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Making Pets: Social Workers, Problem Groups, and the Role of the SPCA--Getting a Little More Precise about Racialized Narratives Commentary

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Making Pets: Social Workers, "Problem Groups," and the Role of the SPCA—Getting a Little More Precise About Racialized Narratives

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Introduction

No one (least of all I) could quarrel with the need to attend to the rhetorical meaning of race in trying cases and representing clients.[1] We need to understand the role of narrative, especially the racialized variety, so that we may (1) appreciate the ways race determines outcomes in our system of civil and criminal justice, (2) combat racialized narratives colored by racism, and (3) understand the limits of what can be achieved through advocacy. In a series of articles culminating in *Race Trials*,[2] Anthony Alfieri has carried out pioneering work in each of these areas. His readers are grateful for his work and contribution.

In this response, I offer additional reasons why we should applaud Alfieri's inquiry into the rhetorical role of race[3]—to allow jurisprudence to accommodate changing social mores and prevent embarrassing and obsolete decisions. I also suggest that we broaden the inquiry to address civil as well as criminal trials[4] and nonwhite groups other than African

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1. *See* RICHARD DELGADO, THE RODRIGO CHRONICLES (1995) (illustrating and arguing for an expanded role for legal storytelling and narrative analysis); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (harmonizing and endorsing the use of stories in the struggle for racial reform).

2. Anthony V. Alfieri, *Race Trials*, 76 TEXAS L. REV. 1293 (1998) [hereinafter Alfieri, *Race Trials*]; *see also* Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063 (1997); Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995).

3. Other writers have written in the same vein. *See, e.g.*, DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992); PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991); Thomas Ross, *The Richmond Narratives*, 68 TEXAS L. REV. 381 (1989). For further works on this topic by the author, see CRITICAL RACE THEORY: THE CUTTING EDGE (R. Delgado ed., 1995); Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993).

4. *See infra* subpart II(A).

Americans.[5] My two points dovetail; the self-interest based reason I put forward for studying the role of racialized narrative also supports the expanded inquiry I outline.

I. Interest Convergence: Why We Should Applaud and Further Alfieri's Inquiry

In *Race Trials*, Anthony Alfieri urges that we attend, in a more systematic way, to the rhetorical significance of race in the narratives we use in representing clients and trying cases. He urges, for example, that we "augment the still-evolving definition of race trials"[6] and "broaden the discursive map of 'race talk.'"[7] He envisions "weav[ing] multiple strands of theoretical and practical analysis into a broad investigation of the status of race, racialized narrative, and race-neutral representation in law, lawyering, and ethics."[8] His "project focuses on the rhetoric of race or 'race-talk' in the prosecution and defense of racially motivated violence in civil and criminal law proceedings."[9] Using a series of recent, racially-charged criminal trials, he shows how race casts a powerful shadow, sometimes to the benefit, but more often to the detriment, of African-American defendants and communities.[10]

Why should anyone, other than outsider scholars and a few well-wishers, welcome Alfieri's project? Mainstream scholars, judges, and court administrators *should* attend to the writings of Alfieri and his colleagues in the clinical theory movement for two reasons: one prudential, the other jurisprudential. The prudential reason is easily stated: to avoid condemnation at a later time. As Robert Cover and others have pointed out, every generation or so the judicial system hands down a decision that in time seems egregious and inhumane, so that subsequent scholars and ordinary citizens ask the "How could they?" question of its author.[11] Cases like *Buck v. Bell*,[12] *Plessy v. Ferguson*,[13] and the *Chinese Exclusion Case*[14] mar the careers of otherwise eminent justices. In our

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5. *See infra* subpart II(B).

6. Alfieri, *Race Trials*, *supra* note 2, at 1294.

7. *Id.*

8. *Id.* at 1301.

9. *Id.*

10. *See id.* at 1323 (describing the trials of Lemrick Nelson).

11. *See* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 197-259 (1975) (discussing the judiciary's predominant choice of formalism over morality in slavery decisions of the mid-nineteenth century); *see also infra* note 16 and accompanying text.

12. 274 U.S. 200 (1927) (opinion by Justice Holmes upholding the involuntary sterilization of a mentally retarded woman).

13. 163 U.S. 537 (1896) (opinion by Justice Brown holding that "separate but equal" treatment does not violate the Equal Protection Clause).

