

9-1-1987

Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism

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Recommended Citation

Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 U. Miami L. Rev. 127 (1987)

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Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism

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I. WINDOWS AND MIRRORS

Buzzers are big in New York City. Favored particularly by smaller stores and boutiques, merchants throughout the city have installed them as screening devices to reduce the incidence of robbery. When the buzzer sounds, if the face at the door looks "desirable," the door is unlocked. If the face is that of an "undesirable," the door stays locked. Predictably, the issue of undesirability has revealed itself to be primarily a racial determination. Although the buzzer system was controversial at first, even civil rights organizations have backed down in the face of arguments that the system is a "necessary evil,"¹ that it is a "mere inconvenience" compared to the risks of being murdered,² that discrimination is not as bad as assault,³ and that in any event, it is not *all* blacks who are barred, just "17-year-old black males wearing running shoes and hooded sweatshirts."⁴

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1. Gross, *When 'By Appointment' Means Keep Out*, N.Y. Times, Dec. 17, 1986, at B1, col. 3.

2. *Id.*

3. Letter to the Editor from Michael Levin and Marguerita Levin, N.Y. Times, Jan. 11, 1987, at E32, col. 3 [hereinafter Letter to the Editor].

4. *Id.*

Two Saturdays before Christmas, I saw a sweater that I wanted to purchase for my mother. I pressed my brown face to the store window and my finger to the buzzer, seeking admittance. A narrow-eyed white youth who looked barely seventeen, wearing tennis sneakers and feasting on bubble gum, glared at me, evaluating me for signs that would pit me against the limits of his social understanding. After about five seconds, he mouthed, "We're closed," and blew pink rubber at me. It was one o'clock in the afternoon. There were several white people in the store who appeared to be shopping for things for *their* mothers.

I was enraged. At that moment I literally wanted to break all of the windows in the store and *take* lots of sweaters for my mother. In the flicker of his judgmental grey eyes, that saleschild had reduced my brightly sentimental, joy-to-the-world, pre-Christmas spree to a shambles. He had snuffed my sense of humanitarian catholicity, and there was nothing I could do to snuff his, without simply making a spectacle of myself.

I am still struck by the structure of power that drove me into such a blizzard of rage. There was almost nothing I could do, short of physically intruding upon him, that would humiliate him the way he humiliated me. No words, no gestures, no prejudices of my own would make a bit of difference to him. His refusal to let me into the store was an outward manifestation of his never having let someone like me into the realm of his reality. He had no connection, no compassion, no remorse, no reference to me, and no desire to acknowledge me even at the estranged level of arm's length transactor. He saw me only as one who would take his money and therefore could not conceive that I was there to give him money.

In this weird ontological imbalance, I realized that buying something in that store was like bestowing a gift: the gift of my commerce. In the wake of my outrage, I wanted to take back the gift of my appreciation, which my peering in the window must have appeared to be. I wanted to take it back in the form of unappreciation, disrespect, and defilement. I wanted to work so hard at wishing he could feel what I felt that he would never again mistake my *hatred* for some sort of plaintive wish to be included. I was quite willing to disenfranchise myself in the heat of my need to revoke the flattery of my purchasing power. I was willing to boycott this particular store, random white-owned businesses, and anyone who blew bubble gum in my face again.

My rage was admittedly diffuse, even self-destructive, but it was symmetrical. The perhaps loose-ended but utter propriety of that rage is no doubt lost not just to the young man who barred me, but to

those who appreciate my being barred only as an abstract precaution, and who approve of those who would bar, even as they deny that *they* would bar *me*.

The violence of my desire to have burst into that store is probably quite apparent to the reader. I wonder if the violence and the exclusionary hatred are equally apparent in the repeated public urging that blacks put themselves in the shoes of white store owners,⁵ and that, in effect, blacks look into the mirror of frightened whites faces to the reality of their undesirability; and that then blacks would “just as surely conclude that [they] would not let [themselves] in under similar circumstances.”⁶

This article will consider how the rhetoric of increased privatization, in response to racial issues, functions as the rationalizing agent of public unaccountability, and ultimately, irresponsibility. My emphasis will be more on the process of exclusion than on reiterating the substantive literature of silenced voices, a body as great as the history of this nation. I will analyze the language of lawmakers, officials, and the public in order to present racial discrimination—so pervasive yet so hard to prosecute, so active yet so unactionable—in a new light. My concern is the need for new tools with which to confront issues such as discriminatory prosecution, prejudice as a silent force in jury reallocation of the burden of proof, the adequacy of an evidentiary system in which relevance and materiality are subjective reflections of self-interested values, private assumptions about race and class, and right and wrong as forces in the allocation and distribution of the resources for survival. To this end, I will examine two cases: the death of Eleanor Bumpurs, an elderly black woman shot by police in the Bronx, and the beating of three black men by white teenagers in the Howard Beach section of Queens.

