

## INTERRACIAL VIOLENCE AND RACIALIZED NARRATIVES: DISCOVERING THE ROAD LESS TRAVELED

## VIOLÊNCIA INTERRACIAL E NARRATIVAS RACIALIZADAS: DESCOBRINDO CAMINHOS POUCO PERCORRIDOS

Robin D. Barnes\*

**Abstract:** This article question the underlying assumptions and, therefore, potential effectiveness of Anthony Alfieri's recent essay, "Defending Racial Violence. Alfieri's proposal, in the form of an enforceable rule, would likely wind up on a collision course with principles underlying the First Amendment to the U.S. Constitution. The article demonstrates the level of confusion that develops from rules that too easily or arbitrarily frustrate the legitimate interests of attorneys and clients in pursuing the best criminal defense. It also recommends providing carefully constructed, simulated exercises for classroom dialogue in ethics courses as a viable, alternative method for introducing a race - conscious ethic to young lawyers that does not run afoul of basic constitutional freedoms. The article disagrees with Alfieri's conclusion that "defense lawyers find scarce opportunity to contest the dominant narratives embedded in laws, institutional practices, and legal relations, even when those narratives inscribe negative racial stereotypes." The article concludes that the history and evolution of the entire system of criminal justice in this country dictates greater reliance upon mainstream prescriptions of neutrality rather than race-conscious rules and affirm that on questions concerning injury to black America's social identity, critics like Alfieri usually fail to consider just how broad the range of race-based assumptions are that ground representations of moral agency.

**Keywords:** Racialized narratives. Criminal justice system. Race relations in the United States.

**Resumo:** Este artigo questiona os pressupostos subjacentes e a potencial efetividade do recente ensaio de Anthony Alfieri, intitulado "Defendendo a violência racial". A proposta de Alfieri, na forma de uma regra aplicável, colide com os princípios da Primeira Emenda à Constituição dos EUA. O artigo demonstra a confusão gerada a partir de regras que fácil ou arbitrariamente frustram os legítimos interesses de procuradores e de clientes em busca da melhor defesa criminal. O artigo também recomenda métodos alternativos para a discussão racial nas Universidades e discorda que os advogados de defesa têm escassa oportunidade para contestar as narrativas dominantes embutidas em leis, em práticas institucionais, mesmo quando essas narrativas inscrevem estereótipos raciais negativos. O artigo conclui que a história e a evolução de todo o sistema de justiça criminal dos EUA exige maior dependência de prescrições tradicionais de neutralidade do que normas de consciência racial e sustenta que, em questões relativas à agressão racial aos negros da América, críticas como a de Alfieri geralmente falham em considerar o quanto os preconceitos raciais são representações que sustentam modelos morais.

**Palavras-chave:** Narrativas racializadas. Sistema de justiça criminal. Relações raciais nos Estados Unidos

\* Robin D. Barnes, University of Connecticut School of Law, rbarnes@law.uconn.edu

## 1 Introduction

Anthony Alfieri's recent essay, "Defending Racial Violence,"<sup>1</sup> analyzes various models of legal argumentation and strategy.<sup>2</sup> The essay focuses on the trial of two black men charged with attacking a white trucker during the Los Angeles uprising sparked by the acquittal of four white police officers who brutalized Rodney King.<sup>3</sup> After examining what he calls the rhetorical structure of defense arguments in the case, Alfieri reaches some interesting conclusions, which he would apparently generalize to all cases of black-on-white violence. Alfieri asserts that race-based narratives of deviance – stories of ghettoized deprivation, neglect, and resulting pathologies – are used by criminal defense attorneys to hone arguments that mar their individual clients' legal identities and distort the integrity of the entire black community.<sup>4</sup> According to his analysis, when defense attorneys present narratives of "black deviance" they depict the collective black community as virtually incapable of exercising morally responsible choices.<sup>5</sup> Alfieri, though, seems far less concerned with group libel than with what he characterizes as depersonalization of "individual responsibility for violent behavior."<sup>6</sup> The essay, which does not offer any version of a tentative Model Rule of Professional Responsibility, proposes as a matter of ethical responsibility that lawyers be constrained in one of two ways. Alfieri argues that lawyers should either be precluded from utilizing narratives of "black deviance," or be held "responsible" for the absence of lawyer-client consultations concerning defense strategies and perceptions related to individual moral character and community integrity.<sup>7</sup> [\*789]

