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# THE HARTMAN HOTZ LECTURE

## Race-Based Defenses— The Insights of Traditional Analysis

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For the past several years, Professor Anthony Alfieri has been working on a project that he describes as an attempt to apply Critical Race Theory to the ethical standards governing prosecutors and defense attorneys in criminal cases. Recently summed up in an article appearing in the *Georgetown Law Journal*,<sup>1</sup> this project proposes radical changes in the ethical rules as well as in the criminal justice system itself, a position that has occasioned considerable commentary.<sup>2</sup> In this essay, I join that commentary, focusing on Alfieri's analysis of the defense attorney's role.

At their most extreme, Alfieri's views on this issue lead him to conclude that defense attorneys should be sanctioned for raising claims, such as the "rotten social background" and "black rage" defenses, that might cause racial harm by pathologizing African-Americans or otherwise creating a negative im-

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1. Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 GEO. L.J. 2227 (2001) [hereinafter Alfieri, *Race Defenders*].

2. See Robin D. Barnes, *Interracial Violence and Racialized Narratives: Discovering the Road Less Traveled*, 96 COLUM. L. REV. 788 (1996); Richard Delgado, *Making Pets: Social Workers, "Problem Groups," and the Role of the SPCA—Getting a Little More Precise About Racialized Narratives*, 77 TEX. L. REV. 1571 (1999); Abbe Smith, *Burdening the Least of Us: "Race-Conscious" Ethics in Criminal Defense*, 77 TEX. L. REV. 1585 (1999).

age of the black community.<sup>3</sup> As a backup position, Alfieri proposes that sanctions be imposed on defense attorneys who do not make diligent efforts to dissuade their clients from raising such defenses.<sup>4</sup> Although I support Alfieri's campaign to sensitize attorneys to the harms of racialized narrative, my central conclusion is that the first prescription is unsound and that the second should be tempered, for a host of reasons. Developing those reasons provides the opportunity to think more deeply not just about "race talk" in the criminal justice system, but also about dispute resolution in criminal cases, the appropriate scope of the substantive criminal law and the associated relevance inquiry, the role of social science in resolving criminal disputes, and the nature of "prejudice" as an evidentiary matter.

This essay begins, in Part I, with a more detailed description of Alfieri's thesis and his application of it to three highly publicized "race cases." Alfieri criticizes the defense attorneys in these cases for being insufficiently attentive to the negative race-based messages their arguments sent to the jury and the public at large, and goes on to conclude that their actions should have been considered unethical. My first response to this point of view, developed in Part II, is that requiring the defense attorney to reject non-frivolous arguments based on their potential for racial harm misconstrues the role of the defense attorney, not just in an adversarial system, which Alfieri clearly disdains, but in any rational system of dispute resolution. The trial judge, not the defense attorney, must be the ultimate arbiter of which arguments are permissible.

That conclusion leads to Part III, which uses the rules of evidence—the trial judge's marching orders—as a framework for discussing the propriety of race-based defenses. Those rules require an analysis of the relevance, reliability and prejudicial impact of any evidence presented.

Part III begins with a discussion of "relevance," or more precisely, materiality. In a criminal case, the substantive criminal law determines the types of arguments the defense may make. This is a simple point, but it is one that Alfieri, intent on ethical issues, neglects. As it turns out, many of the arguments

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3. See *infra* text accompanying note 13.

4. See *infra* text accompanying notes 14-15.

that Alfieri wants to ban from the courtroom on racial harm grounds, including some of those made in the three principal cases he describes, could be prohibited on lack of materiality grounds. But that outcome should be recognized as the consequence of strict adherence to “neutral” substantive law principles, not a desire to do racial justice. Furthermore, when the substantive law *does* authorize a particular argument, preventing its assertion by black defendants, of all people, requires weighty justification, which Alfieri, the rest of this essay argues, fails to provide.

Part III also discusses another crucial inquiry that Alfieri does not address directly—the reliability, or probative value, of the evidence presented by the defense and its overall helpfulness to the fact-finder. This inquiry, recently reinvigorated by the Supreme Court’s decision in *Kumho Tire Co. v. Carmichael*,<sup>5</sup> might also lead to exclusion of some types of evidence that Alfieri fears, since that evidence is frequently based on nebulous conjecture about defendant behavior. On the other hand, many race-based defense arguments can be considered helpful on a number of grounds, grounds that again are not outweighed in the typical case by any evidence Alfieri presents.

That brings us to the final inquiry required by the rules of evidence—prejudice. Under well-accepted evidentiary doctrine, even material evidence that is sufficiently reliable may be excluded if it would substantially prejudice the parties. It is here, and not in connection with defense attorney ethical rules, that Alfieri’s concerns most clearly intersect with traditional legal analysis. For Alfieri is essentially arguing that prejudice should be defined with the community, as well as the individual litigants, in mind. In some cases such an approach might make sense. For instance, where the race-based defense argument is only tenuously material or reliable, or its harm to the community will be palpable, a situation I suggest was presented by the Bernhard Goetz case, an anti-defense ruling might be appropriate. But that type of showing will rarely be forthcoming. In the usual case, the impact of a race-based argument is unknowable; indeed, it is quite possible that Alfieri’s approach is more dam-

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5. 526 U.S. 137, 150-51 (1999) (construing the Federal Rules of Evidence to require that all expert testimony, not just expert testimony based on scientific principles, be based on “reliable” methodology and principles).

aging to his overriding agenda of improving race relations than the current regime.

### I. ALFIERI'S ARGUMENT

Alfieri's articles use three principal cases as the springboard for arguing that defense attorneys have an ethical obligation to avoid certain types of race-based defenses. The first is the prosecution of Damian Williams and Henry Watson on twelve charges of aggravated mayhem, felony assault, robbery and attempted murder.<sup>6</sup> Those charges arose out of the beating of Reginald Denny and seven others during the Los Angeles riots that followed the acquittal of the officers who beat Rodney King.<sup>7</sup> The lawyers in the Williams and Watson cases argued, largely successfully,<sup>8</sup> that the defendants were caught up in the "group contagion" of anger and frustration following the King verdict, so much so that they did not possess the intent to kill or even to cause severe harm.<sup>9</sup>

Despite the success of this argument, Alfieri criticizes it for labeling young black males as "ignorant," "unsophisticated" and "out of control," all characteristics the attorneys attributed to Williams or Watson and, by implication, the other rioters as a group.<sup>10</sup> Although neither the lawyers nor their witnesses suggested that only blacks are prone to mob violence, Alfieri continually asserts that this "deviance narrative constructs racial identity in terms of bestiality or pathology [and] . . . portrays young black males as deviant objects controlled by bestial instincts or pathological impulses."<sup>11</sup> Further, he asserts, this type

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6. Alfieri describes and analyzes this case in Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995) [hereinafter Alfieri, *Defending Racial Violence*].

7. The first "Rodney King" trial, in Simi Valley, resulted in an acquittal on all serious charges of four white police officers, three of whom were captured on videotape beating King after they had stopped him in a high-speed chase. See GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 38 (1995).

8. Williams was acquitted on attempted murder and aggravated mayhem charges, but convicted of simple mayhem. *Id.* at 234.

9. Alfieri, *Defending Racial Violence*, *supra* note 6, at 1310-12.

10. *Id.* at 1312, 1314-15.

11. *Id.* at 1304; see also Alfieri, *Race Defenders*, *supra* note 1, at 2257-58 (asserting that group contagion theory "intimates that young black males as a group, and the black community as a whole, share a pathological tendency to commit acts of violence in collective outings").

of argument causes significant harm to black individuals and black communities by undermining their self-image and reinforcing the biases of the dominant white society.<sup>12</sup>

As a corrective to this perceived problem, Alfieri argues that lawyers should forego “racial[ly] deviant narratives” unless necessary “to subvert an excessive and discriminatory prosecution.”<sup>13</sup> Alternatively, as a “weak” prescription, defense attorneys should explicitly deliberate with the client about the potential for racial injury that such a narrative would cause and attempt to dissuade the client from such a course.<sup>14</sup> At the same time, Alfieri would apparently permit lawyers to suggest and raise “defiance narratives,” that is, narratives that depict crime committed by African-Americans as a rebellion against an oppressive system rather than as a deviant act.<sup>15</sup> These prescriptions are all based on Alfieri’s primary aim of avoiding “narratives or stories that construct racial identity in terms of individual, group, or community deviance.”<sup>16</sup>

The second situation Alfieri uses to further his analysis of defense attorney ethics in racialized cases is a series of trials aimed at convicting Henry Hays, James Knowles and Frank Cox

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12. Alfieri, *Defending Racial Violence*, *supra* note 6, at 1324 (asserting that “[b]y privileging a narrative of racial deviance, the defense teams help constitute black men and their communities in terms of pathological violence”).

13. *Id.* at 1341.

14. *Id.* at 1342.

15. *Id.* at 1316-20 (describing “defiance narratives,” generally in positive terms).

16. *Id.* at 1306. Alfieri’s theoretical justification for this stance is much more elaborate than the text indicates, resting primarily on the principles of “race-consciousness,” “contingency,” and “collectivity.” *Id.* at 1331-39. I do not describe these principles in the text for space reasons, and because they collapse into the quoted statement already in the text. With an apology to Professor Alfieri, here is my thumbnail sketch of the three principles. The principle of race-consciousness requires all of us to “evaluate[] the boundaries of racialized stories, constantly checking their configuration, meaning, and context,” to ensure that “black dignity and decency” are maintained as much as possible. *Id.* at 1332-33. The principle of contingency recognizes the contingent, self-constructed nature of identity and requires that the black individual construct an identity that maintains not just his dignity but also the dignity of the black community. *Id.* at 1335-36. The principle of collectivity “holds lawyers and clients jointly responsible for the community destruction and harm caused by racialized narratives.” *Id.* at 1337. The lawyers in the Williams and Watson trial apparently violated all three principles with their assertion of a group diminished capacity defense because the defense undermined both the dignity of their clients and the African-American community.

for the lynching of Michael Donald, an African-American.<sup>17</sup> Alfieri spends very little time talking about these specific proceedings, however. Rather, he launches into a discussion of “three varieties of lynching defenses” that he has apparently culled from a review of lynching cases: jury nullification, victim denigration, and diminished capacity.<sup>18</sup> Jury nullification strategies include selection of jurors who are likely to protect white supremacists and trial tactics that implicitly or explicitly encourage jurors to be “astonish[ed]” that the government has the temerity to prosecute lynching behavior.<sup>19</sup> Along the same lines, victim denigration characterizes the black victim as a person of immoral character, thereby seeking “to enforce racial segregation by affirming the status of the white lawbreaker and demeaning the body of the black victim.”<sup>20</sup> Diminished capacity arguments “contend that the extreme nature of white commitment to community-wide racial supremacy induces a state of mind bordering on delusion,” and thus depict white perpetrators as innocent products of a white supremacist culture.<sup>21</sup>

Alfieri rejects what he calls the “modernist” justification for these defenses—that they are natural outgrowths of a well-functioning adversarial system—on the ground that it permits attorneys to avoid moral accountability for their actions;<sup>22</sup> indeed, he suggests that defense attorneys who engage in such arguments may be liable under anti-discrimination laws.<sup>23</sup> He also rejects what he calls the “postmodernist” justification for such defenses—that, because there are no morally correct positions, only political ones, advocacy should embrace any argument that can win for the client.<sup>24</sup> He instead endorses a “morality-centered aspirational ethics” which “presupposes that objec-

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17. These cases are briefly discussed in Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063, 1063-65 (1997) [hereinafter Alfieri, *Lynching Ethics*].

