally as 'every day,' thus changing the details of the plaintiff's story.").

111. Norelus v. Denny's Inc., No. 94CV2680, 2000 WL 33541630, at *8 (S.D. Fla. Mar. 21, 2000) (sanctions order), *rev'd sub nom.* Amlong & Amlong v. Denny's, Inc., 500 F.3d 1230 (11th Cir. 2007).

112. *Amlong*, 500 F.3d at 1251 (holding that the conduct of the Amlongs' did not amount to bad faith).

113. *Norelus*, 2000 WL 33541630, at *4 n.4. The district court remarked that witnesses testified that Norelus "herself acted in an inappropriate sexual manner at work." *Id.* at *6.

114. *Amlong*, 500 F.3d at 1244–45.

amount of $389,739.07.[115]

On appeal, the U.S. Court of Appeals for the Eleventh Circuit held that the district court's actions—rejecting the magistrate judge's demeanor-intensive credibility determinations, substituting its own contrary findings without conducting a new hearing, and holding the Amlongs jointly liable for fees and costs—exceeded its authority and abused its discretion.[116] The court of appeals credited the magistrate's belief that "the polygraph examinations were a genuine effort to discern the truth, not a fraudulent attempt to create a false veneer of diligence" and that the production of the errata sheet had been "motivated" by the Amlongs' "grave concern to tell an accurate story" and their well-intentioned effort to mitigate Norelus's "emotional instability and substantial language and cultural barriers."[117] The court of appeals complained that the district court "unequivocally rejected the magistrate judge's factual findings and conclusions of law regarding both the Amlongs' subjective intent and their objective conduct."[118] Finding a "direct repudiation" of the magistrate's credibility findings, the court reversed the sanction order as invalid and an abuse of discretion, holding that "a district court may not override essential, demeanor-intensive fact finding by a magistrate judge without hearing the evidence itself or citing an exceptional justification for discarding the magistrate judge's findings."[119]

## IV. RELITIGATING IDENTITY TRIALS

> law is not made from above
> —Ariela J. Gross
> *What Blood Won't Tell: A History of Race on Trial in America*

Gross reports that racial identity trials established whiteness as "a prerequisite for citizenship" and proffered "civic acts as the proof of whiteness."[120] For Gross, the trials leave a narrative legacy deeply "ingrained in our thought, our legal system, our cultural practice, and our racial common sense."[121] Lawyers and judges, she points out, "continue to reproduce racial hierarchy through seemingly neutral practices that

115. *Id.* at 1237.

116. *Id.* at 1251–52 ("[T]he district court improperly discarded the findings of fact made by the magistrate judge and substituted its own.").

117. *Id.* at 1248.

118. *Id.* at 1248–49.

119. *Id.* at 1249–50.

120. GROSS, *supra* note 1, at 295.

121. *Id.*

perpetuate established patterns of power and privilege."[122]

In the case of Floride Norelus and in the field of civil rights more generally, lawyers and judges likewise reproduce racial hierarchy in culture and society through the neutral formalism of advocacy and adjudication. In advocacy, neutral formalism dictates colorblind conventions of pleading, pretrial discovery, and trial practice that isolate individuals from their community settings and sever personal identities from their cultural and social contexts. In adjudication, neutral formalism directs colorblind judgments of conduct and credibility independent of the identity-based differences of language, culture, and social history.

Under the jurisprudence of neutral formalism, the conventions of advocacy and the judgments of adjudication give rise to "common sense" presumptions and inferences concerning individual consent, intent, and responsibility. Gross reveals that both advocates and adjudicators deploy science to support and, at other times, to contradict the findings and conclusions of common sense reasoning. In the instant case, for example, the Amlongs retained the services of a polygraph expert and a Creole-speaking psychologist to test the truth of Norelus's allegations of sexual assault and to corroborate her symptoms of posttraumatic stress disorder. Although that expert testimony, and its scientific undergirding, stood uncontradicted, it failed to overcome the district court's common sense dismissal of Norelus's claims as "baseless."[123]

Norelus's litigation failure confirms Gross's thesis of the privilege-reinforcing power of "common sense" to inscribe identity with racialized or gendered meaning and to imbue identity with moral character, notwithstanding countervailing evidence. Rooted in racial knowledge, that privilege-reinforcing power, Gross maintains, draws on the predominant cultural "understanding of individuals' appearance, reputation, civic and social performances, and associations."[124] Here as elsewhere, the predominant perception of low-wage undocumented immigrant women of color in contemporary sexual harassment litigation evokes images of "sexually graphic innuendo" and narratives of "hav[ing] slept with 1,000 men."[125] In this way, Gross indicates, contemporary civil rights litigation

122. *Id.*

123. Norelus v. Denny's Inc., No. 94CV2680, 2000 WL 33541630, at *15 (S.D. Fla. Mar. 21, 2000) (sanctions order), *rev'd sub nom.* Amlong & Amlong v. Denny's, Inc., 500 F.3d 1230 (11th Cir. 2007).