Besides the inherent difficulty of reaching a consensus on all the dynamics that affect high-profile cases, which – In the United States – Include interracial crimes of violence, Alfieri's proposal to ban "black deviance" narratives is unworkable for many different reasons. First and foremost, the proposal remains disconnected from any concrete goal or objective that a rulemaking body could effectively monitor or control, assuming it possessed the requisite authority. Second, the case study method is ineffective for advancing Alfieri's claim.<sup>8</sup> If his argument is that black men who commit violent crimes against innocent whites are "getting away with it" or that defense lawyers in such cases routinely argue that these defendants are mostly blameless (under a "black deviance" theory), he has failed to make his case. If, instead, he simply believes that it is morally wrong for attorneys to intentionally and recklessly depict black America as "lacking in the properties of mind and character necessary for moral agency"<sup>9</sup> under any circumstances, then he should seriously examine the conduct of a representative sample of criminal defense attorneys to determine if such a problem actually exists. Instead, Alfieri merely points to a series of neutral arguments orchestrated by defense attorneys in a single case - arguments which he urges his readers to construe as suggesting race-based deviance. Relying heavily upon his knowledge of the defendants' and victim's races, Alfieri never substantiates his claim that the lawyers' presentation of the "group contagion" diminished capacity defense

uniquely implicates only black community character and behavior, in Los Angeles or elsewhere. Yet, Alfieri justifies his proposal by arguing that use of the “mob-violence incited” defense in this trial suggests that “young black males as a group, and the black community as a whole, share a pathological tendency to commit acts of violence.”<sup>10</sup> The principal flaw of Alfieri’s essay is that in all but one passage he presents as a form of “race-talk,” defense lawyers easily could have been describing a white community, and two white defendants who grew up in a predominantly white environment. Prior to issuing a blanket prohibition, Alfieri should have determined whether legal narratives of “black deviance” are a significant source of harm to the social identities or integrity of African Americans.

In Part I, I question the underlying assumptions and, therefore, potential effectiveness of Alfieri’s proposal. Contrary to Alfieri’s conclusion, defense stories of “black deviance” in cases involving black defendants tend to reflect, and perhaps reinforce perceptions of black and white social identities, rather than construct new ones. To constrain the options [\*790] of criminal defense attorneys would prescribe a uniquely legal remedy for what is essentially a socially constructed problem. Even assuming, for the sake of argument, that a significant number of lawyers defending blacks indicted for black-on-white crimes intentionally and recklessly use narratives of “black deviance” for the sole purpose of winning acquittals for their clients, Alfieri’s proposal, in the form of an enforceable rule, would likely wind up on a collision course with principles underlying the First Amendment to the U.S. Constitution. Beyond Alfieri’s failure to discuss an appropriate sanction for lawyers who violate the rule, it is not entirely clear from his essay when a violation would occur. Thus, challenges to his proposal would rely on First Amendment principles governing vagueness<sup>11</sup> and overbreadth.<sup>12</sup> More significantly, the restraints proposed under Alfieri’s “ethic of race-conscious responsibility” represent a form of content-based regulation that the Constitution forbids.<sup>13</sup>

Part II, relying on an analysis of law student discussion in ethics class, demonstrates the level of confusion that develops from rules that too easily or arbitrarily frustrate the legitimate interests of attorneys and clients in pursuing the best criminal defense. Part III recommends providing carefully constructed, simulated exercises for classroom dialogue in ethics courses as a viable, alternative method for introducing a race – conscious ethic to young lawyers that does not run afoul of basic constitutional freedoms. In defending or prosecuting highly charged racial cases, attorneys may want to consider the promise of deliberative empathy.<sup>14</sup> This technique presents the single strongest argument against Alfieri’s proposal to ban from the courtroom speech that presents specified points of view. Lawyers challenging what they perceive to be illegitimate uses of racialized narratives will make the best use of their training and talent, following the tradition of the “more speech” paradigm. I disagree with Alfieri’s conclusion that “defense lawyers find scarce opportunity to contest the dominant narratives embedded in laws, institutional practices, and legal relations, even when those narratives inscribe negative racial stereotypes.”<sup>15</sup> Criminal justice is sought through an adversarial system in which lawyers through their role as advocates, and with their training in

the art of legal argumentation, are equipped to overcome the difficulties [\*791] presented by racialized narratives irrespective of whether such narratives originate with opposing counsel or filter into the courtroom from other environments.<sup>16</sup>

This response concludes that on questions concerning injury to black America's social identity, critics like Alfieri usually fail to consider just how broad the range of race-based assumptions are that ground representations of moral agency. The history and evolution of the entire system of criminal justice in this country dictates greater reliance upon mainstream prescriptions of neutrality rather than race-conscious rules.