The second purpose of this article is to examine racism as a crime, an offense so deeply painful and assaultive as to constitute something I call “spirit-murder.” Society is only beginning to recognize that racism is as devastating, as costly, and as psychically obliterating as robbery or assault; indeed they are often the same. Racism resembles other offenses against humanity whose structures are so deeply embedded in culture as to prove extremely resistant to being recognized as forms of oppression.⁷ It can be as difficult to prove as

5. Gross, *supra* note 1.

6. Letter to the Editor, *supra* note 3. The fact that some blacks might agree with the store owners, shows that some of us have learned too well the lessons of privatized self-hatred and rationalized away the fullness of our public, participatory selves.

7. That the framework of society dictates the nature of an offense is not a recent phenomenon:

child abuse or rape, where the victim is forced to convince others that he or she was not at fault, or that the perpetrator was not just "playing around." As in rape cases, victims of racism must prove that they did not distort the circumstances, misunderstand the intent, or even enjoy it.

II. CRIMES WITHOUT PASSION

A. *Eleanor Bumpurs and the Language of Lawmakers*

On October 29, 1984, Eleanor Bumpurs, a 270-pound, arthritic, sixty-seven year old woman, was shot to death while resisting eviction from her apartment in the Bronx. She was \$98.85, or one month, behind in her rent.⁸ New York City Mayor Ed Koch and Police Commissioner Benjamin Ward described the struggle preceding her demise as involving two officers with plastic shields, one officer with a restraining hook, another officer with a shotgun, and at least one supervising officer. All of the officers also carried service revolvers. According to Commissioner Ward, during the course of the attempted eviction Mrs. Bumpurs escaped from the restraining hook

Radical criminologists have traditionally argued that the definition of offenses is historically contingent, a function of the needs of the dominant class at any point in history. Many activities that seem totally unexceptionable on their face (for instance, hunting in England on medieval common grounds) turns into the capital offense of poaching as the ascending bourgeoisie wants to consolidate its control over land as a commercial factor of production and to proletarianize the peasantry by denying it sources of sustenance other than wages for hired work. . . . At the same time, as activities harmless to all but the rulers are outlawed, obviously harm-causing activities that are routinely performed by the dominant classes (e.g., spewing carcinogens into the air and water) tend to be noncriminal or, even when criminalized (e.g., white-collar crimes like embezzlement and price-fixing), punished trivially and rarely.

Kelman, *The Origins of Crime and Criminal Violence*, in *THE POLITICS OF LAW* 218 (D. Kairys ed. 1982).

8. The tragedy of Eleanor Bumpurs was put in an ironic perspective by one citizen who asserted:

What has not been made clear in discussion relating to this case is that Mrs. Bumpurs was evicted on a default judgment of possession and warrant of eviction issued without any hearing of any kind. She was never personally served because, allegedly, she was not at home on the two occasions the process server says he called. Since Mrs. Bumpurs did not appear in court to answer the petition for her eviction, the default judgment for possession and warrant for her eviction were signed by the Civil Court judge solely on the papers submitted. From what we know now, . . . there is serious doubt about the validity of those papers.

Only last year, in announcing the indictments of five process servers, the Attorney General and the New York City Departments of Consumer Affairs and Investigation issued a report on service of process in Civil Court, finding that at least one-third of all default judgments were based on perjurious affidavits. . . . N.Y. Times, Mar. 19, 1987, at A26, col. 4.

twice and wielded a knife that Commissioner Ward says was "bent" on one of the plastic shields. At some point, Officer Stephen Sullivan, the officer positioned farthest away from her, aimed and fired his shotgun. It is alleged that the blast removed half of her hand, so that, according to the Bronx District Attorney's Office, "[I]t was anatomically impossible for her to hold the knife."⁹ The officer pumped his gun and shot again, making his mark completely the second time around.¹⁰