18. *Id.* at 1074. I say “apparently” because his description of these three defenses is preceded by a section entitled “Lynching Histories,” *id.* at 1069-74, although no direct link between this section and the defenses is made.

19. *Id.* at 1077-79.

20. *Id.* at 1079.

21. *Id.* at 1082.

22. Alfieri, *Lynching Ethics*, *supra* note 17, at 1087. Alfieri at one point speaks of the “complementary norms of neutral partisanship and moral nonaccountability.” *Id.*

23. *Id.* at 1088.

24. *Id.* at 1089.

tively correct answers exist and that there is an impartial position from which to distinguish legitimate from illegitimate uses of power."<sup>25</sup> The values upon which such ethics should be built include "norm[s]" of "citizenship" (including the obligation to build and strengthen interracial communities), "race consciousness" (including an obligation "to refrain from harmful, racialized rhetoric"), and "spirituality" (including an obligation to "combat moral disassociation and to eschew narrow self-interest in advocacy").<sup>26</sup> Based on these values, jury nullification, victim denigration and diminished capacity arguments should be prohibited in lynching prosecutions.

The third case on which Alfieri focuses is the state homicide prosecution of Lemrick Nelson and the federal civil rights prosecutions of Nelson and Charles Price, both African-Americans, for the killing of Yankel Rosenbaum and the incitement of interracial violence in Crown Heights, New York.<sup>27</sup> The death of Rosenbaum, a Hasidic Jew, occurred after a car in a motorcade escorting a Jewish leader accidentally ran over two black children; a rumor subsequently circulated in the black community, already concerned about differential police treatment of blacks and Jews, that medical personnel had evacuated the driver of the car before the children. Nelson and Price were apparently part of a large crowd of black residents who gathered to protest the incident. Incited by shouts of "no justice, no peace" and "let's go to Kingston Avenue and get a Jew," a group of young black men left the crowd and went toward Kingston Avenue, where they encountered Rosenbaum.<sup>28</sup> Shouting "there's a Jew, get the Jew," the group kicked, beat and stabbed Rosenbaum, who identified Nelson as one of his attackers before he died.<sup>29</sup>

Alfieri's description of the racial component of the defense's case (which produced an acquittal in the state prosecution, although not the federal one) focuses primarily on two aspects of that case: the defense attorneys' vigorous attack on the

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25. *Id.* at 1090 (quoting Eric Blumenson, *Mapping the Limits of Skepticism in Law and Morals*, 74 TEX. L. REV. 523, 531 (1996)).

26. *Id.* at 1095-1100.

27. This case is described in Anthony L. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293, 1323-35 (1998) [hereinafter Alfieri, *Race Trials*].



credibility and biases of the police officers,<sup>30</sup> and their willingness to depict Nelson and Price as “hapless, ill-fated victims of a racist society.”<sup>31</sup> Of most relevance here is the second tactic. To avoid his transfer to adult court, the defense described Nelson, a sixteen-year-old, as the product of family dysfunction and poverty,<sup>32</sup> a position that others have dubbed a “rotten social background” argument.<sup>33</sup> To avoid conviction on incitement grounds, the defense depicted Price as an addict whom no one would follow.<sup>34</sup>

Alfieri sums up these arguments about the defendants by asserting that the defense teams “reproduced” the prosecution’s assertion of “irredeemable black racial inferiority,”<sup>35</sup> by describing Nelson as “stunted” and Price as “incompetent.”<sup>36</sup> To Alfieri these types of arguments cause “stigma injury,” because they “portray black defendants as the deviant or deformed representatives of future black generations,”<sup>37</sup> and “expressive or representational harm,” because they reinforce negative stereotypes about African-Americans.<sup>38</sup> Thus, he again calls for “race-conscious community-guided regulation” of legal advocacy that would eliminate or minimize such arguments.<sup>39</sup>

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30. See *id.* at 1346 (“The stigma of racial accusation and stereotyping . . . is found explicitly . . . in the state and federal charges of police bias.”); see also *id.* at 1353 (stating that the defense teams “deployed the precept of inferiority to contest the motive, credibility, and neutrality of arresting officers, prosecutors, and federal as well as state judges”). I am not sure what Alfieri is driving at with these statements and so will not comment further on them.

31. *Id.* at 1337.

32. Alfieri, *Race Trials*, *supra* note 27, at 1330-31. Actually, Alfieri’s description of this argument occurs in his discussion of prosecution tactics. Only later, as indicated below, does he connect these tactics with defense actions.

33. See Richard Delgado, “Rotten Social Background”: *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. J. 9 (1985) [hereinafter Delgado, *Rotten Social Background*]. Delgado borrowed the phrase from the defense attorney’s arguments in *United States v. Alexander*, 471 F.2d 923 (D.C. Cir. 1972), a case I will discuss further in this essay. See *infra* text accompanying notes 147-56.

34. Alfieri, *Race Trials*, *supra* note 27, at 1339 (noting that a defense attorney described Price as an addict and then asked, “When was the last time an addict set you off?”).

35. *Id.* at 1353.

36. *Id.* Alfieri does not provide any quotes to the transcript of the trial. Thus, these words may be his summary of the defense argument rather than statements by the attorneys themselves.

37. *Id.* at 1354.

38. *Id.* at 1354-56.

39. Alfieri, *Race Trials*, *supra* note 27, at 1363.

Alfieri's analysis is much richer than has been outlined here. More detailed description of his arguments follows in the remaining sections of this essay. But enough has been said to this point to give the reader a grasp of his basic propositions. According to Alfieri, long-term concerns about community reputation and racial harmony should trump short-term individual concerns about liberty; the adversarial mind-set should be replaced with one imbued with race-consciousness; and defense attorneys have an ethical obligation to implement both of these goals.

## II. THE CRIMINAL DEFENSE ATTORNEY'S ROLE

The traditional stance on the criminal defense attorney's role views the attorney as an advocate for the client's position.<sup>40</sup> The client determines objectives, and the attorney chooses the tactics best suited to achieve those objectives.<sup>41</sup> While the interests of third parties should be discussed with the client and may also influence objectives and tactics,<sup>42</sup> the client's interests are paramount. These rules flow from the assumption that the autonomy and dignity of the client are preeminent values, and that the attorney is the client's agent.<sup>43</sup>

Alfieri attacks this traditional model on at least three different grounds. First, the model's assumption that clients have the capacity to understand their self-interest and the interests of others in the context of racialized defenses is compromised by a

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40. The American Bar Association's Model Rules of Professional Conduct state the traditional view succinctly: "A lawyer shall abide by a client's decisions concerning the objectives of representation . . ." MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2001); *see also* ABA STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE 4-1.2(b) (1993) (stating that the defense attorney's basic duty is "to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation").

41. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (distinguishing between "objectives of representation," which are for the client to determine, and "means by which they [the objectives] are to be pursued," about which the attorney should consult with the client).

42. MODEL RULES OF PROF'L CONDUCT R. 2.1 ("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."); *see also* MODEL RULES OF PROF'L CONDUCT R. 4.4 ("In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person . . .").

43. *See generally* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 10.3.2 (2d ed. 1986) (noting that "[t]he American principle of professional zeal . . . stems from concepts of individual autonomy" and the American regard for legal rights of individuals).

number of factors, including the defense attorney's preference for adversarial solutions. Second, even if a client's decision to pursue such a defense is considered competent, that decision is ultimately the defense attorney's, not the client's, and the defense attorney should override the client's decision because these defenses cause more harm than good. Third, even if the harm these defenses cause cannot be reliably measured, a proper criminal justice system—one that is less adversarial than our current system—would not countenance such arguments, because the focal point of ethical analysis would be the community rather than the individual. In disagreeing with these arguments, I try to address them on their own terms, rather than start with premises that inevitably result in divergence.

### A. The Incapacity Argument

Alfieri does not accept the traditional view that criminal defendants can make dispositive decisions about their case, at least when those decisions concern racialized defenses. The traditional view, Alfieri asserts, rests either on a "contractarian" model, which "builds on the presuppositions of moral agency and rational individualism" in honoring a client decision to raise such a defense,<sup>44</sup> or a "communitarian" model, under which the client "approves racialized defense strategies as a result of client-lawyer colorblind deliberative counseling."<sup>45</sup> Alfieri is unwilling to subscribe to either account. He rejects "the presumption that a defendant-client may freely adopt a self-abasing narrative,"<sup>46</sup> in particular, he says, clients may be inhibited or coerced by defense lawyers or "laws or sociolegal practices" and thus sanction race-based defenses "despite lingering doubts and reservations."<sup>47</sup> He also suspects that counseling that is simply race-neutral, rather than race-conscious, will not avoid racist impacts.<sup>48</sup> Shorn of the verbiage, Alfieri appears to be saying that neither clients nor attorneys can be trusted to make the right

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44. Alfieri, *Race Defenders*, *supra* note 1, at 2259.

45. *Id.* at 2259-60. The fullest account of these models and their drawbacks is found in Alfieri, *Defending Racial Violence*, *supra* note 6, at 1324-28.

46. Alfieri, *Race Defenders*, *supra* note 1, at 2260.

47. Alfieri, *Defending Racial Violence*, *supra* note 6, at 1325.

48. *Id.* at 1330 ("The colorblind discourse of empathic deliberation masks the tolerance of racialized narrative under conventional ethical regimes.").

(race-conscious) decision, so that authority should be taken away from them and replaced with a rule that requires the attorney to forego race-based defenses, at least those that focus on “deviance.”

A first reaction to this argument is that it seems to be based on an unlikely assumption: that black defendants who want to raise race-based defenses are not as capable as their (often white) attorneys of figuring out whether a given defense is self-abasing or offensive to the black community, or of balancing those concerns against the stigma of prison.<sup>49</sup> Even if, however, we take as a given that the defendant who makes such a decision got it wrong, Alfieri’s proposed approach is internally flawed, because it undermines his central goal of minimizing stigmatization of African-Americans. A policy that disregards the expressed desires of black criminal defendants (even criminal defendants who have “lingering doubts”) on the ground they do not really know what is good for them or their community is deeply denigrating to both individual clients and to blacks generally. As far as the client is concerned, ignoring his or her current choice about an important strategy is likely to be much more psychologically debilitating than arguing that a past choice was influenced by situational variables such as social background or rage at white society.<sup>50</sup> As far as the community is concerned, minimization of the choices black defendants make has the added disadvantage of being unequally applied; presumably, attorneys will still assert diminished capacity and like defenses for white clients, so that it will appear as if attorneys believe that only black clients are confused about the issues in such cases.