## **2 The legal v. Social experience of racial subordination for african americans**

One could legitimately ask why Alfieri focused so heavily on a case that lends little credibility to his thesis and neglected other opportunities to investigate how other race-based narratives shape black identity. Fundamentally, the "race-talk" that Alfieri may uncover in legal argumentation is tightly bound to and originates from an ongoing social discourse that dehumanizes blacks and other racial minorities in relation to whites. The dialogue may filter into the courtroom, but the buzzwords, sound bites, and color-coded descriptions proliferate during media coverage of highly charged racial cases. Alfieri describes narratives of black "deviance and defiance" but does not consider, in his exploration of the "rhetoric of race [...] in criminal defense advocacy and ethics dealing with racially motivated private violence,"<sup>17</sup> the manner in which narratives of "white defiance" operate to exculpate whites guilty of violent crimes against African Americans.

White defiance narratives - depicting morally responsible, courageous individuals who are forced to rebel against or respond to an injustice - lower perceptions of a valued black population and threaten the integrity of the white community.<sup>18</sup> They effectively alter the substantive outcomes of some criminal cases along with certain social realities.<sup>19</sup> The police and community reactions during the racial hoax cases involving Charles Stuart and Susan Smith, the public and media defense of Bernard Goetz, the implications of the state trial acquittal of the police officers who brutalized Rodney King, and the media coverage of the ju- [\*792] rors and jury profiles in the criminal trial of O.J. Simpson are recent examples of this disturbing phenomenon.<sup>20</sup>

Media coverage of violent interracial crimes presumptively characterizes white defendants and victims using narratives of "white defiance;" at the same time, deviance narratives are accepted, by and large, as the rule rather than the exception for black victims, defendants, and now jurors. Racialized narratives are featured repeatedly in a media-driven public discourse that perniciously questions the motives, morals, and credibility of the black community while elevating the social standing, legitimacy, and value of whites. As was done in fighting so many of the race-based injustices of the past, when black America, across socioeconomic lines, decides that it will no longer acquiesce in the face of obdurate reproductions

of libelous images and skewed identities, that will mark the beginning of a permanent shift in this phenomenon. Until then, we must recognize that attorneys defending high-profile clients in racially charged cases are stuck, to some extent, with the social identity of the client that has already played out in the media. Such a recognition undermines justifications for additional controls on attorney behavior in an adversarial system, unless such controls relate directly to lawyer-media relations.<sup>21</sup>

Alfieri's proposal is unprecedented: It openly restricts defense lawyers to certain legal arguments, regardless of their value or proximity to "objective" truth. His proposal is divorced from any goal of advancing substantive justice. This fact sets his proposal apart from other restrictions upon lawyer's speech authorized by the Model Rules.<sup>22</sup> These rules do not intrude into the strategic options of lawyers and clients absent a clear showing of intentional wrongdoing. Delegating "responsibility" for advancing the race-conscious ethic that Alfieri proposes jeopardizes the presentation of both legitimate and questionable deviance-related arguments in one fell swoop.<sup>23</sup> Lawyers looking for adequate notice of exactly what the rule forbids would be placed in the untenable position of having to guess when its boundary was about to be crossed. Even a rule banning all race-based narratives is unlikely to survive constitutional challenge. Attempts to prescribe only racially sanitized defense stories will be met with vigorous and legitimate challenges by attorneys who believe that a racially dominant narrative is central to the just resolution of their particular case. Thus, a lawyer's choice to characterize a racist police officer who has testified in a criminal case as a neo-Nazi would be defended on the grounds that the Constitution does not permit suppression of the "truth" in order to impose a racially acceptable orthodoxy. Alfieri's proposal, however, seeks to silence only certain racial perspectives - those likely to be expressed while defending charges related to an interracial crime of violence perpetrated by black defendants. In essence, he seeks to impose a viewpoint-based restriction that interferes with the First Amendment and Sixth Amendment liberties of both the lawyer and client. The Supreme Court has subjected rules restricting the speech rights of lawyers engaged in criminal defense to high levels of scrutiny, striking down ethics rules which impose vague and arbitrary rules of conduct.<sup>24</sup>