14. 130 U.S. 581 (1889) (opinion by Justice Field upholding a law excluding Chinese laborers from entering the United States).

time, we have seen retired judges question their own roles in upholding sodomy laws.[15] If the consensus takes a certain form—condemning homosexuality, for example—it is difficult to perceive how what is written today may strike a future generation (or even oneself, later) as cruel and inhumane when the consensus shifts.[16] Who can assert with certainty that *Bowers v. Hardwick*[17] and *McClesky v. Kemp*[18] will not turn out to be the *Dred Scotts*[19] of our age, condemned by a later time as barbaric and wrong? Closely examining how we think, speak, and act in areas such as race can reduce the chance that history will judge us harshly.

The jurisprudential reason to further the "racialized narrative" inquiry is that attending to the rhetorical role of race in legal representation and rules enables us to accommodate change. According to one theory of law reform, legal decision-making structures ought to be chosen in light of the stage of social evolution represented by the matter under consideration.[20] With cases falling in a zone of moral flux, judges, legislators, and even legal scholars ought to adopt relatively open rules of discourse and judgment, assuring that the widest possible range of options are heard and entertained.[21] Later, once social consensus has emerged over an issue (such as women's right to work on the same terms as men), cases may be decided under bright-line rules, with more streamlined treatment.[22] Before that time, presumptions should be relaxed, burdens of proof eased, and limitations on who may speak and about what, kept to a minimum.[23]

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15. *See* Anadi Agneshwar, *Ex-Justice Says He May Have Been Wrong*, NAT'L L.J., Nov. 5, 1990, at 3 (noting that Justice Powell later questioned his vote in *Bowers v. Hardwick*, 478 U.S. 186 (1986), to uphold Georgia's anti-sodomy law).

16. *See* Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEXAS L. REV. 1929, 1930 (1991) (explaining that "these notorious opinions seemed to their authors unexceptional, natural, 'the truth'").

17. 478 U.S. 186 (1986) (upholding as constitutional a Georgia statute, applied to homosexuals, criminalizing sodomy).

18. 481 U.S. 279 (1987) (ruling that statistical evidence of racial disparities in the application of the death penalty in Georgia did not demonstrate a constitutionally significant risk of racial bias in Georgia's capital-sentencing process and therefore did not violate the Eighth Amendment).

19. 60 U.S. (19 How.) 393, 404 (1856) (stating that blacks "are not included, and were not intended to be included, under the word 'citizen' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States").

20. *See* Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 298-301 (1975); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1673, 1673-87 (2d ed. 1988) (developing a "constitutional model designed to match decision structures with substantive human ends").

21. *See* Tribe, *supra* note 20, at 290-93 (suggesting that constitutional principles should be concerned with the evolution of policy over time).

22. *See id.* at 290, 314 (noting that the flexible period should last "for a time" and that the "series of individualized determinations . . . may offer a basis for reestablishing a rule . . . around a new consensus").

23. *See id.* at 287-93, 303-12.

By maintaining relatively open rules of decision for matters on which society has yet to reach a consensus, we do ourselves a favor—even if it means more time and effort for the judicial branch.

Since the meaning of race is a matter of intense concern to society today, and is likely to remain so as our demography changes and economic globalization requires dealing with many nonwhite nations, inquiries like Alfieri's into the way race functions in the legal system will advance rational decision making. What will this entail? It will require that we look closely at rules of advocacy and professional responsibility.[24] We must also examine our daily practices when communicating with clients, in order to see how race advantages some and disadvantages others.[25] It counsels that we initially suspend judgment on Paul Butler's proposal to allow black juries to nullify certain verdicts.[26] Perhaps this idea will turn out to bring benefits, while causing few losses. We should be careful not to paint with too broad a brush, for example by prohibiting all racial references by lawyers as illegitimate.[27] We should guard against ruling out statistical proof of discrimination, for example, in the operation of the death penalty merely because that discrimination is less than total or because introducing safeguards in one area might require doing so in others as well.[28] Explorations like Alfieri's can help the law move more smoothly to the next level, while guarding against damaging errors and marred reputations.

II. Broadening the Inquiry

A. Including Civil Trials in Studies of the Rhetoric of Race

Writers who explore the role of race in trials should expand their focus to include civil as well as criminal trials. Alfieri says his project is to lay bare the rhetoric of race in "trials"[29] and "representation,"[30] but it is clear that he is mainly concerned with criminal trials.[31] This is understandable, since criminal prosecution is the most graphic coercive

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24. Alfieri and others have begun this task. *See* Alfieri *Race Trials*, *supra* note 2, at 1339 (surveying "the regulation of racial bias specific to the prosecution and the defense function").

25. *See id.* at 1323-39, 1342, 1346-47 (examining the legal strategies used in the trial of Lemrick Nelson).

26. *See* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679 (1995) (positing that in some cases "it is the moral responsibility of black jurors to emancipate some guilty black outlaws").