This is not to deny that defense attorneys may do an unsatisfactory job of telling their clients about all the repercussions of certain defenses. Alfieri has done a real service in highlighting

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49. See Sharon Elizabeth Rush, *Sharing Space: Why Racial Goodwill Isn't Enough*, 32 CONN. L. REV. 1, 24 (1999) (discussing “the reality that Whites can never know the full effects of racism”).

50. See generally Bruce J. Winick, *Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571, 581-82 (1995) (arguing for a “presumption of competence” in the client decision-making context in large part because the incompetency label can become a self-fulfilling prophecy, acting to diminish self-esteem, inhibit initiative and motivation, and cause depression).

this deficiency in connection with racialized arguments, just as others have pointed out attorneys' failure to fully apprize defendants about the disadvantages of the insanity defense and other potentially stigmatizing defenses.<sup>51</sup> For Alfieri, however, a mere conversation about potential racial harms is not enough; that is the "communitarian" account of the traditional model, of which he disapproves. At bottom, he believes that attorneys imbued with the individual-oriented adversarial tradition are unlikely to give a sufficiently fair description of the group-oriented racial stigma associated with such defenses.<sup>52</sup>

Even if that is true, a more measured approach than banning racialized defenses altogether would be to educate attorneys about the gist of Alfieri's articles and require them to pass on those insights, to the extent necessary, to their clients.<sup>53</sup> Although Alfieri's "weak" version of the attorney's obligation is similar to this approach, he wants attorneys to do more than educate; he wants them to adopt his "reservations" concerning the use of racialized narratives and "urge" clients to adopt them as well.<sup>54</sup> I prefer the language of the Model Code of Professional Responsibility requiring the lawyer "to point out those factors which may lead to a decision that is morally just as well as legally permissible."<sup>55</sup> If that approach is taken and lawyers forthrightly describe potential racial harms, the intimidation of clients that Alfieri fears should be minimized; at the same time, the obvious coercion involved in overriding or denigrating a client's expressed wish to assert a racialized defense will be avoided.

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51. See, e.g., Justine A. Dunlap, *What's Competence Got to Do With It: The Right Not to Be Acquitted by Reason of Insanity*, 50 OKLA. L. REV. 495, 507-14, 526-27 (1997) (describing the adverse consequences of an insanity verdict and concluding that the defense "should be sought only by a competent defendant who has been explained the consequences and who desires to pursue such a course").

52. For instance, he states that "inclusion" of race-based considerations in attorney-client dialogue "seems unlikely given dominant accounts of criminal defense advocacy and ethics." Alfieri, *Defending Racial Violence*, *supra* note 6, at 1342.

53. Alfieri discusses the need to train lawyers about "race talk," but seems pessimistic. See Alfieri, *Race Trials*, *supra* note 27, at 1301 (noting that law schools "routinely omit mention of race in discussions of lawyering and ethics," and that "[t]hat omission usually passes without complaint").

54. Alfieri, *Defending Racial Violence*, *supra* note 6, at 1338.

55. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1980).

## B. The Racial Harm Argument

Alfieri seems to concede that some clients may be sufficiently aware of the issues, at least after a conversation with the attorney, to express a “competent” preference for a racialized defense over other defenses or over foregoing a defense altogether.<sup>56</sup> Even so, he argues, that wish should be disregarded, on one of two grounds. First, clients are entitled to dictate only objectives, not tactics, and defenses fit into the latter category.<sup>57</sup> Second, even if racialized defenses are clearly the client’s domain, their harm is so great that the client’s wishes must be overridden.<sup>58</sup>

The first argument is relatively easily rebutted. The majority of courts that have considered the issue agree that defenses that construct exculpatory or mitigating stories about the defendant, such as insanity and diminished capacity, should be controlled by the defendant.<sup>59</sup> Because, as Alfieri so eloquently explains, such defenses are the core “narrative” of the case,<sup>60</sup> the

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56. See Alfieri, *Defending Racial Violence*, *supra* note 6, at 1337 (discussing how the “principle of collectivity holds lawyers and clients jointly responsible for the community destruction and harm caused by racialized narratives”); see also *supra* note 16.

57. Alfieri, *Race Defenders*, *supra* note 1, at 2262 (responding to the claim that limiting client choices places “constraints on a criminal defendant’s freedom of defense” by stating that “[u]nder the ethics codes, defensive strategy effectively rests on the discretionary judgments of counsel, not the client”).

58. Alfieri, *Defending Racial Violence*, *supra* note 6, at 1334 (rejecting the “[e]levation of the value of safeguarding the client body from state interference over the value of honoring client subjectivity” through avoidance of deviance narratives).

59. See David S. Cohn, *Offensive Use of the Insanity Defense: Imposing the Insanity Defense Over the Defendant’s Objection*, 15 HASTINGS CONST. L.Q. 295, 299-301 & n.31 (1988); see also *State v. Frierson*, 705 P.2d 396, 403-04 (Cal. 1985) (concerning diminished capacity); *People v. Hattery*, 488 N.E.2d 513, 519 (Ill. 1985) (pertaining to sentencing factors); *Jacobs v. Commonwealth*, 870 S.W.2d 412, 418 (Ky. 1994) (regarding the insanity defense); *Treese v. State*, 547 A.2d 1054, 1055 (Md. 1988) (concerning the insanity defense); *State v. Bean*, 762 A.2d 1259, 1266 (Vt. 2000) (concerning the insanity defense). *But see State v. Samuel*, 838 P.2d 1374, 1382 (Haw. 1992) (holding that the attorney controls the assertion of the diminished capacity defense). I have argued that clients should control these decisions. See Christopher Slobogin & Amy Mashburn, *The Criminal Defense Lawyer’s Fiduciary Duty to Clients with Mental Disability*, 68 FORDHAM L. REV. 1581, 1632-36 (2000).

60. Alfieri, *Defending Racial Violence*, *supra* note 6, at 1305 (discussing the “contest of power over story,” and concluding that “[t]he winner of that contest controls, at least in an ephemeral sense, the signification of meanings and values in the juridical world of courts, public institutions, and street-level agents”).

defense attorney should not be able to assert them without the client's consent.<sup>61</sup>

If the client does consent, however, the traditional position is that the attorney should pursue the defense vigorously. Alfieri argues instead for an "antifidelity position."<sup>62</sup> The lawyer's "legal and political responsibility to an other—an individual, group or community connected to but standing apart from the client," supercedes the duty to the client.<sup>63</sup> For Alfieri, this antifidelity stance should hold even though, as demonstrated by the Williams, Watson and Nelson cases, fidelity to the client's wishes may be instrumental in avoiding prison time.

Underlying this argument, of course, is an assessment that the harm to the relevant racial community is palpable and that it is more important than avoiding harm to the individual defendant. Although I will argue to the contrary later,<sup>64</sup> I will assume for now that the first assertion is true: I will suppose that race-based arguments do harm the community in a significant way. However, to be fair, I will also assume (again contrary to at least some of my arguments below),<sup>65</sup> that racialized defense arguments about group contagion, diminished capacity, black rage, and rotten social background are legally relevant and sufficiently valid.

Under these assumptions, the issue Alfieri raises can be characterized as follows: Are we willing to prevent defendants from making arguments that will reduce or eliminate time in prison in order to avoid racial stigma to the defendant and his or her community? Given the incommensurate nature of these variables, there may be no satisfactory way of answering this question. In any event, as later parts of this essay argue, ultimately that task should be left up to the political process. To provide some feel for the issue, however, consider two perspectives.

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61. This is in essence Professor Uviller's analysis in reaching the conclusion that the defendant should control decisions about *all* defenses. H. Richard Uviller, *Calling the Shots: The Allocation of Choice Between the Accused and Counsel in the Defense of a Criminal Case*, 52 RUTGERS L. REV. 719 (2000).

62. Alfieri, *Race Trials*, *supra* note 27, at 1361.

63. *Id.*

64. See *infra* text accompanying notes 139-64.

65. See *infra* text accompanying notes 124-38.

First, consider the Supreme Court's peremptory challenge jurisprudence, which also involves balancing community and individual interests in a racialized context. In *Batson v. Kentucky*,<sup>66</sup> the Court held that prosecutorial use of peremptory challenges to exclude African-Americans solely because of their race violates the Equal Protection Clause. In *Georgia v. McCollum*,<sup>67</sup> the Court extended this rule to defense use of peremptories, in essence holding that the equal protection rights of black jurors and the black community outweigh the interest of the defendant in constructing his own jury.<sup>68</sup> That holding seems to support Alfieri's position. However, the *McCollum* Court also thought it important to insist that its ruling would not undermine the defendant's right to an impartial trial. Indeed, it emphasized that there is "a distinction between exercising a peremptory challenge to discriminate invidiously against jurors on account of race and exercising a peremptory challenge to remove an individual juror who harbors racial prejudice."<sup>69</sup> In the latter instance and in other instances where bias against the defendant may exist, the Court made clear that the defense could (and should) use a peremptory challenge to exclude a potential juror, regardless of race.<sup>70</sup> In short, the Court seemed to be saying, individual justice trumps harm to the black community in the jury selection setting.

Alfieri might argue that the harm occasioned by use of peremptory challenges against blacks is not equivalent to the harm caused by race-based defenses.<sup>71</sup> As a second perspective, consider how the issue might be resolved behind a Rawlsian veil of

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66. 476 U.S. 79 (1986).

67. 505 U.S. 42 (1992).

68. *Id.* at 59.

69. *Id.*

70. *Id.* at 58 ("We have . . . held that there should be a mechanism for removing those on the venire whom the defendant has specific reason to believe would be incapable of confronting and suppressing their racism" (citing *Ham v. South Carolina*, 409 U.S. 524, 526-27 (1973); *Rosales-Lopez v. United States*, 451 U.S. 182, 189-90 (1981))); see also *Purkett v. Elem*, 514 U.S. 765, 769-70 (1995) (permitting removal of jurors of certain race for any genuine, race-neutral reason).

71. He might also say that he too would allow a race-based response to fight racism. See *supra* text accompanying note 13. But apparently he would not allow race-based defenses for any other reason, which, analogizing to the *Batson* line of cases, would mean that, unless he makes the lesser harm argument described in the text, he would not approve of removing a black individual for other types of biases.



ignorance, where the rule-maker is identityless. Under veil conditions, the rule-maker cannot know whether, once the rule is imposed, he will be black<sup>72</sup> and, if so, whether he will be a law-abiding citizen stigmatized by race-based defenses or a criminal defendant unjustly convicted or sentenced if such defenses are prevented. The rule-maker might be tempted to support Alfieri's approach, on the ground he is more likely to end up in the former category than the latter. But that calculus must also take into account the fact that convictions and long sentences hurt not only those convicted but also many other innocents—black and white, related and distant.<sup>73</sup>

More importantly, the possibly stigmatizing effect of race-based defenses pales in comparison to the stigma associated with the large number of African-Americans serving hard time, a number that is radically disproportionate to their presence in the general population,<sup>74</sup> and that may well be disproportionate to their involvement in crime.<sup>75</sup> This state of affairs, which a critical race scholar like Alfieri would presumably bemoan, would only be exacerbated by his proposal, in part because the elimination of race-based defenses would add to that number,<sup>76</sup> but primarily because the public would be deprived of explanations for it. The story of black crime in Alfieri's regime would be a shallow one, largely unexplicated by environmental, interpersonal, or psychological variables, variables that despite their

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72. Of course, he might be a white person, whose attitude toward all of this could be even more complicated, as suggested below.