124. GROSS, *supra* note 1, at 296.

125. *Norelus*, 2000 WL 33541630, at *4 n.4. Indeed, the court of appeals noted that Norelus "slept with *over* 1000 men," thus illustrating the permeation of the perception of immigrant women as

continues to "regulat[e] citizenship" in accordance with historically racialized and gendered categories while simultaneously operating to produce those same categories through the "performance of citizenship."[126]

Like the antebellum and Jim Crow courts of the nineteenth and twentieth centuries, the *Norelus* and *Amlong* courts invoke a combination of reputation, performance, and association in determining racial identity. Both trial and appellate courts reflect Gross's sense of "the persistence of the idea of racial 'performance'" in race and gender identity litigation.[127] Both implicitly and explicitly, the courts equate Norelus's "civic acts and displays of moral and social character" with the subordinate categories of racial identity and inferior ranks of social hierarchy she inhabits.[128] In the Norelus case, as in other areas of immigration litigation,[129] "the discourse of racial performance" that Gross articulates and the connection that she draws "between racial identity and fitness for citizenship . . . remains potent."[130]

In this important respect, Gross's "common sense" of race—her notion that "we know it when we see it"—proves "surprisingly durable."[131] The history of the *Norelus* trial, for example, shows that a common sense of race and gender pervades law, litigation, and the legal system. This community racial knowledge rewards litigants who perform and pass into whiteness and womanhood with "full legal and social citizenship."[132] Conversely, community racial knowledge punishes litigants who, like Floride Norelus, fail in their cultural performance of white womanhood. Constrained by culture, language, and race, Norelus falters in her claims of

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promiscuous. *Amlong*, 500 F.3d at 1256 (emphasis added). This is especially disconcerting because it was the appellate court that generally held a more sympathetic view toward Norelus. Thus, while the appellate court's insertion of the word "over" was probably not out of ill will, it nonetheless reflects the appellate court's, perhaps unconcious, negative view of Norelus and, by extension, other immigrant women who do not fit community-created definitions of whiteness and womanhood.

126. GROSS, *supra* note 1, at 296.

127. *Id.*

128. *Id.* at 296–97.

129. *See generally* John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817 (2000) (revealing the importance of the performance of whiteness in immigration suits and policymaking); Enid Trucios-Haynes, *The Legacy of Racially Restrictive Immigration Laws and Policies and the Construction of the American National Identity*, 76 OR. L. REV. 369 (1997) (criticizing the dominance of assimilation theory in immigration law and policy); Kevin R. Johnson & Bill Ong Hing, *National Identity in a Multicultural Nation: The Challenge of Immigration Law and Immigrants*, 103 MICH. L. REV. 1347 (2005) (reviewing SAMUEL P. HUNTINGTON, WHO ARE WE?: THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY (2004)).

130. GROSS, *supra* note 1, at 297.

131. *Id.*

132. *Id.* at 298.

honor, sexual purity, and moral virtue, the very core qualities of whiteness and womanhood that Gross chronicles. To prevail at her sexual harassment trial would have required Norelus to perform the community-bolstered and scientifically buttressed qualities of white womanhood—precisely Gross's feminine equivalent of performing white male citizenship. The practical effect of such a failed performance lies in the district court's denial of Norelus's claim to the rights and privileges of white citizenship in the workplace.

Gross sketches three approaches to identity trials that are useful in understanding Norelus's case and in litigating future sexual harassment and employment discrimination cases.[133] The first approach borrows from conventional colorblind litigation strategies directing neutrality toward race. Race neutral litigation, Gross notes, "refuse[s] to recognize race," treating it "solely as a formal category" defined "merely as 'skin color.'"[134] This stance, she complains, presumes "that existing racial hierarchies are inevitable results of cultural difference" simply reflecting "wholly reasonable cultural discrimination."[135] In Norelus's case, neither courts nor litigants directly challenged the overlapping hierarchies—class, gender, and racial—framing Norelus's experience of sexual harassment, thus leaving her and other undocumented immigrant women of color susceptible to ongoing abuse and exploitation in the low-wage marketplace.

A second approach Gross mentions connects litigation to the politics of identity by "asserting racial identities with pride and basing claims to political participation . . . on the basis of those identities."[136] Rather than disaggregate race and culture,[137] this approach focuses on "building political coalitions around racial identities when it is strategically useful to do so."[138] Like many, Gross views identity politics as a "vital expression"

133. *See* Christine N. Cimini, *Ask, Don't Tell: Ethical Issues Surrounding Undocumented Workers' Status in Employment Litigation*, 61 STAN. L. REV. 355 (2008) (discussing the ethical obligations of lawyers representing undocumented immigrants).