27. *See* Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 734 (1995) (arguing that forbidding references to race causes "legal decisionmakers . . . [to be] less able to control their discriminatory response").

28. *See* McCleskey v. Kemp, 481 U.S. 279, 315-18 (1987) (warning that requiring too strict a standard of justice in capital penalty cases could result in costly reforms elsewhere).

29. *See, e.g.*, Alfieri, *Race Trials*, *supra* note 2, at 1294, 1299, 1301, 1365.

30. *See, e.g.*, *id.* at 1294, 1299, 1302, 1303.

31. *See, e.g.*, *id.* at 1326-90 (analyzing the use of racial rhetoric in a criminal trial).

power of the state. That race plays a role in this arena is also undeniable—all we have to do is look at the composition of our jails and penitentiaries.[32] But people of color come before the civil courts, too, probably at least as often as they do criminal courts. They sue or are sued for divorce, child support, or restraining orders; by landlords for eviction; and by credit agencies, loan sharks, and installment merchants for collection or repossession. When this happens, a host of racialized narratives, substantive laws, remedies, presumptions, and discourse patterns challenge litigants and their lawyers in the search for justice.[33] The cost of litigation,[34] the geography of remedies,[35] and the disproportionate shunting of small-stakes claims to deformalized forums[36] are all issues scholars interested in pursuing the role of race in civil settings should explore.

B. Expanding the Inquiry Beyond the Black-White Paradigm of Race

Alfieri and others who wish to understand the role of racialized narratives need to expand their gaze to groups beyond blacks.[37] Alfieri

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32. *See* MARK MAUER & TRACY HULING, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 1 (The Sentencing Project ed., 1995) (explaining that one in three African American males are currently under the supervision of the criminal justice system).

33. A hypothetical example of such a racialized narrative would go as follows: "This plaintiff claims the merchant misled her, but she's at fault, too. Why don't these people just learn English?" On the deployment of various racialized narratives in judicial and quasi-judicial settings, see PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991) and Patricia J. Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989).

34. By this I mean filing, service and process fees, counsel fees, and the costs associated with fact investigation and discovery, all of which can quickly add up to tens of thousands of dollars for even a fairly simple case. *See* Deborah M. Shelton, Employment Law, The Maryland Survey: 1995-1996, 56 MD. L. REV. 825, 842 (1997) (explaining that high costs can make litigating wrongful discharge claims impossible).

35. For example, provisional (or pre-judgment) remedies such as replevin, unlawful detainer, and garnishment are commonly used by loan sharks and credit merchants seeking speedy relief—but are not available to plaintiffs such as mothers of children injured by defective products such as infant safety belts. *See* JOHN J. COUND ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 219, 219-44 (7th ed. 1997) (examining limitations on the use of provisional remedies imposed by the Due Process Clause).

36. Many scholars chide the use of informal forums. *See* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1391-99 (arguing that alternative systems of dispute resolution may be injurious to minorities); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549-50 (1991) (criticizing the use of mediation as an alternative to the adversary system in custody disputes).

37. *See* Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEXAS L. REV. 1181, 1196-97 (1997) (book review) (arguing that the black-white paradigm has doctrinal, conceptual, and real-world consequences which limit the way we think of race and racism); Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213, 1214-15 (1997) (criticizing the black-white paradigm as exclusive and limiting in racial discourse, especially with respect to Latinos).

writes that race, in general, is his object of attention,[38] yet his article focuses on just one racial minority group: blacks.[39] But Latinos and Asians (to take two examples) are not, however, merely African Americans with slightly lighter skins. Mainstream society has racialized Latinos and Asians differently from African Americans. Skin color comes into play, of course, but so does discrimination based on accent,[40] national origin or immigrant status,[41] religion,[42] and culture.[43] The invidious stereotypes that afflict these groups differ as well,[44] so that jury selection and voir dire strategies necessary to assure a fair trial must take different approaches. A lawyer familiar with advocacy on behalf of blacks will recognize the racialized narratives of danger, threat, and animality,[45] but might fail to recognize, and counter, Chicano or Asian racial narratives.

Alfieri and other clinical theorists must expand beyond their current Afrocentric focus for another reason. Preoccupation with a single racial minority group can easily end up slighting, or even affirmatively harming, another. For example, while American society was celebrating *Brown v. Board of Education*,[46] a justly deserved victory for black school children, Congress was ordering "Operation Wetback," a massive roundup of Chicanos, many of whom were American citizens, for deportation to Mexico.[47] Two years later, an article appeared in Duke Law School's Journal of Law and Contemporary Problems about the so-called "wetback

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38. *See supra* notes 6-8 and accompanying text; *see also* Alfieri, *Race Trials*, *supra* note 2, at 1295, 1294-95 (characterizing the race theory used in his analysis of trials as seeking "to develop a color-conscious, pluralistic approach to advocacy that honors the integrity of diverse . . . racial identities").