73. See, e.g., Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1306-07 (2001) (noting that prison time correlates with increased criminal activity after prison, discourages job-readiness education, hurts dependent family members, increases the number of households headed by single women, reduces the number of adults who can supervise children, and "tear[s] at the fabric of disadvantaged communities, aggravating the social problems in those communities of low employment rates, family instability, and the lack of social organization that facilitates law-abidingness").

74. Alfred Blumstein, *Incarceration Trends*, 7 U. CHI. L. SCH. ROUNDTABLE 95, 103 (2000) (stating that the incarceration rate of African-Americans is 8.2 times that of whites).

75. See Samuel L. Myers, Jr., *Racial Disparities in Sentencing: Can Sentencing Reforms Reduce Discrimination in Punishment?*, 64 U. COLO. L. REV. 781 (1993) (describing why studies that suggest there is no racial discrimination in sentencing are flawed).

76. A focus on the types of culpability concerns that race-based defenses address, however, might reduce that number significantly. Cf. Paul Butler, *Retribution, for Liberals*, 46 UCLA L. REV. 1873 (1999) (arguing that too many African-Americans are incarcerated for too long and proposing that refocusing on retribution as the primary principle of punishment would reduce—in a fair manner—those numbers).

“stigmatizing” effect would help mitigate the crime in the community’s eyes.<sup>77</sup> Given these concerns, the greater communal harm could well come from exclusion of race-based defenses.

Unlike others,<sup>78</sup> I do not dismiss Alfieri’s contrary conclusion out of hand. Assuming we jettison the rule that the client’s wishes govern and assuming further that racialized defenses can cause real harm (both big assumptions), his position is defensible. But I also think he rejects the traditional view too blithely.

### C. The Corrupt System Argument

One often gets the sense that Alfieri is not very interested in trying to balance the harms of liberty deprivation and racial harm because he is convinced that race-based defense arguments are the product of a corrupt system. Even if racial harm is inchoate and therefore not easily weighed against loss of liberty, he suggests that we would inevitably come to see things his way if we were not so immersed in bankrupt adversarial mores. Along these lines, he speaks of the “radical individualism of the adversarial model” that makes public and private “interest convergence” impossible;<sup>79</sup> “[c]riminal defenders [who] stand unaccountable for expressing judgments of inferiority in narrative and story”<sup>80</sup> because of a “weak normative conception of ethics deficient in the valuation of dignity, community, and equal citizenship;”<sup>81</sup> and postmodernist “adversarial norms [that] legiti-

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77. For more discussion of this latter point, see *infra* text accompanying notes 150-53; see also Brown, *supra* note 73, at 1307 (“African-Americans are incarcerated at rates drastically higher than their percentage of the population. Moreover, this disproportionate focus of criminal justice on racial minorities infuses interpersonal relations and public consciousness with racialized images of crime and criminals.”).

78. See Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 951 (2000) (arguing that Alfieri’s proposal for defense lawyers to be more community-oriented is “both untenable and disingenuous”); see also Barnes, *supra* note 2, at 790, stating:

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.

*Id.*

79. Alfieri, *Race Trials*, *supra* note 27, at 1363.

80. Alfieri, *Race Defenders*, *supra* note 1, at 2257.

81. *Id.* at 2262.

mize the language of racial hierarchy and, hence, reproduce race relations of domination and subordination.”<sup>82</sup>

If Alfieri could show that race-based claims are fraudulent, he would have a powerful argument, for even traditionalists view misleading the judge and jury as an adversarial excess.<sup>83</sup> Alfieri does suggest, in his discussion of lynching defenses like “victim denigration,” that racialized defenses are based on an “ideology” of “deception,”<sup>84</sup> and in that specific context he may well be right.<sup>85</sup> But group contagion, black rage, diminished capacity and rotten social background arguments are at least plausible and cannot be called fraudulent.<sup>86</sup> I will continue to assume, as I did above, that these defenses are not deceptive.

Alfieri would insist, nonetheless, that they be barred because of their basis in “radical individualism,” their insult to “dignity, community, and equal citizenship,” and their reproduction of “racial hierarchy.”<sup>87</sup> Again, this contention is not a balancing argument of the type just discussed, but rather an assertion that privileging individual concerns over third-party interests, a prime feature of the adversarial system, is flawed in the first instance. Accepting the premise that the adversarial system focuses on individual litigants to the detriment of society at large, I have two objections to his conclusion that valid defenses can therefore be circumscribed or barred.

First, the “flaw” that Alfieri identifies is an attribute of all dispute resolution regimes, not just the adversarial one. In con-

82. Alfieri, *Lynching Ethics*, *supra* note 17, at 1091.

83. See WOLFRAM, *supra* note 43, § 12.3.4, at 642-43 (citing cases and noting that the “Model Rules contain vague and possibly broad provisions” that create an obligation to avoid “creating misleading impressions through advocacy,” but also noting that “it is certainly not a standard requirement that an American advocate always avoid distorting facts”).

84. Alfieri, *Lynching Ethics*, *supra* note 17, at 1085.

85. Similarly, deception could be said to be involved in lynching cases when a defense attorney uses a peremptory challenge to exclude a prospective juror, purportedly on the ground that the person would be biased against his client, but in fact in an attempt to ensure that racists are on the jury. However, such a challenge would violate *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (holding that defense use of peremptories to exclude potential jurors on the basis of race violates the Equal Protection Clause). See *supra* text accompanying notes 67-68.

86. For further discussion of this point, see *infra* text accompanying notes 130-38.

87. See *supra* text accompanying notes 79-82.

tinental “nonadversarial” systems,<sup>88</sup> for instance, criminal defendants routinely tell their stories to the court through the device of “unsworn” testimony.<sup>89</sup> Not only are they expected to relate their side of the case, they are immune both from perjury prosecution (since the testimony is not under oath), and from a contempt citation for refusing to answer questions.<sup>90</sup> If a European criminal defendant wanted to explain his or her offense as the product of black rage, a dysfunctional family, or mob violence, the court would be obliged to hear the explanation.<sup>91</sup> The same stance is taken in alternative dispute resolution regimes.<sup>92</sup> Because of the informal, narrative-based nature of such regimes,

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88. The term “nonadversarial” was first applied to European criminal justice systems by Professor Damaska to differentiate their preference for “inquiry” into the facts over the American-style “contest” over those facts. See Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 563-64 (1972).

89. See CRAIG M. BRADLEY, *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 210 (1999). For example, a defendant in Germany “is not sworn to tell the truth and cannot be punished if he does not.” *Id.* A defendant in Argentina “is entitled to assert his right to make an unsworn statement.” *Id.* at 43. A defendant in France is interrogated by the court, but “is not put under oath.” *Id.* at 171. The Italian Constitution “declares that ‘everyone shall have the inviolable right of defense in every phase and stage of any legal proceedings,’” *id.* at 278, which means that “the defendant has the right to make statements relevant to the charges at any time during the proceedings” but “may not give sworn testimony.” *Id.*

90. *Id.* at 210.

91. Cornelius Nestler, Professor of Law at Koln University, affirmed that German defendants are permitted to raise virtually any argument in an effort to obtain mitigation or exculpation. E-mail from Cornelius Nestler, Professor of Law, Koln University, Germany, to the author (Aug. 24, 2001) (on file with author) (noting that the defendant can say “whatever he wants” so long as the statements are not themselves offenses, and noting that German law places very few restrictions on defense-proffered evidence). Whether expert testimony could be heard on these types of topics would depend on the judge’s view of its reliability. *Id.* This topic is discussed later in this essay. See *infra* text accompanying notes 124-38.

92. See, e.g., Isabelle Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 68 (describing the process of mediation as “the interaction of narratives”). Even in the domestic abuse context, where giving voice to the battering man is often viewed with particular concern, this ADR principle stands. John Braithwaite & Kathleen Daly, *Masculinities, Violence and Communitarian Control*, in JUST BOYS DOING BUSINESS? MEN, MASCULINITIES AND CRIME 189, 208 (Tim Newburn & Elizabeth A. Stanko eds., 1994) (noting, in the context of community conferencing, that “[i]t would not be possible to have regulatory institutions where only feminist voices were heard and misogynist voices were completely silenced”); Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2162-63 (1993) (“The tenet [of not judging blameworthiness] forces the mediator to treat spousal abuse and domination neutrally.”).

muzzling a civil attempt by a litigant to explain his or her actions in racial terms would be anathema.<sup>93</sup> Thus, even if we disregard the commands of the First Amendment,<sup>94</sup> the Sixth Amendment<sup>95</sup> and the Due Process Clause,<sup>96</sup> these traditions bespeak a deep and universal commitment to voice, regardless of its impact on third parties.

This commitment suggests a second reason to be leery of Alfieri's approach, a reason which again has nothing to do with the adversarial system *per se*. Even if many racialized stories are harmful, allowing the defense attorney to be the sole arbiter of whether such harm will occur is antithetical to the "other-regarding" premise underlying Alfieri's project. While a defense attorney can, in theory, be counted upon to assess the risks and benefits of presenting evidence when the unit of analysis is simply the individual defendant, only the community, or some representative thereof, can adequately judge whether harm to parties outside the attorney-individual dyad is significant enough to forego a particular defense.<sup>97</sup> In other words, if a defense is to be squelched, it should be squelched not by the defense attorney, before anyone else has had the opportunity to evaluate it, but by the judge, who is institutionally better equipped to assess its full implications, and who applies the rules laid down by the community and the legislature in doing so. That observation

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93. This is not to suggest that certain voices cannot and should not be challenged during mediation, of course. That has been the suggestion of many commentators. *See, e.g.*, Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; Fischer, *supra* note 92; Sara Kristine Trenary, *Rethinking Neutrality: Race and ADR*, DISP. RESOL. J., Aug. 1999, at 40.

94. Barnes, *supra* note 2, at 790 (arguing that "the restraints proposed under Alfieri's 'ethic of race-conscious responsibility' represent a form of content-based regulation that the Constitution forbids").

95. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (holding that "[w]hether rooted directly in the Due Process Clause . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment . . . the Constitution guarantees criminal defendants a 'meaningful opportunity to present a complete defense'" (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984))).

96. *Rock v. Arkansas*, 483 U.S. 44, 49-53 (1987) (holding that criminal defendants have a right to testify, based on the Due Process Clause's guarantee of fairness, the Compulsory Process Clause and the Fifth Amendment's protection of silence unless the defendant chooses to speak).