### 3 In pursuit of the best criminal defense

In proposing that lawyers forego use of "black deviance" narratives, Alfieri presumes that the criminal defense lawyers' mandate to win, coupled with their tendency to lump black males into a deviant category, produces a harm for which attorneys are not held accountable.<sup>25</sup> However, his solution is antithetical to the lawyer's duty to act solely in the interests of individual clients - a duty which in certain cases may require the use of racialized narratives. A lawyer who introduces expert testimony (rather than personal musings) on the history, evolution or significance of the use of the word nigger by law enforcement officials has effec-

tively presented a racialized narrative. Even though the Model Rules of [\*794] Professional Responsibility are a race-neutral body of rules, they clearly permit arguments pertaining to such testimony.

The Model Rules are founded upon race-neutral principles<sup>26</sup> and place very few restrictions on the strategic and rhetorical options of trial attorneys, other than that evidence be honestly and truthfully presented.<sup>27</sup> Similarly, the American Bar Association's Standards for Criminal Justice, which are highly regarded in a majority of states, leave most rhetorical choices to the advocate.<sup>28</sup> Consistent with other model provisions, one guideline provides a broad analogue to Alfieri's proposal. The standards temper lawyers' use of rhetoric during criminal trials under Standard 4-7.7 (Arguments To The Jury).<sup>29</sup> This section, originally designed to insure trial fairness, simply states that "defense counsel should not make arguments calculated to appeal to the prejudice of the jury."<sup>30</sup>

My own experience teaching the mandatory legal ethics course indicates that law students - for all of their zeal in justifying the conduct of criminal defense lawyers on behalf of clients - exhibit poor understanding of how this rule should operate. Standard 4-7.7 states a general prohibition, while Alfieri's proposal addresses the "ethics" of the use of "black deviance" narratives. In light of classroom discussions in which students vigorously asserted the "client first" orthodoxy only to abandon it when confronted with an unpopular criminal defendant in a racially charged case, I have little reason to be optimistic about lawyers' ability to understand, or apply Alfieri's rule with consistency. The aforementioned First Amendment objections aside, general confusion and arbitrary application provide sufficient grounds for questioning the efficacy of his rule.

Most students heavily scrutinize rules of conduct that they perceive as interfering with zealous representation. When confronted with a textbook hypothetical exploring a law firm's duty to its junior associates, and a potential conflict of interest in serving the needs of a client, the students were adamant in their views. The best interest of the client, broadly construed, should always prevail - even if that means allowing jurors' prejudices to dictate litigation strategy. Although the standards forbid arguments that play to those prejudices, tactical decisions made to accommodate them at the expense of equity and fairness received little or no [\*795] scrutiny from a large majority of students. A synopsis of the problem and a summary of the ensuing discussion follows:

Karen Horowitz is a third year associate at a firm where she has competently handled the legal matters of a banking client for over two years. The client has recently been named as a defendant in a suit brought in a certain jurisdiction deep in the South. Horowitz, contrary to her legitimate expectation, has been told that she will not be a part of the litigation team handling the case because everyone in this jurisdiction belongs to one sort of white supremacist group or another. A Jewish female lawyer, among others, would not be favorably received, and has no hope of winning the case.<sup>31</sup>