39. *See, e.g.*, Alfieri, *Race Trials*, *supra* note 2, at 1305, 1307-08, 1313, 1318-19, 1322-39, 1342, 1353. Other groups rate barely a mention. *See id.* at 1307 n.79, 1310 nn.94, 102.

40. *See generally* Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991).

41. *See* Michael A. Olivas, *Unaccompanied Refugee Children: Detention, Due Process, and Disgrace*, 2 STAN. L. & POL'Y REV. 159, 163 (1990) (arguing that the Immigration and Naturalization Service "has acted aggressively to deny detained aliens their few rights, has defied court orders to administer the laws more conscientiously, and has created a system that terrorizes and coerces children into conceding their legal claims"); Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805 (1994) (describing workplace occurrences of national origin discrimination despite Title VII's prohibition against such discrimination).

42. *See* ROBERT ALAN GOLDBERG, HOODED EMPIRE: THE KU KLUX KLAN IN COLORADO 164-65 (1981) (noting discrimination against Catholic Latinos in the Southwest).

43. *See infra* notes 91-94 and accompanying text.

44. *See, e.g.*, Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1273-75 (1992) (tracing Mexican-American stereotypes from the U.S. seizure of Mexican territory in the Southwest to World War II).

45. *See id.* at 1262-67 (providing a historical account of African-American stereotypes beginning with the U.S. slave trade).

46. 347 U.S. 483 (1954).

47. *See, e.g.*, Kevin R. Johnson, *Race, The Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1138 (1998) (describing workplace occurrences of national origin discrimination despite Title VII's prohibition against such discrimination).

problem," approving the government's mass deportation program.[48] Only a few years earlier, a presidential decree had ordered all Japanese Americans living on the West Coast to relocate to wartime detention camps, where they spent the war years behind barbed wire, many losing farms and businesses.[49] *Korematsu v. United States*,[50] which approved this wartime internment, was decided only ten years before *Brown*. Reconstruction, a time of great gains for blacks, coincided with the enactment of anti-Asian immigration laws, in part as a sop to white southerners who were concerned that caste might turn out to mean nothing.[51] In Mississippi, planters refused to rehire the newly freed blacks; instead they brought in Mexicans and Asians.[52] During World War II, we were somewhat more generous toward domestic minorities such as blacks and Mexicans, but turned our backs on Jews fleeing the Holocaust.[53]

Ignoring racialization of one group can also positively injure another. For example, in the wake of *Brown*, school authorities in Texas and the Southwest certified certain schools as desegregated on the ground that they were fifty percent Mexican and fifty percent black.[54] In a similar vein, the Texas Court of Criminal Appeals, in the same year as *Brown*, rejected a Latino's claim of a racially stacked jury, composed of all whites, on the ground that Mexicans are members of the white race.[55] Cases having to do with interpreters[56] and class suits[57] also contain "racialized narratives" or racialized treatment of Latino Americans, all of which might be unrecognizable to a lawyer not trained to look for them. A lawyer who thinks, "Oh, well, I deal mostly with one group (say, blacks); I'll postpone coming to terms with the Chicano or the Asian situation" can end up doing a disservice to both groups.

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48. *See* Eleanor M. Hadley, *A Critical Analysis of the Wetback Problem*, 21 LAW & CONTEMP. PROBS. 334, 350-51 (1956) (describing the roundup as necessary in order to bring illegal immigration under control).

49. *See* Johnson, *supra* note 47, at 1125.

50. 323 U.S. 214 (1944).

51. *See* Johnson, *supra* note 47, at 1123.

52. *See* Telephone Interview with Juan F. Perea, Professor of Law, University of Florida (Oct. 20, 1998); *see also* Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 HASTINGS WOMEN'S L.J. 79, 87 (1998) (noting that "[a]fter the Civil War some Southern plantation owners seriously considered replacing their former slaves with Chinese Labor").

53. *See* Hing, *supra* note 52, at 89, 94 (describing U.S. efforts to recruit Mexican laborers during the 1930s and 1940s, and the concurrent refusal to relax immigration restrictions for European Jews).

54. *See* George A. Martinez, *Mexican Americans and Whiteness*, *in* THE LATINO/A CONDITION: A CRITICAL READER 175 (Richard Delgado & Jean Stefancic eds., 1998) [hereinafter THE LATINO/A CONDITION].