97. Indeed, a defense attorney might even abuse the racial harm rationale by, for instance, refusing to raise a race-based defense not out of concern about harm to African-Americans but because he wants to avoid a defense that appears to absolve blacks from committing crimes against whites.

leads to an examination of the judge's role in monitoring race-based arguments.

### III. RACE-BASED ARGUMENTS UNDER THE RULES OF EVIDENCE

When, if ever, should a judge permit defense arguments that focus on racial issues? The rules of evidence provide one framework for answering this question. Generally, evidence that is relevant—that is, evidence that is material to a fact in issue and possesses sufficient probative value on that issue—is admissible unless there is a substantial risk it will prejudice one or more of the parties.<sup>98</sup> When expert testimony is involved, as is sometimes the case with racialized defenses, the evidence must also be “helpful,” in the sense that it provides information not ordinarily accessible to a layperson.<sup>99</sup> Thus, the rules of evidence require measuring four different properties of a given piece of evidence: its materiality, its probative value, its helpfulness, and its potential for prejudice.

Although this four-part analysis derives from traditional evidentiary tenets, it can still accommodate consideration of Alfieri's concerns, specifically by reframing them in terms consistent with the prejudice inquiry. At the same time, this four-part analysis makes clear that Alfieri's concerns are not the only considerations that determine the type of arguments courts can and should hear. It turns out that many of the race-based arguments he rejects might be banned for reasons having nothing to do with their potential for racial harm.

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98. See, e.g., FED. R. EVID. 401 (defining relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence”); FED. R. EVID. 402 (stating that relevant evidence is generally admissible). *But see* FED. R. EVID. 403 (stating that relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice”).

99. See, e.g., FED. R. EVID. 702 (stating that witnesses may give expert opinions if they possess “scientific, technical or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue”); *see also* CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE § 13, at 54 (John Strong ed., 4th ed. 1992) (“Rule 702 should permit expert opinion even if the matter is within the competence of the jurors if specialized knowledge will be helpful . . .”).

### A. Materiality

The materiality of evidence is determined by the substantive law, in this case the criminal law. If evidence raising a race-based argument is not germane to the elements of or defenses to the crime in question, it is not admissible. Alfieri pays little attention to this inquiry. Yet virtually every type of racialized argument that he finds in his three primary cases could be validly prohibited or limited on materiality grounds, without resorting to assumptions about the racial harm they would cause.

Most obviously, the various types of lynching defenses that Alfieri describes—nullification, victim denigration, and diminished capacity—are unlikely to get past a judge who evaluates their materiality closely. By definition, a nullification argument is immaterial, as it attempts to convince the jury to disregard the law. While juries may be entitled to nullify (and in fact probably cannot be prevented from doing so),<sup>100</sup> direct pleas by the defense attorney for the jury to disregard the law are forbidden in virtually every state,<sup>101</sup> and judges should ensure that they never occur.<sup>102</sup> More subtle attempts to get the jury to nullify are generally harder to control,<sup>103</sup> but in the lynching context they will usually be transparent and easily stifled.<sup>104</sup> Just as

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100. W. William Hodes, *Lord Brougham, the Dream Team, and Jury Nullification of the Third Kind*, 67 U. COLO. L. REV. 1075, 1080 (1996) (stating that “nullification (of all kinds) has deep roots in American legal history and is so thoroughly interwoven with the institution of the jury trial that it cannot be eliminated unless the jury itself is eliminated”).

101. See *Sparf v. United States*, 156 U.S. 51, 102 (1895) (holding that defense attorneys do not have the right to argue to the jury that it is free to disregard the law as given by the judge); Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 294-95 (1996) (noting that “except for the few states that allow juries to be told that they are the judges of both law and facts [Leipold cites to three states], the nearly uniform practice remains that courts will not tell jurors of the power and will not permit defendants to argue for nullification”).

102. See Rebecca Love Kourlis, *Not Jury Nullification; Not a Call for Ethical Reform; But Rather a Case for Judicial Control*, 67 U. COLO. L. REV. 1109, 1113-14, 1119 (1996) (asserting, based on a review of the case law and ethical standards, that “[a]sking a jury to ignore the law and acquit a defendant who would otherwise be found guilty on the facts and law of the case is not a proper request for a defense attorney to make,” and arguing that judges must take an active role in preventing nullification arguments by defense attorneys).

103. See generally Hodes, *supra* note 100, at 1080-81 (stating that “coaxing a nullification vote from the jurors must also be counted as one of the criminal defense attorney’s built-in arsenal of tactical weapons”).

104. For instance, a defense attorney in a lynching case might try to suggest the jury nullify by trying to paint either the victim or the black community in negative terms. The

clearly, any evidence or argument that suggests the black victim of a lynching deserved death (short of evidence of provocation) is off-bounds. The rules of evidence declare victim-character irrelevant except where a dispute exists as to who was the first aggressor in a crime of violence.<sup>105</sup> Finally, the claim that a white lyncher was so suffused with white supremacist notions that his actions were quasi-delusional is not evidence of diminished capacity; that defense only applies when intent to kill is absent,<sup>106</sup> yet such intent clearly exists in such cases. At best, the argument that the crime was caused by intense commitment to supremacist values sounds in insanity.<sup>107</sup> From what one can gather from Alfieri's commentary on lynching defenses, however, no lyncher has been willing to stretch the argument that far.<sup>108</sup>

Similarly, a rotten social background defense of the type raised in Nelson's case<sup>109</sup> is difficult to fit into any traditional criminal culpability doctrine. It is not an insanity defense, because there is no "mental disease or defect," the traditional predicate for such a defense,<sup>110</sup> and even if one expanded that

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first ruse will not work for reasons explained in the text immediately following, and the second type of argument is even more clearly immaterial.

105. See, e.g., FED. R. EVID. 404(a); see also FED. R. EVID. 404 advisory committee's note (stating that "[i]n most jurisdictions today, the circumstantial use of character is rejected [except that] . . . an accused may introduce pertinent evidence of the character of the victim, as in support of a claim of self-defense to a charge of homicide or consent in a case of rape").

106. WAYNE R. LAFAVE, CRIMINAL LAW 391 (3d ed. 2000) (describing the doctrine of "diminished responsibility" as one that focuses on whether "the defendant's mental condition is admissible on the question of whether the defendant had the mental state which is an element of the offense with which he is charged").

107. Even if the lyncher intended to kill, he might have an insanity defense if his reasons for doing so were "crazy." See GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 205 (2d ed. 1997).

108. Alfieri does at times refer to lynchers claiming that they are in a "delusional" state. See Anthony V. Alfieri, *(Er)Race-ing an Ethic of Justice*, 51 STAN. L. REV. 935, 943 (1999). However, he consistently discusses only the diminished capacity defense in such cases. See *id.*; Alfieri, *Lynching Ethics*, *supra* note 17, at 1081-84.

109. See *supra* text accompanying notes 32-33.

110. Current insanity tests generally require a serious mental disability as a predicate for the insanity defense. MELTON ET AL., *supra* note 107, at 195 (noting that, while the term is elastic, in the insanity defense context it has generally required a serious mental disorder such as psychosis or at least a serious personality disorder, and may not be premised solely on environmental, as opposed to endogenous, causes). Most individuals who claim their crime was due to a "rotten social background" (without more) will usually be diagnosed, if diagnosable at all, with a less serious personality disorder such as antisocial



threshold notion, the argument is not premised on the type of serious cognitive or volitional impairment the insanity defense requires.<sup>111</sup> Although trial court judges rarely prevent defendants from raising an insanity defense, regardless of its etiology,<sup>112</sup> the one appellate court that directly considered whether “rotten social background” could form the basis for that defense concluded it could not.<sup>113</sup> The rotten social background argument is even more clearly inappropriate as a lack-of-mens rea defense; the individual asserting it may have been caused to commit the crime for any number of environmental or psychological reasons, but he still intended to commit it.<sup>114</sup> At most, this kind of

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personality disorder, which most states refuse to recognize as a basis for the insanity defense. *See, e.g.*, *People v. Fields*, 673 P.2d 680, 707-08 (Cal. 1983) (“To classify persons with ‘antisocial personality’ as insane would put in the mental institutions persons for whom there is currently no suitable treatment, and who would be a constant danger to the staff and other inmates. Mental hospitals are not designed for this type of person; prisons are.”) (citations omitted); *see also* LAFAVE, *supra* note 106, at 332 (noting that, even though the definition of mental disease or defect is broad, “psychopathic personality[] would clearly appear to be excluded by the requirement that the accused have suffered from a disease of the mind”).

111. *See* MELTON ET AL., *supra* note 107, at 198-201 (noting that the insanity defense requires proof either of an inability to appreciate the wrongfulness of one’s act or a significant inability to control behavior arising from something other than “passion” or “anger”).

112. Up until 1955, the drafters of the Model Penal Code asserted that “no American case [had] excluded evidence or refused to charge on the defense of insanity merely because the evidence in support of the defense related to neurosis or psychopathic personality or other mental disturbance rather than a psychosis.” MODEL PENAL CODE § 4.01 app. A (Tentative Draft No. 4 1955). Since then, however, courts have been more willing to monitor the defense, perhaps because claims have become more outlandish. *See, e.g.*, *United States v. Lewellyn*, 723 F.2d 615, 620 (8th Cir. 1983) (upholding a trial court’s exclusion of insanity defense evidence based on a diagnosis of pathological gambling, proffered by a defendant charged with embezzlement).

113. *United States v. Alexander*, 471 F.2d 923, 959 (D.C. Cir. 1973) (upholding the trial judge’s instruction telling the jury that it should not be concerned with whether the defendant had “a rotten social background” but rather should focus on “whether he had an abnormal condition of the mind that affected his emotional and behavioral processes at the time of the offense”). This case is discussed further at *infra* text accompanying notes 147-49.

114. A common misconception is that if one can prove that a crime was caused by something “outside of his control,” it is excusable. Thus, one sees arguments that an excuse should lie when a person has an extra Y chromosome, a broken family, a different brain structure, and so on. The criminal law applied at trial is not particularly interested in causation, however. It focuses on intent, relevant to the diminished capacity defense, and on the reasons and beliefs for acting, relevant to the insanity defense. *See generally* Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1091 (1985) (stating that the causal theory of excuse “neither describes accurately the accepted excuses of our criminal law nor provides a morally acceptable basis for deciding what conditions ought to qualify as excuses from criminal liability”).

argument might be considered at sentencing,<sup>115</sup> or, as in Nelson's case,<sup>116</sup> in determining whether a juvenile is amenable to treatment and thus a candidate for juvenile court jurisdiction.<sup>117</sup> These latter two situations are low profile venues that are unlikely to trigger the types of widespread racial stereotyping that concerns Alfieri.