One could conclude that the potential thirty million dollar judgment unduly influenced the discussion that followed, but many students swore that the money did not influence them. Almost without exception they agreed that the decision to take Horowitz off the case was a strategic decision made in the client's best interest. That her presence may be desired on a case where being female and a Jew would be seen as assets was described as merely the flip side of the same coin. As part of the assignment I asked the students to come up with a win-win situation. The only "win" that most were able to contemplate on their own was the hiring of local counsel to advance the client's cause. Very little thought was given to questions such as whether the firm had a duty to state clearly its policies on such matters, so as to provide adequate notice to lawyers and clients; whether the associate, in light of the firm's decision, deserved additional compensation (such as credit toward partnership); or whether there was some other behind-the-scenes role that Horowitz could or should have been allowed to assume given the nature and timing of the dilemma. A few students expressed strong views on these issues, concluding that the young lawyer was entitled to more than a pat on the head accompanied by a welcome to the "real world." One or two declared that neither the firm nor the client had a legitimate interest in removing her from the case. For the most part, the dissenters were denounced for their willingness to subordinate the best interests of the client "because the case involved money." They were accused of basing their judgment upon an irrational, and perhaps subconscious, indifference toward economic or business interests. One critic went so far as to conclude that the group would never even entertain such views had the discussion centered on the interests of a client facing prison or capital punishment. The vocal majority had in fact shown a marked proclivity toward allowing questionable conduct on the part of attorneys engaged in criminal defense.

In subsequent weeks we discussed attorney conduct in the trial of O.J. Simpson. Many students expressed the view that defense attorney Johnnie Cochran had violated Standard 4-7.7 by making arguments [\*796] designed to appeal to jurors' prejudices.<sup>32</sup> Cochran's depiction of police detective Mark Fuhrman as a Nazi was widely denounced, even though it was based upon concrete evidence that this key prosecution witness bragged about brutalizing and framing black Americans, and had possible ties to militant white supremacist organizations.<sup>33</sup> Few students raised serious objections to the judge's ruling that excluded Fuhrman's taped confessions concerning the planting of evidence, and only two challenged as legally significant the fact that the judge rather than the jury would decide if Fuhrman's confessions were simply hyperbole. None questioned the propriety of a higher court stepping in to alter jury instructions regarding Fuhrman's late decision to exercise his Fifth Amendment privilege against self-incrimination. However, when Cochran told jurors to strike a blow for justice by sending, through an acquittal, a message to government officials about police corruption, he was viewed as having crossed a bright line. Most students thought him guilty of playing to a race-based prejudice that compromised the outcome of the trial. Although prosecutor Marcia Clark also admonished jurors to strike a blow for

justice by sending a message to wife-batterers everywhere through conviction of Simpson, she received no criticism whatsoever. None of the students questioned ethical boundaries in relation to her behavior.

#### 4 The best use of lawyers' training and talent

The theory that the best response to speech that threatens the exercise of other fundamental rights is simply more speech on the same subject has garnered more than its fair share of criticism for legitimate reasons. Young lawyers may find themselves in a courtroom, responding to a racialized narrative that they believe compromises the just outcome of a particular case. In these instances the more speech paradigm provides the best defense. Lawyers should be not only forewarned but also trained, during the course of their legal education, to face such crises head on. Exercises that effectively demonstrate how defense lawyers use what Alfieri identifies as imaginative empathy may be a starting point. Such exercises could be incorporated into mandatory legal ethics classes and trial practice courses.

"Imaginative empathy honors difference by "allowing the empathizer to construct the other as a completely separate being ..." <sup>34</sup> It thus enables us to own up to our racial legacy without sacrificing justice. This race-conscious solution was utilized by attorney/author John [\*797] Grisham in his book *A Time to Kill*.<sup>35</sup> The fictional account of a double murder case features an enraged black father who purposefully shot and killed two racists who raped his ten-year-old daughter. After a high-profile indictment and trial in what quickly became a racially charged case, the jury and the public seemed hopelessly divided. In seeking to break the jury deadlock, one white female juror convinced other jurors, who were also white, to join her in the following exercise. "Pretend with me for a moment. I want you to use your imaginations. I want you to close your eyes and listen to nothing but my voice."<sup>36</sup>

Pretend that the little girl had blond hair and blue eyes, that the two rapists were black, that they tied her ... [and] raped her ... Picture the little girl layin' there beggin' for her daddy while they kicked her in the mouth and ... broke both jaws... [She told the jurors to ... I]magine that the little girl belonged to them - their daughter. Be honest with themselves and to write on a piece of paper whether or not they would kill those black bastards if they got the chance.<sup>37</sup>

The vote was twelve to zero in favor of acquittal.