In the two and one-half year wake of this terrible incident, controversy raged as to whether Mrs. Bumpurs ought to have brandished a knife and whether the officer ought to have fired his gun. In February 1987, a New York Supreme Court justice found Officer Sullivan not guilty of manslaughter.¹¹ The case centered on a very narrow issue of language pitted against circumstance. District Attorney Mario Merola described the case as follows: "*Obviously*, one shot would have been justified. But if that shot took off part of her hand and rendered her defenseless, whether there was any need for a second shot, which killed her, that's the whole issue of whether you have reasonable force or excessive force."¹² My intention in the following analysis is to underscore the significant task facing judges and lawyers in undoing institutional descriptions of what is "obvious" and what is not, and in resisting the general predigestion of evidence for jury consumption.

Shortly after Mr. Merola's statement, Officer Sullivan's attorney, Bruce Smiry, expressed eagerness to try the case before a jury.¹³ Following the heavily publicized attack in Howard Beach, however, he favored a bench trial. In explaining his decision to request a nonjury trial, he stated:

I think a judge will be much more likely than a jury to understand the defense that the shooting was justified. . . . The average lay person might find it difficult to understand why the police were there in the first place, and why a shotgun was employed. . . . Because of the climate now in the city, I don't want people perceiving this as a racial case.¹⁴

Since 1984, Mayor Koch, Commissioner Ward, and a host of

9. N.Y. Times, Jan. 12, 1987, at B2, col. 5.

10. N.Y. Times, Feb. 27, 1987, at B1, col. 2.

11. The case was not brought to trial until January, 1987. Initially, a grand jury indicted Officer Sullivan for reckless manslaughter. Two lower courts rejected the indictment, but in 1986, the Court of Appeals of New York reversed and ordered a trial regarding the second shot. *Id.*

12. N.Y. Times, Nov. 26, 1986, at B6, col. 3 (emphasis added).

13. *Id.*

14. N.Y. Times, Jan. 12, 1987, at B2, col. 3.

other city officials repeatedly have described the shooting of Mrs. Bumpurs as completely legal.¹⁵ At the same time, Commissioner Ward has admitted publicly that Mrs. Bumpurs should not have died. Mayor Koch admitted that her death was the result of "a chain of mistakes and circumstances" that came together in the worst possible way, with the worst possible circumstances.¹⁶ Commissioner Ward admitted that the officers could have waited for Mrs. Bumpurs to calm down, and that they could have used teargas or mace instead of gunfire. According to Commissioner Ward, however, these observations are made with hindsight. As to whether this shooting of a black woman by a white police officer had racial overtones, he stated that he had "no evidence of racism."¹⁷ Commissioner Ward pointed out that he is sworn to uphold the law, which is "inconsistent with treating blacks differently,"¹⁸ and that the shooting was legal because it was within the code of police ethics.¹⁹ Finally, city officials have resisted criticism of the police department's handling of the incident by remarking that "outsiders" do not know all of the facts and do not understand the pressure under which officers labor.

The root of the word "legal" is the Latin word *lex*, which means law in a fairly concrete sense—law as we understand it when we refer to written law, codes, and systems of obedience.²⁰ The word *lex* does not include the more abstract, ethical dimension of law that contemplates the purposes of rules and their effective implementation. This latter meaning is contained in the Latin word *jus*, from which we derive the word "justice."²¹ This semantic distinction is not insignificant. The word of law, whether statutory or judicial, is a subcategory of the underlying social motives and beliefs from which it is born. It is the technical embodiment of attempts to order society according to a consensus of ideals. When society loses sight of those ideals and grants obeisance to words alone, law becomes sterile and formalistic; *lex* is applied without *jus* and is therefore unjust. The result is com-

15. Remarks of Benjamin Ward, Police Commissioner of New York City, at City University of New York (CUNY) Law School (Nov. 1985) (audiotape on file at CUNY) [hereinafter Ward].

16. N.Y. Times, Nov. 21, 1984, at B3, col. 1.

17. *Id.* Against this, it is interesting to note that in New York City, where blacks and latinos account for close to half the population, "86.8% of police officers are white; 8.6% are black; 4.5% Latino; and 0.1% Asian or American Indian." Fact Sheets on Institutional Racism, Council on Interracial Books for Children, (January 1982).