55. *See* Hernandez v. Texas, 251 S.W.2d 531 (1952), *rev'd*, 347 U.S. 475 (1954).

56. *See, e.g.*, Hernandez v. New York, 500 U.S. 352 (1991).

57. *See, e.g.*, Tijerina v. Henry, 48 F.R.D. 274 (1969). On whether Mexican Americans can sue as a legally cognizable class, see Richard Delgado & Vicky Palacios, *Mexican Americans as a Legally Cognizable Class under Rule 23 and the Equal Protection Clause*, 50 NOTRE DAME LAW. 393 (1975).

Just as the medical profession cannot ignore how race and ethnic status affect a group's access to health care, as well as their risk of occupational accidents or diseases such as skin cancer, high blood pressure, and diabetes,[58] lawyers must understand how different groups are at risk of discriminatory treatment by society and the courts. The Supreme Court, by imposing such barriers as burden of proof, intent requirements, tight chains of causation, and limitations on who can sue for what, makes it dauntingly difficult for a prototypical black plaintiff to recover for discrimination.[59] But the limitations the legal system imposes on Hispanics, for example, are different, and in some cases, harder to surmount.[60] What one learns from advocacy on behalf of one group does not transfer automatically into informed advocacy on behalf of another.

Sensitization to the narrative of race regarding one group thus does little when one is representing another group. That other group may present entirely new challenges, including recognizing how foreign language competency, court translators, the fear of deportation, discrimination based on accent and body language, and religiously based reluctance to sue all factor in.[61] Even a seemingly neutral rule, such as a university's requirement that undergraduates spend their first year living on campus in a dormitory, can have a tremendous impact on racial minority communities.[62] New lines of scholarship,[63] including

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58. *See* ARMANDO B. RENDON, CHICANO MANIFESTO 92 (1971) (noting that Mexican Americans suffer from a disproportionately high rate of infant death).

59. *See* Richard Delgado, *Rodrigo's Bookbag: Brimelow, Bork, Hernstein, Murray and D'Souza—Recent Conservative Thought and the End of Equality*, 50 STAN. L. REV. 1929, 1937 (1998) (considering these and other door-closing rulings).

60. For example, are Latinos even a legally cognizable class? *See* Delgado & Palacios, *supra* note 57, at 393 (arguing that even in the wake of the intensive civil rights movement, Chicanos are not a legally cognizable class). Are they entitled to serve on juries if they speak Spanish in addition to English? *See* Hernandez v. New York, 500 U.S. 352, 360-61 (1991) (holding that it is not a per se violation of the Equal Protection Clause to exercise a peremptory strike against individuals who do not convincingly agree to disregard Spanish testimony in favor of the English translation). Can even the way they look hurt them? *See* Ann T. Greeley et al., *What's in a Face?*, CCM: THE AMER. LAW. CORP. COUNS. MAG., Oct. 1998, at 64.

61. *See supra* notes 39-43 and accompanying text.

62. At my own campus, this rule operates as a powerful deterrent for minorities considering college, and not only because of the cost. Many minority parents in Denver, only 30 miles from campus, would permit their daughters and sons to commute but hesitate to let them live in a dorm dominated by animal-house behavior. Others need the high-achieving high school graduate to live at home to serve as a role model and surrogate parent for younger siblings, who may be experimenting with drugs and gangs. *See* Richard Delgado & Jean Stefancic, *Home-Grown Racism: Colorado's Historic Provision—and Denial—of Higher Education Equal Opportunity*, 70 COLO. LAW. (forthcoming 1999) (discussing the impact of this rule on the minority community).

63. *See, e.g.*, Berta Esperance Hernández-Truyol, *Borders (En)Gendered: Normatives, Latinas, and a Latcrit Paradigm*, 72 N.Y.U. L. REV. 882 (1997); Cynthia Kwei Yung Lee, *Beyond Black and White: Racializing Asian Americans in a Society Obsessed with O.J.*, 6 HASTINGS WOMEN'S L.J. 165 (1995). *See generally* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241 (1993) (discussing the new lines of Asian-American critical legal scholarship).

casebooks[64] and anthologies,[65] allow scholars interested in tracing the rich tapestry of race to come to terms with it in all its multiplicity.