Only in the Williams and Watson case,<sup>118</sup> where a group contagion/diminished capacity theory was advanced in an attempt to avoid mayhem, aggravated mayhem, and attempted murder charges, is there a relatively good argument that the evidence was material to a trial issue. Even there the judicial ruling was probably only half right. That is because California law, like many states' laws, permits diminished capacity testimony only if offered to show the absence of specific intent.<sup>119</sup> If mayhem and aggravated mayhem are general intent crimes, as they may be in California,<sup>120</sup> the group contagion testimony is clearly immaterial on those charges. Even if mayhem requires proof of a specific intent to cause serious bodily harm or disfigurement, the testimony that Williams was "out of control" is of dubious materiality with respect to that crime. Diminished capacity evidence must tend to show an absence of intent, not merely the ab-

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115. See, e.g., MINNESOTA SENTENCING GUIDELINES, reprinted in *Research Project: Minnesota Sentencing Guidelines*, 5 HAMLIN L. REV. 293, 412-15 (1982) (permitting a sentence reduction on "substantial grounds . . . which tend to excuse or mitigate the offender's culpability, although not amounting to a defense").

116. See *supra* text accompanying notes 27-34.

117. At least for less serious crimes, in most states whether a child under eighteen is tried as an adult or a juvenile depends upon the juvenile court's determination of the juvenile's treatability, which involves, *inter alia*, ascertaining the presence of factors that influenced behavior (such as a dysfunctional family or peer relationships) and that might be changeable through rehabilitation. See Christopher Slobogin, *Treating Kids Right: Deconstructing and Reconstructing the Amenability to Treatment Concept*, 10 J. CONTEMP. LEGAL ISSUES 299, 301-12 (1999).

118. See *supra* text accompanying notes 6-9.

119. CAL. PENAL CODE § 28 (West Supp. 2002).

120. *People v. Sekona*, 32 Cal. Rptr. 2d 606, 609 (Cal. Ct. App. 1994). The California Court of Appeals stated:

No specific intent to maim or disfigure is required [to convict for mayhem], the necessary intent being inferable from the types of injuries resulting from certain intentional acts; one who unlawfully strikes another without the specific intent to commit the crime of mayhem is still guilty of that crime if the blow results in the loss or disfigurement of a member of the body or putting out of the eye of the victim.

*Id.*

sence of control or premeditation.<sup>121</sup> At most, evidence that Williams was in a frenzy tends to show that he did not have the purpose of killing Denny but rather intended only to beat him, proof that would be material to the attempted murder charge, but probably not the mayhem or aggravated mayhem charges.

In short, many of the racialized defenses Alfieri describes would not get past first base under standard criminal law doctrine, because “colorblind” rules declare them immaterial. Whether such defenses *should* be considered material is another question. Contrary to Alfieri’s apparent assumption, the black community might seek to change criminal liability rules to accommodate racialized arguments, just as feminists have brought about analogous change in connection with criminal defenses in prosecutions of battered women who kill their batterers.<sup>122</sup> This essay is not the place to develop substantive criminal law doctrine.<sup>123</sup> But the point made at the end of the last section is worth repeating. The political process and judges, not defense attorneys operating in isolation, should determine which arguments are material and which are not.

## B. Probative Value and Helpfulness

Racialized defense arguments could be in serious trouble even if they pass the materiality threshold because, given their often speculative nature, they may be lacking sufficient “proba-

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121. See *supra* note 106. Even a person who acts under the influence of the “heat of passion” acts intentionally. See LAFAVE, *supra* note 106, at 394. LaFave also noted that fewer than half the states recognize the diminished capacity defense in any event. *Id.* at 391 n.3.

122. As Professor Mosteller has shown, the “reasonable battered woman” standard owes its current prominence in statutory and case law as much to feminist persuasiveness as to anything else. Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461, 484-91 (1996). Mosteller has further discussed the trend toward the admission of battered woman syndrome evidence and proffered it as an illustration that “political forces are now openly shaping a field of law—the law of evidence—where such forces have been previously less overt.” *Id.* at 515.

123. See, e.g., Delgado, *Rotten Social Background*, *supra* note 33. On the assumption that we have a retributive system of justice, I have argued that the insanity defense should be abolished and replaced by rules that focus more closely on mens rea, self-defense and duress, subjectively defined. Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199 (2000). Under that proposal Nelson and the typical lyncher would have no defense, but defendants who assert a “black rage” argument, see *infra* text accompanying notes 146-48, might have either a full or partial defense, depending on the type of danger they believed their crime would avert.

tive value” or accuracy.<sup>124</sup> This second threshold inquiry is joined by a third when, as was the case with Williams’ group contagion argument and is often true in black rage and rotten social background cases, the defense relies on an expert, because then the evidence must also “assist” the factfinder by adding to the layperson’s knowledge base.<sup>125</sup> Further, courts are much more likely to scrutinize the accuracy and helpfulness of expert testimony today because of a trio of decisions over the last decade from the U.S. Supreme Court. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>126</sup> *General Electric Co. v. Joiner*,<sup>127</sup> and *Kumho Tire Co. v. Carmichael*,<sup>128</sup> the Court reinvigorated the judge’s role vis-a-vis such testimony by construing the federal rules of evidence to require exclusion unless the basis of the expert’s opinion is derived through the scientific method or similarly reliable procedures.<sup>129</sup>

As noted above, Alfieri at one point alludes to this problem by suggesting that racialized defenses are deceptive. More specifically, he states that “[d]eception is central to the ideology and practice of racialized defenses,” apparently because they are based on modernist or postmodernist approaches to advocacy which have “renounce[d] the search for truth” in the pursuit of victory.<sup>130</sup> As noted earlier, that may be true in the context in which he makes that statement—the lynching defenses—but Alfieri sweeps with far too broad a brush if he means to say that all racialized defenses are fabrications. They may be based on

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124. The term “probative value” is often used to refer to materiality and accuracy together. See, e.g., FED. R. EVID. 403. I think analysis is furthered by keeping the two concepts distinct. See MCCORMICK, *supra* note 99, § 185, at 774-75 (“A fact that is ‘of consequence’ is material, and evidence that affects the probability that a fact is as a party claims it to be has probative force.”).

125. See *supra* note 99 (describing FED. R. EVID. 702).

126. 509 U.S. 579, 594-95 (1993) (holding that, under the federal rules, expert testimony that purports to be scientific must be “reliable,” which generally means it must be based on scientifically tested principles and scientific methodology).

127. 522 U.S. 136, 141-42 (1997) (holding that the trial judge is to determine the reliability question).

128. 526 U.S. 137, 150-51 (1999) (holding that “technical and specialized knowledge” must meet the same admissibility threshold of “reliability” as scientific evidence).

129. *Daubert* is now followed not only in federal court but is also followed in at least twenty states. DAVID FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE § 1.30 n.5 (Supp. 1999) (noting that since 1997 at least two states have joined the nineteen that have adopted the principles of *Daubert*).

130. Alfieri, *Lynching Ethics*, *supra* note 17, at 1085-86.

speculation, but it is usually informed speculation, and it is normally proffered by professionals acting in good faith.<sup>131</sup>

That fact should enable expert testimony in racial cases to avoid the “deceptive” label, but it does not necessarily ensure escape from the reliability requirement imposed by the *Daubert* trilogy. Take the expert testimony about group contagion in the Williams case. To begin with, it was presented by a social worker, not a psychiatrist or psychologist, which may mean the “expert” was not really an expert on the behavioral dynamics of mob violence.<sup>132</sup> Reinforcing that view is the fact that the witness did not appear to rely on any published research describing mob violence or its effect on the mental states of individuals who are in a mob. Nonetheless, the expert felt able to state that at “the height of the contagious feeling, . . . especially in those situations where there is frenzy or a lot of anger . . . one is governed by . . . a lot of impulsive behavior, a lot of impulsive action where there isn’t much thinking prior to acting.”<sup>133</sup> That conclusion, while plausible, is not based on the scientific method and could well fall short in the eyes of a court adhering to the spirit of *Daubert*.<sup>134</sup>

To date, most courts have not applied *Daubert* rigidly, at least to expert testimony on mental state.<sup>135</sup> But *Kumho Tire*,

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131. Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427, 461 (1982) (“At best, opinions about psychological processes—beyond merely descriptive observations—are clinical probability judgments rooted in theoretical constructs that are more or less widely shared among mental health professionals.”).

132. Alfieri, *Defending Racial Violence*, *supra* note 6, at 1311.

133. *Id.* at 1312 (quoting from trial transcript).

134. See FLETCHER, *supra* note 7, at 234 (calling the testimony in the Williams case a “parody of scientific thinking”). It is worth noting, however, that scientific research bearing on this question does exist and that, had it been proffered, it probably would have been admissible under *Daubert*. See, e.g., Edward Diener, *Deindividuation: The Absence of Self-Awareness, and Self-Regulation in Group Members*, in THE PSYCHOLOGY OF GROUP INFLUENCE 231 (Paul B. Paulus ed., 1980) (discussing research showing how involvement in groups may cause “deindividuation,” which can “release the person from both societal norms and personal standards that normally influence behavior,” although the precise actions taken “will depend on his or her motivations and desires at the time and on situational influences such as the behavior of models”). On the other hand, this type of testimony might not be material, because it supports neither an insanity nor diminished capacity defense as traditionally defined.

135. See Donald N. Bersoff et al., *The Admissibility of Psychological Evidence Six Years After Daubert: Floodgates or Gatekeeping?* (1999) (unpublished manuscript) (study indicating that the proportion of cases admitting expert evidence about such subjects as

which for the first time made clear that the reliability principle established in *Daubert* would apply to “specialized” as well as “scientific” information,<sup>136</sup> was decided only two years ago. Perhaps courts will begin investigating in earnest the basis of “soft” behavioral science testimony in the same careful way they have heretofore examined testimony derived from the harder sciences.<sup>137</sup> If so, once again “neutral” evidentiary principles will accomplish Alfieri’s goal of excluding racialized defenses, without reference to potential racial harm.

On the other hand, as I have argued elsewhere,<sup>138</sup> there are good reasons—having to do with the difficulty of studying mental states in a scientific manner and with the right to voice alluded to earlier—for construing *Daubert-Kumho Tire* more flexibly in the criminal defense context and adopting a relaxed probative value threshold in such cases. Furthermore, these race-based arguments can be truly “helpful” to the factfinder, which other-

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mental disorders, syndromes, intent, and child sex abuse victims remained the same or actually increased in the first five years after *Daubert*); James T. Richardson et al., A Case Law Survey of Social and Behavioral Science Evidence After *Daubert* (1997) (unpublished manuscript) (finding, based on a survey of cases evaluating syndrome evidence since *Daubert* that “[c]ourts are not generally engaging in scientific reviews of the proffered syndrome[; m]ost typically the focus is on general acceptance and the qualifications of the expert, and even then the judicial review tends to be cursory”).

136. 526 U.S. at 150-51.

137. Cf. *United States v. Velarde*, 214 F.3d 1204, 1210-11 (10th Cir. 2000) (finding that the trial judge erred in not holding a *Daubert* hearing on the admissibility of testimony about the characteristics of abused children). Reflecting the impact of *Kumho Tire*, Rule 702 was recently amended to provide that opinion testimony is admissible only “if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.” FED. R. EVID. 702.