18. Ward, *supra* note 15.

19. Raab, *Ward Defends Police Actions in Bronx Death*, N.Y. Times, Nov. 3, 1984, § 1, at 27, col. 1.

20. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 682 (1983).

21. *Id.* at 655.

pliance with the letter of the law, but not the spirit. A sort of punitive literalism ensues that leads to a high degree of thoughtless conformity. This literalism has, as one of its primary underlying values, order—whose ultimate goal may be justice, but whose immediate end is the ordering of behavior. Living solely by the letter of the law means living without spirit; one can do anything as long as it comports with the law in a technical sense. The cynicism or rebelliousness that infects one's spirit, and the enthusiasm or dissatisfaction with which one conforms is unimportant. Furthermore, this compliance is arbitrary; it is inconsistent with the will of the conformer. The law becomes a battleground of wills. The extent to which technical legalism obfuscates and undermines the human motivations that generate our justice system is the real extent to which we as human beings are disenfranchised.

Cultural needs and ideals change with the momentum of time; redefining our laws in keeping with the spirit of cultural flux keeps society alive and humane. In the *Bumpurs* case, the words of the law called for nonlethal alternatives first, but allowed some officer discretion in determining which situations are so immediately life endangering as to require the use of deadly force.²² This discretionary area was presumably the basis for the claim that Officer Sullivan acted legally. The law as written permitted shooting in general, and therefore, by extension of the city's interpretation of this law, it would be impossible for a police officer ever to shoot someone in a specifically objectionable way.

22. Laws requiring police officers to use nonlethal alternatives are prevalent in this country.

[N]ationwide, a majority of the states have specific provisions governing the use of deadly force. Approximately twenty-four states have codified the common-law 'fleeing felon' rule under which a law enforcement officer is justified in using deadly force in order to arrest any person suspected of committing any felony. Primarily because of the considerable discretion inherent in the choice to use deadly force, provisions of the Model Penal Code have called for state statutes requiring the decision to use deadly force be based on the concern for immediate public safety rather than the fact that a felony, in name only, has been committed.

As a general proposition, efforts to control the use of deadly force have not fared too well over time. For example, the Missouri legislature rejected the suggestion of its advisory committee to limit the use of deadly force when he or she 'reasonably believes' such force is necessary. Of the states evaluated, over half dealt with the issue of the use of force, but few adhered to the standard of the Model Penal Code concerning the police decision to use force. The approach of the legislatures evaluated has to be described as one of maintaining extensive discretion in the use of force—not of limiting it.

Williams, *The Politics of Police Discretion*, in *DISCRETION, JUSTICE, AND DEMOCRACY* 23 (C. Pinkele & W. Louthan eds. 1985).

If our laws are thus piano-wired on the exclusive validity of literalism, if they are picked clean of their spirit, then society risks heightened irresponsibility for the consequences of abominable actions. Accordingly, Jonathan Swift's description of lawyers weirdly and ironically comes to life: "[T]here was a Society of Men among us, bred up from their Youth in the Art of proving by words multiplied for the Purpose, that White is Black and Black is White, according as they are paid. To this Society all the rest of the People are Slaves."²³ We also risk subjecting ourselves to such absurdly empty rhetoric as Commissioner Ward's comments to the effect that both Mrs. Bumpurs' death and racism were unfortunate, while stating "but the law says"²⁴ Commissioner Ward's sentiments might as well read: "The law says . . . and therefore the death was unfortunate but irremediable; the law says . . . and therefore there is little that can be done about racism." The law thus becomes a shield behind which to avoid responsibility for the human repercussions of both governmental and publicly harmful private activity.²⁵

A related issue is the degree to which much of the criticism of the police department's handling of this case was devalued as "noisy" or excessively emotional. It is as though passionate protest were a separate crime, a rudeness of such dimension as to defeat altogether any legitimacy of content. We as lawyers are taught from the moment we enter law school to temper our emotionalism and quash our idealism. We are taught that heartfelt instincts subvert the law and defeat the security of a well-ordered civilization, whereas faithful adherence to the word of law, to stare decisis and clearly stated authority, would as a matter of course lead to a bright, clear world like the Land of Oz, in which those heartfelt instincts would be preserved. Form is exalted over substance, and cool rationales over heated feelings. But we should not be ruled exclusively by the cool formality of language or by emotions. We must be ruled by our complete selves, by the intellectual and emotional content of our words. Governmental representatives must hear the full range of legitimate concerns, no matter how indelicately expressed or painful they may be to hear.