134. GROSS, *supra* note 1, at 299.

135. *Id.* at 300.

136. *Id.* at 300–01.

137. Although Gross later criticizes some of the more problematic aspects of identity politics, she recognizes the value of seeing race and culture as closely intertwined by noting that "[b]ecause racism has expressed itself in cultural terms, race and culture cannot be disaggregated without ignoring vast realms of reinforcement of racial hierarchy." *Id.* at 303.

138. *Id.* at 301. *See also* Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863, 908–09 (1993) (arguing in favor of forming "[a] viable multiethnic, multiracial society that recognizes a need for separatism in certain sectors").

of "the genuine need to preserve . . . political and cultural communities."[139] Yet she warns that identity politics "cannot truly combat the work that law has done" in preserving and reproducing racial hierarchy without enlisting the transformative power of courts to recognize and remake race.[140]

Unsatisfied with either the colorblind or identity-politics approach to combating racism, Gross proposes a third approach that takes into account discrimination "on the basis of racial performance."[141] Paradoxically, Gross's "antiracist agenda" commands a return to the courts and their legislative and administrative counterparts to "unmake" race and end the tolerance of stereotype and stigma in civil rights advocacy and adjudication.[142] To do so requires antiracist advocates, especially litigators, to recognize the interconnectedness of race and culture. Among clients and communities of color, race-based identity and community "constitute[s] dignity-based process values that derive from fundamental notions of personhood and self-determination" and preserve or enlarge cultural, social, and political standing.[143] Thus, to fulfill political commitments to democratic access and racial equality in representing undocumented immigrants,[144] as well as other women and individuals of color in sexual assault and harassment trials,[145] civil rights advocates must broaden their

139. GROSS, *supra* note 1, at 302. *See also* Darren Lenard Hutchinson, *Progressive Race Blindness?: Individual Identity, Group Politics, and Reform*, 49 UCLA L. REV. 1455, 1465–75 (2002) (revealing the shortcomings of and ultimately rejecting "progressive race blindness" theory).

140. GROSS, *supra* note 1, at 302.

141. *Id.* at 304.

142. *Id. See also* Theresa M. Beiner, *Using Evidence of Women's Stories in Sexual Harassment Cases*, 24 U. ARK. LITTLE ROCK L. REV. 117 (2001) (advocating that courts take into account how women in the real world experience and react to sexual harassment instead of relying on popular assumptions of how women "should" act in such situations).

143. Anthony V. Alfieri, Gideon *in White*/Gideon *in Black: Race and Identity in Lawyering*, 114 YALE L.J. 1459, 1461 (2005).

144. *See, e.g.*, Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525 (2000) (stressing the need to consider race when analyzing immigration law and policy); Cheryl Little, *InterGroup Coalitions and Immigration Politics: The Haitian Experience in Florida*, 53 U. MIAMI L. REV. 717 (1999) (revealing the disparate treatment of Haitian immigrants compared to those from other Latin American countries and the U.S. government's ignorance of Haitian politics and culture).

145. *See, e.g.*, Mario L. Barnes, *Black Women's Stories and the Criminal Law: Restating the Power of Narrative*, 39 U.C. DAVIS L. REV. 941 (2006) (urging civil rights advocates to balance the usefulness of generalized culturally created narratives about women of color against the need to make courts view women of color as individuals with their own unique stories); Darci E. Burrell, *Myth, Stereotype, and the Rape of Black Women*, 4 UCLA WOMEN'S L.J. 87 (1993) (urging feminist activists and legal theorists to realize how stereotypes about African American men and women's sexuality deny women of color equal legal protection); Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387 (1996) (exposing the prevalence of patriarchy in the legal system and advocating changes to courtroom rules to improve the fairness of jury trials).

role and function to embrace politics, culture, and society. By channeling litigation toward broader client-community roles and relationships, advocates may expand democratic and equality claims to political and social spheres outside law.[146]

## V. CONCLUSION

Gross's historical analysis of identity trials carries crucial relevance to contemporary civil rights debates over the construction of race and gender in law and litigation. That analysis not only elucidates the notions of racialized common sense and performance, but also illuminates the trial and appellate strategies in Floride Norelus's case and in civil rights cases more generally. The analysis also suggests important alternative approaches to civil rights litigation embodied in identity performance and empowerment strategies. The efficacy of contemporary civil rights litigation depends on the integration of grass-roots, legal-political identity performance and empowerment tactics within communities of low-wage undocumented immigrant workers of color. At their most promising, these tactics create innovative forms of collaboration between lawyers and clients working in community-based advocacy campaigns. These new approaches to advocacy have the potential to shift the role and function of civil rights representation toward greater legal-political discourse and democratic renewal.[147] Gross's work reveals the oppositional voices and narratives of freedom that call out again and again for such renewal.

146. Alfieri, *supra* note 143, at 1481–88.
147. *Id.*