Social scientists know that when two minority groups of color co-exist in the same region, white folks often "make pets" of one—ordinarily the numerically smaller, less threatening group—at the expense of the other.[66] Members of the smaller group may be offered positions as overseers, or nominated to positions such as personnel director or director of human relations or college admissions.[67] They thus unwittingly contribute to the oppression of the other minority group. Everyone, even *good white liberals* like Alfieri, must beware of this tendency. The country's demographics are changing; the number of blacks and Hispanics are now nearly equal.[68] In parts of the country, blacks predominate; in other parts, Latinos are more numerous.[69] In many areas, Asians are the fastest-growing minority.[70] Because of the different experiences, methods of racial identification, and histories of each minority group, it is not possible to properly understand different racial minorities by merely analogizing from what one has learned about others. Any particular racial narrative might be authentic as applied to one racial minority, but not so when applied to another. One who wishes to count himself a race reformer ignores this complexity at his or her peril.

C. *White Narratives and Racialized Rhetoric*

As recent writing demonstrates, white folks have a race too, although they rarely think about it or see themselves as racialized.[71] By the same token, they sometimes speak in racialized narratives about themselves,

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64. *See, e.g.*, JUAN F. PEREA ET AL., RACE AND RACES: CASES AND MATERIALS FOR A MULTIRACIAL AMERICA (forthcoming 1999).

65. *See, e.g.*, THE LATINO/A CONDITION, *supra* note 54.

66. *See* Bob Ewegen, *Hispanic Candidates Face Uphill Climb*, DENV. POST, May 4, 1998, at B11.

67. *See* Richard Delgado, *Rodrigo's Fourteenth Chronicle: American Apocalypse*, 32 HARV. C.R.-C.L. L. REV. 275, 294 (1997) (comparing American Latinos with South African "coloreds," who were offered positions as clerks and overseers in the apartheid regime); *see also* Kathleen Morris, *Through the Looking Glass: Recent Developments in Affirmative Action*, 11 BERKELEY WOMEN'S L.J. 182, 188 (1996) (noting that in 1990, Latinos in California held 9.56% of available management jobs while blacks held only 5.1%).

68. *See* Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CAL. L. REV. 1395, 1407 (1997) (noting that the United States' population is 9.5% Hispanic and 11.8% black).

69. *See* Rachel F. Moran, *What if Latinos Really Mattered in the Public Policy Debate?*, 85 CAL. L. REV. 1315, 1316 & n.4 (1997) (discussing Latinos' displacement of blacks as the largest minority group in some areas, such as Arizona, California, Colorado, Hawaii, Idaho, South Dakota, Texas, Utah, Vermont, Washington, and Wyoming).

70. *See* Chang & Aoki, *supra* note 68, at 1423 (presenting the ethnic make-up of Monterrey Park, California, where Asians and Pacific Islanders constitute 57.5% of the population).

71. On the recent "whiteness movement," see CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado and Jean Stefancic eds., 1997).

although the narratives are so familiar that they strike both the speaker and the listener not as narratives at all, but the truth. One narrative that may be familiar to readers is that of white innocence, often counterposed against the narrative of black imposition. Thomas Ross has identified and written about these narratives in connection with the debate over affirmative action.[72] Another is what I might call white fatalism: "Oh, I'd never challenge that white cop, even though I know he's lying. It would just inflame the white jury."[73] Terms and narratives such as color blindness and merit also contain a white-coded dimension almost impossible to escape once one analyzes their meanings and deployment.[74] It will be helpful to consider two further narratives whose racial character—and white valence—are less obvious: free speech and antidiversity. These narratives often appear in debates about hate speech and affirmative action in higher education, where their white race-coding is rarely perceived or challenged.

1. Free Speech.—In the controversy over hate speech and crimes, and to some degree that over-regulation of sexual harassment and pornography, a free-speech narrative is often deployed in a way that advances and encodes white privilege, while cutting short discussion of countervailing equality values.[75] For example, opinions striking down campus hate speech codes, which are used to deter racist speech and insults at universities, often proceed in strict First Amendment terms,[76] as though these cases were not about race and racism but rather the free speech right of the bigot. Justice Scalia's opinion in *R.A.V. v. St. Paul, Minnesota*[77] illustrates this exposition of one narrative at the expense of the other—he

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72. *See* Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990); *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1 (1990).

73. White fatalism recognizes and condemns actors like the lying police officer—but nevertheless gives in to them as inevitable. On the general presumption of white truthfulness and validity, see generally STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (1996); on the way this plays out in police encounters, see KATHERYN K. RUSSELL, THE COLOR OF CRIME 33-46 (1998) (examining how different races have divergent perspectives concerning police abuse).

74. *See* Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1718, 1718-19 (1995) (arguing that merit functions both as a justification to the socially elite class for its position and as a "resource attractor," allowing members of the socially elite class "to purchase more increments of merit for themselves and their children"); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 2-3 (1991) (book review) ("A color-blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans.").