138. My most recent exposition on this topic is Christopher Slobogin, *Doubts About Daubert: Psychiatric Anecdotes as a Case Study*, 57 WASH. & LEE L. REV. 919 (2000) [hereinafter Slobogin, *Doubts About Daubert*]; see also Christopher Slobogin, *Psychiatric Evidence in Criminal Trials: To Junk or Not to Junk?*, 40 WM. & MARY L. REV. 1 (1998) [hereinafter Slobogin, *Psychiatric Evidence*]; Christopher Slobogin, *The Admissibility of Behavioral Science Information in Criminal Trials: From Primitivism to Daubert to Voice*, 5 PSYCHOL. PUB. POL’Y 100 (1999). In these articles I proposed that, in the context of past mental state defenses, expert psychological testimony ought to be admissible if “based on a theory or concept that is plausible to a significant number of professionals in the field,” a test that is very similar to the general acceptance test announced in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and is meant to be more lenient than the *Daubert-Kumho Tire* formulation. Slobogin, *Psychiatric Evidence*, *supra*, at 40. In the wake of *Kumho Tire*, I supplemented this standard with a proposal that expert testimony be required to have “factor-based” incremental validity, meaning that it must provide the fact-finder with information about material factors it would otherwise not consider. Slobogin, *Doubts About Daubert*, *supra*, at 944-47.

wise might succumb to preconceptions about criminal behavior, and in particular criminal behavior by blacks. By providing technical and often counterintuitive explanations for this behavior—based on mob dynamics, environmental influences, rage at white society and so on—these arguments can educate a jury toward a more nuanced decision on culpability issues. If one accepts these propositions about the probative value and helpfulness inquiries, and assuming race-based arguments are material, their admissibility may then ultimately depend upon the final evidentiary inquiry—the extent to which they will be misused or unfairly harm a “party” to the dispute.

### C. Prejudice

Under traditional evidentiary analysis, as encapsulated in the Federal Rules of Evidence, evidence that is relevant and helpful may still be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice . . . .”<sup>139</sup> “Unfair prejudice” is usually defined with reference solely to the parties in the dispute and considers only the effect of given evidence on the decision-maker.<sup>140</sup> Thus, the claim that a particular trial argument will harm non-litigants in the eyes of other non-litigants, which is the type of claim Alfieri is making, does not fit neatly into the traditional prejudice inquiry.

There are many evidentiary analogues to this type of reasoning, however, even when the litigant whose case will be undermined by concern about third-party interests is a criminal defendant. For instance, exclusion based on privilege law, such as the privilege against self-incrimination and the physician-patient privilege, can easily harm defense efforts to obtain relevant, exculpatory evidence. It is nonetheless permissible, as a means of protecting the constitutional and privacy rights of third-party witnesses.<sup>141</sup> The same justification underlies rape shield laws,

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139. FED. R. EVID. 403.

140. See FED. R. EVID. 403 advisory committee’s note (“‘Unfair prejudice’ within its context means an undue tendency to suggest [a] decision on an improper basis, commonly, though not necessarily, an emotional one.”).

141. See, e.g., *Washington v. Texas*, 388 U.S. 14, 23 n.21 (1967) (stating that the defendant’s right to present a defense should not be construed “as disapproving testimonial privileges, such as the privilege against self-incrimination or the lawyer-client or husband-wife privileges”); *United States v. Abbas*, 74 F.3d 506, 511 (4th Cir. 1996) (stating that in a conflict between the defendant’s Sixth Amendment right and a potential witness’

which render inadmissible possibly relevant evidence about past sexual acts of alleged rape victims to protect the privacy of rape complainants and to encourage reporting of rapes and thereby enhance public safety.<sup>142</sup> Admittedly, these evidentiary rules are not generally considered to be implementations of the prejudice concept. But they are based on protecting the interests of people other than the litigants and can require case-by-case analysis of whether those interests outweigh the defendant's in a particular case.<sup>143</sup> It is thus not untenable even from a "traditional" perspective to construe the term "prejudice" to encompass harm to third parties, including the offender's racial community that concerns Alfieri.

The problem, avoided until now in this essay, is how to measure this type of prejudice. While Alfieri is convinced that racialized defenses do irreparable harm to society as a whole, and particularly to minority ethnic groups, that stance is subject to serious question. First, even on Alfieri's own terms, differentiating between prejudicial and non-prejudicial defenses is impossible in many cases. Second, Alfieri is probably wrong about the negative impact of the typical racialized defense on the black community. Contrary to his claims, many of these defenses are likely to have no such effect or even a positive one on race relations.

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Fifth Amendment privilege, the privilege prevails); *United States v. Doyle*, 1 F. Supp. 2d 1187, 1190 (D. Or. 1998) (stating that a defendant's Sixth Amendment right to compulsory process does not trump a victim's right to confidentiality of psychotherapy records); *United States ex rel. Patosky v. Kozakiewicz*, 960 F. Supp. 905, 917 (W.D. Pa. 1997) (holding that the denial of access to a complainant's psychiatric records pursuant to a Pennsylvania statute creating a psychiatrist-patient privilege did not violate the Confrontation Clause).

142. See, e.g., CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE* 230 (1995) (noting that the federal rape shield law was passed in part "to encourage greater reporting of sex offenses" and thus help ensure that rapists are caught and convicted).

143. See, e.g., *United States v. Kinslow*, 860 F.2d 963, 967 (9th Cir. 1983) (upholding a trial court's decision to sustain the prosecution's objection, on privilege grounds, to defense questions regarding what a counselor told a witness); *Shaw v. United States*, 892 F. Supp. 1265, 1277 (D.S.D. 1995) ("The limited interest in encouraging reporting [underlying rape shield laws] would not in and of itself outweigh Shaw's interest in presenting relevant evidence. Nevertheless, this interest is one that must be considered along with other legitimate interests in determining whether a victim's alleged sexual conduct should be admitted."). See generally *Michigan v. Lucas*, 500 U.S. 145, 149 (1991) ("The right to present relevant testimony is not without limitation. The right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process [including assuring the efficient administration of justice].'" (quoting *Rock v. Arkansas*, 483 U.S. 44, 55 (1987))).



The differentiation difficulty permeates Alfieri's entire project. As noted earlier,<sup>144</sup> Alfieri wants to avoid "deviance" narratives, but is willing to countenance "defiance" narratives. As he readily admits, however, these two types of narratives often "intersect,"<sup>145</sup> and probably unalterably so. Take the "black rage" defense, for instance. Examples of individuals who might raise such a defense range from Williams, who proffered a group contagion defense, to Colin Ferguson, whose attorneys, before he fired them, wanted to argue that he killed six people on the Long Island Railway because he was driven into psychosis by an oppressive white society.<sup>146</sup> One could also include within this category Benjamin Murdock, who contended that his violent reaction to being called a "dirty nigger bastard" by a white Marine, whom he subsequently shot and killed, was due in part to his upbringing in a racist society, as well as a product of his "rotten social background."<sup>147</sup> Each of these individuals could be called "deviant." However, each could also be called "defiant," because each rebelled, albeit in a particularly violent fashion, against racism.<sup>148</sup> The deviance and defiance labels—at least as defined by Alfieri—place virtually no constraints on the

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144. See *supra* text accompanying note 15.

145. Alfieri, *Defending Racial Violence*, *supra* note 6, at 1309-10 (referring to the "intersection of defiance and deviance narratives" and "double images of black defiance and deviance"); see also Alfieri, *Race Defenders*, *supra* note 1, at 2258 (discussing the "interlacing and sometimes dissonant deviance and defiance narratives").

146. For an account of the Colin Ferguson case, see David van Biema, *A Fool for a Client*, TIME, Feb. 6, 1995, at 66.

147. See *United States v. Alexander*, 471 F.2d 923, 958-60 (D.C. Cir. 1973).

148. The defiance-deviance opposition could, in theory, overlap with the justification-excuse dichotomy that exists in the criminal law. See Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1163-66 (1987). But the Montgomery bus boycott and the black-organized consumer boycotts in Los Angeles, which Alfieri uses as prime examples of defiance, see Alfieri, *Defending Racial Violence*, *supra* note 6, at 1320, are not remotely comparable to the violent offenses at issue here where the crime is vastly disproportionate to any harm the victim is causing the perpetrator. A better example of a defiance-deviance dichotomy occurs in the battered women situation, where scholars discussing defenses to homicide (of the batterer) have differentiated between a defense based on survivorship and a defense based on "learned helplessness" arguments. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 34-43 (1991) (critiquing the learned helplessness theory). But Alfieri does not provide any equivalently persuasive examples in the racialized defense context. For an approach that moves in that direction, see PAUL HARRIS, *BLACK RAGE CONFRONTS THE LAW* 274 (1997).

defense attorney's strategic (or ethical) decisions or the judge's evidentiary choices.

The deeper question Alfieri and the expanded prejudice inquiry raise concerns the type of message these types of arguments—whether denominated as deviant or defiant—send to the public about African-Americans. One possibility, of course, is that any message sent is not received. This side of the O.J. Simpson and Bernhard Goetz cases, the public, as compared to scholars and the press, is probably apathetic about the details of these trials. For instance, it is unlikely most people know that Williams asserted a group contagion defense, even if they remember that he escaped conviction on his most serious charges.<sup>149</sup>

If the message *is* received, what is it? Alfieri rarely considers the imagery of his illustrative trials had the racialized defense not been raised. For instance, without the group contagion defense, Williams would have looked like the stereotypical psychopath so routinely depicted by Hollywood. Simply watching, without explanation, the videotape of Williams repeatedly clubbing Denny with a brick is likely to trigger the specter of soulless evil and feed into pre-existing fears of young black males. Thus, as Professor Margulies has stated, “[u]nless one believes that the King verdict was not a sign of subordination, or that Damian Williams and his co-defendants would have pulled Reginald Denny from his truck on any sunny Los Angeles day,” excluding the expert testimony “would have been unjust.”<sup>150</sup> In a similar vein, deprived of testimony explaining the effects of being called a “nigger,” African-American defendants in Murdock's situation may well be viewed as trigger-happy subhumans, rather than people who understandably are enraged by that emblem of oppression.

Even testimony that consists solely of a description of how poverty and a violent, racist upbringing can condition random murderous responses such as Ferguson's and (perhaps) Nelson's

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149. I have no way of supporting this assertion, other than to report that no one I have talked to since beginning writing this essay remembers the defense tactics in Williams' case (although virtually everyone remembers the famous videotape of the beating).