Bernard Goetz, who in the late 1980s may have been the most widely discussed white criminal defendant, shot four black teenagers, at least two in the back, without provocation, and was acquitted of all charges related to the shooting.<sup>38</sup> The case provides one of the clearest examples of how narratives of "white defiance" when coupled with narratives of "black deviance" can alter substantive outcomes in certain criminal cases, as well as black social reality.<sup>39</sup> According to Stephen Carter, the great "tragedy of the Goetz case is that a public barely aware of the facts was rooting for him to get away with it."<sup>40</sup> Narratives of "white defiance" are most destructive when they are used to exculpate the unknown white who admits or is proven guilty of committing violent crimes against black Americans.

Narratives of “black deviance” were used to justify public reaction to Goetz’s crimes.<sup>41</sup> Patricia Williams notes “the degree to which the public [\*798] devoured, ex post facto, stories about the deviant behavior of the victims in this case. The victims’ criminal propensities - allegations ranging from rape to robbery - were used ... to show why the four young men deserved to be the objects of intent to kill.”<sup>42</sup> While the victims were characterized as social deviants - violent and dangerous street punks - Goetz’s defiance of the law, which jurors rewarded with an acquittal and requests for his autograph, was deemed an act of heroism.<sup>43</sup> Williams concluded her analysis of the case by introducing the following story, which, “with minor character alterations, is excerpted from Goetz’s videotaped confession.”<sup>44</sup> It could have made for the kind of closing argument that the Grisham tale suggests.

A lone black man was riding in an elevator in a busy downtown department store. The elevator stopped on the third floor, and a crowd of noisy white high school students got on. The black man took out a gun, shot as many of them as he could, before the doors opened on the first floor and the rest fled for their lives. The black man later explained to the police that he could tell from the “body language” of the students, from their “shiny eyes and big smiles,” that they wanted to “play with him, like a cat plays with a mouse.” Furthermore, the black man explained, one of the youths had tried to panhandle money from him and another asked him “how are you?”

“That’s a meaningless thing,” he said in his confession, but “in certain circumstances, that can be a real threat.” He added that a similar greeting had preceded the vicious beating of his father, a black civil rights lawyer in Mississippi, some time before. His intention, he confessed, was to murder the high school students.<sup>45</sup>

Williams concludes that “most white Americans would not hesitate to pronounce the severe contextual misapprehensions of the black gunman as a form of insanity.”<sup>46</sup> With varying degrees of sympathy, he would be judged in need of institutionalization because of the danger presented to himself and others.<sup>47</sup>

The differences in the actual, versus the potential, outcome of the Goetz case reveal how stories of white defiance (in particular) served to cloud public judgment in relation to the substance and process of criminal justice in that case. That Goetz’s lawyers may have taken advantage of the fog is but one reality of an adversarial system for which there are likely to be few practical remedies beyond well-trained opposing counsel. The underlying assumption that such behavior corresponds with a lawyer’s duty to render effective representation to a client facing criminal [\*799] prosecution cannot be challenged on the grounds that it encourages the social prejudices of the general community.

## 5 Conclusion

The theme of Alfieri’s assertions is that it may be not only useful but also imperative to encourage community-based deliberations on the morality of the use of racialized narratives. I agree. For example, I believe it imperative to ackno-

wledge the role of the media in exploiting narratives of “black deviance” and “white defiance” during trials involving interracial crimes of violence. Likewise, there are instances when a pivotal institution must reevaluate how its use of race-based narratives reflects upon its asserted commitment to diversity. This occurred when a group of black parents were successful in convincing their local school board to remove Mark Twain’s *Huckleberry Finn* from the Middle School curriculum in New Haven, Connecticut. Nevertheless, few would agree that such deliberations need to begin with the heart of criminal defense. The debate over the criminal justice system is so skewed that there is scarcely room for a mixed-race discussion of the racially disparate substantive and procedural outcomes generated by the system as it operates in the United States today. Unless reform measures are implemented to reduce many of these disparities, there is little hope for forming the sense of community upon which to base the broader discussion.

In light of the complex history of race relations in the United States, constraining the options of criminal defense attorneys could never be legitimately viewed as a necessary first step toward achieving the result that Alfieri seeks. It seems unlikely that commissioners representing the American Bar Association would ever seriously consider acting upon Alfieri’s proposed rule because, in addition to being violative of constitutional norms, it seeks a legal remedy for a socially constructed problem.