75. *See* Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 346-48 (1991) (discussing these two opposing narratives).

76. *See, e.g.*, UWM Post, Inc. v. Board of Regents of Univ. of Wis. Sys., 774 F. Supp. 1163 (E.D. Wis. 1991); Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989).

77. 505 U.S. 377 (1992).

expounds at length on the free speech aspects of the controversy,[78] while devoting scant attention to the interest of the black family in not having a cross burned on its lawn late at night.[79] The narrative of racial terrorism is virtually missing from this opinion, as it is in the campus hate speech cases.[80] It is as though an unspoken meta-narrative told judges: "the First Amendment is *our* narrative; emphasize that one and the case will come out the way we want." Interestingly, a tort approach to remedying hate speech works better.[81] Many plaintiffs of color have been awarded tort damages for insulting speech under such doctrines as intentional infliction of emotional distress, defamation, assault, and battery.[82] Perhaps tort law has a more egalitarian, populist cast that enables judges to redress more easily the dimension of racial oppression and outrage these cases present. Tort laws, unlike campus speech codes, apply across-the-board, so that a plaintiff of any color subjected to intentional infliction of emotional distress, for example, will be able to sue for damages.

2. Remedies for Historic Racial Wrongs: The Case of Affirmative Action.—Consider how whiteness plays an unexpressed but powerful role in discussion of affirmative action remedies. In a familiar story, opponents of affirmative action argue that racial preferences (1) stigmatize their beneficiaries and (2) are unfair to innocent whites, constituting reverse discrimination and legitimizing the role of groups.[83] To see the racial coding and white valence in this narrative, consider a rarely broached counternarrative that addresses the same concerns. That counternarrative holds that racial *isolation* is at least as great a problem for the nonwhite professional as racial stigma, and that fairness and social utility cut in favor of affirmative action.

According to economic theory, the quality of goods and services ought to go up, not down, when previously excluded groups are granted entry

78. *See id.* at 391, 391-92 (asserting that the St. Paul ordinance banning hate speech violates the First Amendment by endorsing viewpoint discrimination, "impos[ing] special prohibitions on those speakers who express views on disfavored subjects").

79. *See id.* at 395 (favoring protections against "the danger of censorship" over the argument that the St. Paul ordinance "ensure[d] the basic human rights of members of groups that have historically been subjected to discrimination, including the right to live in peace where they wish").

80. *See UMW Post*, 774 F. Supp. at 1172 (declaring the University of Wisconsin's regulation of hate speech unconstitutional because it was not limited to hate speech that "tend[ed] to incite violent reaction"); *Doe*, 721 F. Supp. at 868 ("While the Court is sympathetic to the University's obligation to ensure equal education opportunities for all of its students, such efforts must not be at the expense of free speech.").

81. *See* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 146-49 (1982) (hypothesizing that creation of a tort action to combat hate speech may reduce the use of racial insults as a result of societal desire to conform to the law).

82. *See id.* at 150-65.

83. *See* Delgado, *supra* note 74, at 1719-20, 1728-29.

into schools and workplaces—something a recent book by two former university presidents has documented[84]—while the opposite should happen when the majority group favors its own through old-boy networks, nepotism, and slanted standardized tests.[85] A prime example of the old-boy network working against economic theory is Harvard and Yale's admission preference for "legacy" candidates.[86]

This counternarrative is potentially as potent and grounded in "the truth" as the one conservatives deploy (stigma, incompetence), yet one hears it only rarely. Why? Because the more common narrative resonates with the way whites choose to see the world and comforts them. In this sense, the more common narrative is a white narrative. Alfieri and those working to understand racial narratives must not ignore white narratives. Indeed, excessive preoccupation with the way people of color are spoken of and constructed, without similar attention to the narratives of unjustified white privilege and oppression, can end up harming minority groups.

III. How Careless and One-Sided Rhetorical Analysis Can Injure Oppressed Groups.

My analysis so far suggests that the rhetorical analysis of race is capable of doing a great deal of good, but needs to be expanded beyond its current narrow compass. What will happen if it does not, continuing to examine only narratives of black oppression in the context of criminal race trials? To see how monocular vision can end up harming a group, consider what happened to Mexican Americans at two points in their history.

From 1890 to 1920, millions of poor immigrants from southern and eastern Europe came to the U.S. to work in factories and on farms.[87] Within a short time, a small army of social workers descended on them, establishing settlement houses and schools.[88] The social workers taught the immigrants useful skills, such as speaking English, learning how to fill out a job application, personal hygiene, how to dress, and American

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84. *See* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER 12 (1998) (listing the benefits of minority participation in businesses and professions, including increased recruitment of minority customers and healthier corporations).