150. Peter Margulies, *Identity on Trial: Subordination, Social Science Evidence, and Criminal Defense*, 51 RUTGERS L. REV. 45, 131 (1998). This is an excellent article that touches on many of the issues Alfieri and I are debating.

may do more good than harm. Margulies joins Alfieri here in expressing concern about such testimony's mechanistic explanation of human behavior and its potential for besmirching all ghetto males, as well as the efforts of those churches, families and individuals who try to overcome the rottenness in inner-city communities.<sup>151</sup> Yet such testimony also helps explain criminal behavior in terms other than those which invoke badness or evil; it reminds us that behavior is as much situational as it is attributable to a deliberate human reasoning process,<sup>152</sup> thereby creating in the public audience empathy where there might otherwise have been hate. Such testimony might also occasion a "There, but for the grace of God, go I" response; it could suggest that the sickness resides in society, not the defendant or the black community. Those types of messages could improve, rather than diminish, race relations.<sup>153</sup>

These alternative interpretations of the prejudicial nature of racialized defenses, if accepted, do not dictate their admission into evidence, however. Again, under traditional analysis, all four components of the evidence-materiality, probative value, helpfulness, and potential prejudicial impact—must be considered. The multi-factor analysis plays out differently in each of the cases under discussion.

The group contagion argument advanced on behalf of Williams, *if* limited to the attempted murder,<sup>154</sup> and *if* based on rele-

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151. *Id.* at 124.

152. Social scientists would say that this defense tries to overcome "fundamental attribution error." The phrase posits that when people judge the unusual behavior of others they are prone to try to explain the behavior in terms of the person's psychological disposition (e.g., anger) rather than in terms of the person's situation (e.g., the degree of stress recently experienced by the individual). See generally RICHARD E. NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 133-34 (1980).

153. Professor Judges has suggested that another way these defenses could harm both black defendants and blacks generally is by creating "a perception that African Americans are prone to doing bad things and then playing the 'race card' to escape responsibility." E-mail from Professor Donald P. Judges, Ben J. Altheimer Professor of Legal Advocacy, University of Arkansas School of Law, to the author (Nov. 9, 2001). If that is true, the stigma can be at least partially mitigated by describing these defenses neutrally, i.e., in terms of mob domination, poverty-stricken background, and psychosis, rather than race. To this extent, Alfieri's plea to defense attorneys is well-taken. Defense attorneys should avoid gratuitous references to race when non-racial variables not only will suffice but are more accurate.

154. See *supra* text accompanying notes 119-21.

vant research,<sup>155</sup> seems sufficiently relevant and helpful to deserve consideration by a jury, especially in light of the negative image created in the absence of such a defense. On the other hand, the rotten social background insanity defense raised in Murdock's case is lacking in both materiality and probative value.<sup>156</sup> Further, despite the countervailing considerations identified above, the assertion that the defense pathologizes the entire African-American community is at least plausible, thus making the grounds for excluding it even stronger. Somewhere in between falls the black rage defense that Colin Ferguson's attorneys sought to present. Compared to Murdock's argument, this type of defense fits much more easily within the insanity rubric (at least when, as was true in Ferguson's case,<sup>157</sup> it is associated with psychosis). It also helpfully explains the defendant's motivations and paints them as so abnormal that it is unlikely to taint the rest of the black community. But its probative value is more open to question,<sup>158</sup> even under the relatively relaxed formulation of that concept alluded to earlier in this essay.<sup>159</sup>

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155. See *supra* text accompanying notes 134, 138 (noting that relevant science may not exist on this topic, but also advocating a more relaxed standard for the probative value inquiry when past mental state issues are involved).

156. See *Alexander*, 471 F.2d at 960. On the materiality issue, see *supra* text accompanying notes 110-17. Even if the law were changed to recognize general environmental defenses, the defense's low probative value is apparent from the fact that so many individuals, black and white, who are exposed to rotten environments while growing up do not commit violent crimes. On the other hand, if Murdock's defense had been recharacterized as a "racial insult" defense, he might have been able to raise a provocation defense to murder in some jurisdictions. For instance, under the Model Penal Code's "provocation" formulation, followed by a "substantial minority" of states, see LAFAVE, *supra* note 106, at 713, homicide is reduced to manslaughter if the individual committed the homicide "under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse[. . .] the reasonableness of such explanation or excuse [to be] determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." MODEL PENAL CODE § 210.3(1)(b) (1980).

157. During trial, for instance, he asserted that there were ninety-three counts against him because the year was 1993, announced that he would call as a "witness a parapsychologist and exorcist who would testify that government agents had planted a microchip" in his head, and asked the state's ballistics expert whether the bullet fragments had been tested for "alcohol or substance abuse." Michael L. Perlin, "Dignity was the First to Leave": *Godinez v. Moran, Colin Ferguson, and the Trial of Mentally Disabled Criminal Defendants*, 14 BEHAV. SCI. & L. 61, 73 (1996).

158. Compare Deborah L. Goldklang, *Post-Traumatic Stress Disorder and Black Rage: Clinical Validity, Criminal Responsibility*, 5 VA. J. SOC. POL'Y & L. 213 (1997) (arguing that black rage is based on accepted clinical criteria), with Kimberly M. Copp, *Black*

Note that if exclusion occurs under this analysis it occurs principally because of problems with relevance. Cases where fear of third-party prejudice might outweigh the defendant's right to tell his story, on his own or with the help of experts, will be rare. A possible example of one such case, involving a white rather than a black defendant, is the prosecution of Bernhard Goetz. Charged with the attempted murder of four black youths who had accosted him on a subway, he avoided conviction of any serious offense by arguing that he honestly and reasonably thought his victims were about to kill or seriously injure him.<sup>160</sup> Assume that the law of self-defense is subjectified sufficiently to make material his central assertion—i.e., that people with Goetz's prior history (he had been mugged before) might reasonably act as he did.<sup>161</sup> That assumption allows direct confrontation of the prejudice issue. Goetz's argument not only depicts all young inner-city black males as potentially deadly assailants, but also sends the message that, when confronted by one or more of them, use of deadly force is excusable, if not justifiable. That type of "third-party" prejudice to innocent actors is on its face much more tangible than any of the negative effects that Alfieri mentions.<sup>162</sup> Perhaps in this unusual type of case, the concern

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*Rage: The Illegitimacy of a Criminal Defense*, 29 J. MARSHALL L. REV. 205 (1995) (arguing that there is no psychological basis for the defense).

159. See *supra* note 138 and accompanying text (discussing a general acceptance definition of probative value for evidence about past mental state).

160. For a description of the facts, see *People v. Goetz*, 497 N.E.2d 41, 43-44 (N.Y. 1986).

161. This is, in fact, very close to the standard the appellate court found appropriate in the case. See *id.* at 52. The court explained:

[W]e have frequently noted that a determination of reasonableness must be based on the 'circumstances' facing a defendant . . . [which] encompass any prior experiences he had which could provide a reasonable basis for a belief that another person's intentions were to injure or rob him or that the use of deadly force was necessary under the circumstances.

*Id.*

162. Another example in the same vein comes from the case of Daimian Osby, an African-American whose lawyer claimed his client killed another African-American youth due to an overwhelming fear of black urban youth. Osby was convicted on retrial after the trial judge excluded the arguments of both of the defense's experts—a psychologist and a race relations expert—which were meant to support the "urban survival syndrome." Lori Montgomery, *Teen Guilty of Murder: Urban Theory Not Allowed*, DET. FREE PRESS, Nov. 12, 1994, at 6A (describing the trial of Daimian Osby). That result makes sense because the "syndrome" was essentially the creation of the defense attorney (and therefore lacking in probative value) and fed rather than contradicted preconceptions about inner-city blacks

about injury to African-Americans outweighs the defendant's Sixth Amendment right to present evidence.<sup>163</sup> Even then, I would want some proof that a Goetz-type argument has the hypothesized effect of encouraging others to believe it is "open season" on aggressive inner-city African-Americans.<sup>164</sup>

#### IV. CONCLUSION

Professor Alfieri is to be commended for calling our attention so relentlessly to the community-wide harm race-based defenses can do. But in proposing that such defenses be banned when they express black "deviance," he goes too far. His articles note a number of "oppositions"—between deviance and defiance, the individual and the community, private agendas and public ones—that he tends to reconcile in only one direction. I have tried to demonstrate in this essay that a better way to mediate these oppositions relies on the traditional rules regarding the defense attorney's function and, more importantly, the traditional rules governing the admissibility of evidence.

In a work that also attempts to mediate these and similar oppositions, Professor Margulies writes about four perspectives scholars have taken when considering the admissibility of "social science" evidence that rests in whole or in part on identity issues such as race, gender or sexual orientation.<sup>165</sup> Responsibility theorists insist on keeping exceptions to the general presumption of criminal accountability narrowly defined, and thus tend to view identity defenses with suspicion.<sup>166</sup> Empiricists also are uncomfortable with such defenses because of their speculative nature.<sup>167</sup> Critical defense advocates, on the other hand, generally endorse these defenses because they enlighten

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(and therefore was both unlikely to be helpful and likely to exacerbate stereotypes of the type Alfieri would like to avoid).

163. See generally Janet C. Hoefel, *The Gender Gap: Revealing Inequities in Admission of Social Science Evidence in Criminal Cases*, 24 U. ARK LITTLE ROCK L. REV. 41 (2001) (arguing that the Sixth Amendment always trumps third-party considerations).

164. To my knowledge, after Goetz's acquittal there was no upsurge in "defensive" shootings of African-American youth, by either whites or blacks. A pre-post study investigating racial attitudes before and after trials such as Goetz's and the other conspicuous trials discussed in this article might also help assess whether the societal harm hypothesized by Alfieri is real or imagined.

165. Margulies, *supra* note 150, at 74-77.

166. *Id.* at 84-95.

167. *Id.* at 74-77.

others about the effects a stratified society has on relatively powerless groups.<sup>168</sup> Finally, feminists, although sympathetic to racialized and similar arguments, are sensitive to their potential for exoticizing or pathologizing the groups they purport to describe.<sup>169</sup> In Margulies' scheme, Alfieri falls somewhere between the third and fourth groups.

What is interesting about Margulies' taxonomy for present purposes is how it parallels traditional evidentiary analysis. Responsibility theorists are most interested in the materiality question because they focus on the scope of substantive criminal law doctrines such as insanity and diminished capacity. Empiricists look most closely at the probative value issue because scientific accuracy is their main concern. Critical scholars are more attuned to the helpfulness issue because they want judges and juries, who often come from the mainstream, to understand the nuances of minority group politics. Feminists are most involved with assessing prejudicial impact (under the expanded definition adopted in this article) because they want to avoid unfairly or harmfully characterizing these groups.

This parallel also emphasizes the main point of this essay. The determination of whether racialized defenses should be permitted depends upon a number of factors. Professor Alfieri is right to emphasize race-consciousness as an important variable, but wrong to give it dispositive impact. Considerations relating to the substantive law, empirical reality, and fact-finder preconceptions must also be taken into account. This essay attempts to explicate the application of these factors in racialized cases, using language familiar to judges and lawyers. In doing so, it may also increase the likelihood that Alfieri's insights will have real impact on clients, defense attorneys, judges, juries, and the administration of criminal justice as a whole.

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168. *Id.* at 77-84.

169. *Id.* at 95-100.