Legal ethics courses may be the best forum for discussing cases where racialized narratives and interracial violence intersect, and for encouraging young attorneys to take the higher road. That setting might encourage acknowledgment of the differences in our attitudes during highly charged racial cases as historical reflections of our perceptions, denial, and distrust. A community ethic could develop out of deeper understanding and discussion of the nation’s racial legacy; without such an ethic there is little opportunity for a comprehensive examination of problems related to justice, racial violence, and the use of racialized narratives.

## Footnotes

<sup>1</sup> Anthony V. Alfieri, *Defending Racial Violence*, 95 *Colum. L. Rev.* 1301 (1995).

<sup>2</sup> See *id.* at 131016.

<sup>3</sup> According to one source, the uprising was sparked when a group of police officers tried to arrest a teenage boy shortly after the verdict was announced. One witness stated that “three of them had him on the ground.” CNN News: *The Rage of Despair* (CNN News television broadcast, May 9, 1992, available in LEXIS, News Library, Script File) (statement of eighth riot victim).

<sup>4</sup> See Alfieri, *supra* note 1, at 131213 (claiming those who adopt deviance theory have a tendency toward pathologizing racial difference by combining mental disorder or incompetence with claims of cultural or environmental deprivation).

<sup>5</sup> See *id.* at 1314.

<sup>6</sup> *Id.*

<sup>7</sup> See *id.* at 134142.

<sup>8</sup> Although analyzing the strategy employed in a single trial would not qualify as an empirically valid survey of defense attorney conduct, data gathered from individual case studies can, in some instances, inform the rulemaking process and supply important sources of information for examining whether race-conscious theories are valuable in certain areas of law.

<sup>9</sup> Alfieri, *supra* note 1, at 1304.

<sup>10</sup> *Id.* at 1311.

<sup>11</sup> Vague laws may deter persons from engaging in constitutionally protected speech. All government regulations must be drawn with narrow specificity to insure that they will not be susceptible to sweeping and improper application. See, e.g., *NAACP v. Button*, 371 U.S. 415, 433 (1963).

<sup>12</sup> Challenges to a statute or regulation as overbroad rest primarily upon a claim that the language is so sweeping that it includes both protected and unprotected speech within its scope, in violation of the Constitution. See, e.g., *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

<sup>13</sup> See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (First Amendment generally prohibits regulations of speech and restrictions based on content are presumptively invalid).

<sup>14</sup> See Alfieri, *supra* note 1, at 1328.

<sup>15</sup> *Id.* at 1305.

<sup>16</sup> Alfieri argues that defense lawyers must take a short-term view of the problem within the context of a specific case. See *id.*

<sup>17</sup> See *id.* at 130304.

<sup>18</sup> Stories of “white defiance” injure the larger community when they produce racial discrepancies that are widely ignored while claims of principled impartiality are used to repudiate the fact that race-based disparities, more than “black sensitivity,” undermine the ethical foundation of race-related dialogue.

<sup>19</sup> See *infra* notes 3746 and accompanying text.

<sup>20</sup> See Fox Butterfield, *Charles Stuart’s Brother Indicted in Murder Case*, *N.Y. Times*, Sept. 27, 1991, at A12 (police initially believed Stuart’s account that he and his eight-month pregnant wife were assaulted by a black gunman, but when Stuart became a suspect, he committed suicide); Rick Bragg, *Susan Smith Verdict Brings Relief to Town*, *N.Y. Times*, July 30, 1995, 1, at 16 (Smith convicted for murder of her two children after she had “lied for nine days with tales of a black carjacker”); Carlyle C. Douglas & Mary Connelly, *The Goetz Case’s Jury Sees Justification, Some See Injustice*, *N.Y. Times*, June 21, 1987, 4, at 6 (white gunman acquitted in shooting of four black youths on subway, convicted only on weapons charge); Laura Mansnerus, *Under Fire, Jury System Faces Overhaul*, *N.Y. Times*, Nov. 4, 1995, 1, at 9 (commenting on jury behavior in Rodney King police beating and O.J. Simpson murder acquittals).

<sup>21</sup> For example, a lawyer discovered feeding to news reporters information known to be inadmissible as an evidentiary matter has violated clear norms for which sanctions should apply. See Model Rules of Professional Conduct Rule 3.6 (1994).