85. *See* RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE (1994) (reviewing purported differences in job performance between affirmative action hirees and non-affirmative-action hirees in teaching and law enforcement).

86. *See* John D. Lamb, *The Real Affirmative Action Babies: Legacy Preferences at Harvard and Yale*, 26 COLUM. J.L. & SOC. PROBS. 491 (1993) and Deborah Brandt, *Affirmative Action for Whites at the University of Wisconsin*, J. BLACKS IN HIGHER EDUC., Winter 1998/99, at 127.

87. *See* Joe R. Feagin, *Old Poison in New Bottles: The Deep Roots of Modern Nativism*, *in* CRITICAL WHITE STUDIES 348, 349-50 (Richard Delgado & Jean Stefancic eds., 1997).

88. *See* Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61, 70-71 (1996).

cuisine—even though the new citizens had perfectly adequate recipes and diets.[89]

When the wave of immigration ended in the early 1920s, the social worker industry suddenly was without work. Accordingly, schools of social work rapidly switched their attention to the domestic Latino population, designating it the new problem group.[90] Books, master's, and Ph.D. dissertations on Mexicans proliferated, and America learned, for the first time, that it had a "Mexican problem."[91] A similar story played itself out in the Southwest a few decades later. A liberal Colorado mayor, Quigg Newton, concerned about racism against Latinos in the Denver area, convened a blue-ribbon commission that included community leaders and academics.[92] The commission issued a number of reports that began by condemning social discrimination against the Latino population of Denver, but also went on to insist that the Chicanos had themselves to blame for part of their problem.[93] Learned sociologists wrote that the Mexicans were afflicted by fatalism, lack of achievement orientation, and a "mañana" attitude.[94] Chicano families did too little to keep their children clean, well-clothed, and motivated to succeed in school.[95] In a short time, Chicanos went from being a small, hard-working, largely invisible minority group, trying desperately to scratch out a living in a hostile land, to a "problem group"—much worse off as a result of the Mayor's well-meaning efforts. A wide-ranging study of the problems of all minority groups of color, or of all poor farm-workers, might have avoided this assault.

IV. Conclusion

Latinos are being short-changed by the judicial system—even by their own lawyers—because racist treatment and deployment of racialized narratives against them are often not recognized as such. Focusing on the racialization of one group, without similar attention to that of others, may

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89. *See id.* at 70.

90. *See* Cary McWilliams, *The Mexican Problem*, *in* LATINO/A CONDITION, *supra* note 54, at 196.

91. *See id.* at 196-97.

92. *See* Delgado & Stefancic, *supra* note 62; Tom I. Romero II, No More Mañana for the Queen: The Commission on Human Relations, Mexican Americans and Racial Consciousness in Denver, 1947-1965, at 5 (unpublished manuscript, on file with the *Texas Law Review*).

93. *See* DENVER AREA WELFARE COUNCIL INC., THE SPANISH-AMERICAN POPULATION IN DENVER: AN EXPOLORATORY SURVERY 36-38, 106 (1950) (attributing the school drop-out rates among Latino children to a cultural view that "the future is of little importance").

94. *See* R. W. ROSKELLEY, WHEN DIFFERENT CULTURES MEET: AN ANALYSIS AND INTERPRETATION OF SOME PROBLEMS ARISING WHEN PEOPLE OF SPANISH AND NORTH EUROPEAN CULTURES ATTEMPT TO LIVE TOGETHER 25-35 (1949).

95. *See id.* at 23, 32.

end up harming both groups. Achieving whatever clarity is possible on the way race operates to constrain choices and limit trial possibilities benefits the legal system by opening it up to change and reform. It also helps guard against what Jean Stefancic and I have called "serious moral error."[96]

Alfieri's inquiry needs to expand to include civil trials and groups other than African Americans. It must also attend to narratives of whiteness, white privilege, and unjustified white superiority. As Adrienne Davis has put it, racism is like a hydra-headed monster.[97] One head is outright oppression of people of color; another is white privilege. If we scrupulously confront ill treatment of the first kind, but allow the second to continue unchecked, the system of white-over-brown supremacy will remain roughly intact. Trial outcomes and the racial composition of our jails will be the same as before. Racism is a system of interlocking privileges and oppression, all of which must be addressed systematically and simultaneously, and in all their aspects, or progress will be halting and slow.

96. Delgado & Stefancic, *supra* note 16, at 1932.

97. *See* Adrienne D. Davis, *Identity Notes Part One: Playing in the Light*, 45 AM. U. L. REV. 695, 709 n.51 (1996).