<sup>22</sup> Rules governing the ability of judges and lawyers directly involved in pending matters to comment upon cases, for example, relate to trial fairness, and are further justified by efforts to maintain public confidence in the administration of justice. See *id.* cmt. 1; see also Model Code of Judicial Conduct Canon 3(6) (1989) (regarding judicial speech).

<sup>23</sup> The Supreme Court's Neutral Principles approach to First Amendment issues, see e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), could easily lead to Alfieri's arguments taking effect in ways he did not imagine. Consider the following analogue: Professor A examines a single trial where defense lawyers presented forced incest as a mitigating circumstance, and where the prosecuting attorney told the jurors (during closing argument) that white men have taken a beating in the politically correct police-state now occupying legal discourse. Professor A concludes that gender-talk is being used to exculpate women and diminish the normative prescription of individual responsibility for criminal conduct. Therefore, he argues that defense strategies which suggest that a woman is blameless for crimes committed against men - in a male-dominated society which fails to deal seriously with domestic abuse or sexual assault against women - is morally suspect. Professor A believes that such arguments should be banned in the courtroom because gender-based narratives of deviance compromise perceptions of moral agency, and the integrity of all women.

<sup>24</sup> See *Gentile v. State Bar*, 501 U.S. 1030, 1048-49 (1991).

<sup>25</sup> See Alfieri, *supra* note 1, at 1321.

<sup>26</sup> Under Neutral Principles, the professional ethics rules, see, e.g., Standards for Criminal Justice 4-7.7, and the rules of evidence Fed. R. Evid. 403, forbid statements that are legally irrelevant but highly prejudicial, and statements that are patently false. In this regard, the evidentiary rules concerning false statements refer to all false statements, not merely false statements which express a certain view concerning race, sex, or sexual orientation, for example.

<sup>27</sup> See Model Rules of Professional Conduct Rule 3.3 (1994).

<sup>28</sup> See ABA Standards for Criminal Justice, in Stephen Gillers & Roy D. Simon, Jr., *Regulation of Lawyers: Statutes & Standards* 550 (1995).

<sup>29</sup> See *id.* Standard 4-7.7.

<sup>30</sup> *Id.*

<sup>31</sup> See Stephen Gillers, *Regulation of Lawyers: Problems of Law and Ethics* 21718 (4th ed. 1995).

<sup>32</sup> See *supra* notes 2829 and accompanying text.

<sup>33</sup> Tim Rutten & Andrea Ford, *Families' Anger Erupts Outside the Courtroom*, *L.A. Times*, Sept. 29, 1995, at A1 (families of victims in Simpson trial express anger at Cochran's comparison of Fuhrman to Nazi).

<sup>34</sup> Alfieri, *supra* note 1, at 1328 (quoting Cynthia V. Ward, *A Kinder Gentler Liberalism? Visions of Empathy in Feminist and Communitarian Literature*, 61 *U. Chi. L. Rev.* 929, 931 (1994)).

<sup>35</sup> See John Grisham, *A Time To Kill* (1989).

<sup>36</sup> *Id.* at 477.

<sup>37</sup> *Id.* at 485.

<sup>38</sup> See David E. Pitt, *Goetz is Cleared in Subway Attack*, *N.Y. Times*, June 17, 1987, at A1.

<sup>39</sup> See, e.g., Stephen L. Carter, *When Victims Happen To Be Black*, 97 *Yale L.J.* 420, 428 (1988). The author contends that the underlying message or perception for blacks living in New York is that they can "no longer be certain which gesture of impatience or annoyance someone else will take as a threat, [thus they may be] loathe to ask directions or change of a dollar for fear of a fatal misinterpretation." *Id.* at 426.

<sup>40</sup> *Id.* at 424. A significant question remains as to how Goetz ever escaped the lesser charge of reckless endangerment when there was no dispute about the fact that he took out a loaded gun and opened fire in a New York City subway.

<sup>41</sup> According to one scholar, this appears to be a growing trend. See Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 *Stan. L. Rev.* 781, 783 (1994) (identifying three kinds of racist fears that have been used in self-defense claims by defendants).

<sup>42</sup> Patricia J. Williams, *The Alchemy of Race and Rights* 77 (1991).

<sup>43</sup> See *id.* at 78.

<sup>44</sup> *Id.* at 77.

<sup>45</sup> *Id.* at 76.

<sup>46</sup> *Id.*

<sup>47</sup> See *id.* at 7677.

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