23. J. SWIFT, *GULLIVER'S TRAVELS* (1726).

24. Ward, *supra* note 15.

25. "Th[e] process of allowing the structures we ourselves have built to mediate relations among us so as to make us see ourselves as performing abstract roles in a play that is produced by no human agency is what is usually called . . . reification. It is a way people have of manufacturing necessity: they build structures, then act as if (and genuinely come to believe that) the structures they have built are determined by history, human nature, economic law." Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW*, *supra* note 7, at 289; see also UNITED STATES COMMISSION ON CIVIL RIGHTS, *WHO IS GUARDING THE GUARDIANS? A REPORT ON POLICE PRACTICES* (1981).

But undue literalism is only one type of sleight of tongue in the attainment of meaningless dialogue. Mayor Koch, Commissioner Ward, and Officer Sullivan's defense attorneys have used overgeneralization as an effective rhetorical complement to their avoidance of the issues. For example, allegations that the killing was illegal and unnecessary, and should therefore be prosecuted, were met with responses such as, "The laws permit police officers to shoot people."²⁶ "As long as police officers have guns, there will be unfortunate deaths."²⁷ "The conviction rate in cases like this is very low."²⁸ The observation that teargas would have been an effective alternative to shooting Mrs. Bumpurs drew the dismissive reply that "there were lots of things they *could* have done."²⁹

Privatization of response as a justification for public irresponsibility is a version of the same game. Honed to perfection by President Reagan, this version holds up the private self as indistinguishable from the public "duty and power laden" self. Public officials respond to commentary by the public and the media as though it were meant to hurt private, vulnerable feelings. Trying to hold a public official accountable while not hurting his feelings is a skill the acquisition of which would consume time better spent on almost any conceivable task. Thus, when Commissioner Ward was asked if the internal review board planned to discipline Officer Sullivan, many seemed disposed to accept his response that while he was personally very sorry she had died, he could not understand why the media was focusing on him so much. "How many other police commissioners," he asked repeatedly, "have gotten as much attention as I have?"³⁰

Finally, a most cruel form of semantic slipperiness infused Mrs. Bumpurs' death from the beginning. It is called victim responsibility.³¹ It is the least responsive form of dialogue, yet apparently the

26. Raab, *supra* note 19.

27. *Id.*; Ward, *supra* note 15.

28. This was part of the basis on which two lower courts had vacated the 1985 grand jury indictment of Officer Sullivan, before it finally was reinstated in November, 1986, and the basis on which the Police Benevolent Association protested Officer Sullivan's being tried at all. See N.Y. Times, Nov. 26, 1986, at B1, col. 5.

29. Ward, *supra* note 15; see also N.Y. Times, Nov. 21, 1984, at B3, col. 1 (Mayor Koch's description of the Bumpurs incident).

30. Ward was the first black commissioner in the history of the New York City Police Department. Compared to other responsible officials, he was subjected to a glaringly excessive degree of scrutiny.

31. N.Y. Times, Jan. 13, 1987, at B1, col. 4. The hypothesized failure of Mrs. Bumpurs' children to look after her actually became a major point in Officer Sullivan's defense attorney's opening statement and closing argument. Ironically, "a former employee of the Housing Authority said that, three weeks before Mrs. Bumpurs' death . . . her relatives tried to make a payment of about . . . half of the rent she owed . . . but the former Authority employee, Joan

easiest to accept as legitimate.

All these words, from Commissioner Ward, from the Mayor's office, from the media, and from the public generally, have rumbled and resounded with the *sounds* of discourse. We want to believe that their symmetrical, pleasing structure is the equivalent of discourse. If we are not careful, we will hypnotize ourselves into believing that it *is* discourse.

B. *Howard Beach and the "Private Property" of Neighborhood*

In the early morning hours of December 20, 1986, three young black men left their stalled car on Cross Bay Parkway, in the New York City borough of Queens, and went to look for help. They walked into the neighborhood of Howard Beach, entered a pizzeria, ordered pizzas, and sat down to eat. An anonymous caller to the police reported their presence as "black troublemakers." A patrol car came, found no trouble, and left. After the young men had eaten, they left the pizzeria and were immediately surrounded by a group of eight to ten white teenagers who taunted them with racial epithets. The white youths chased the black men for about three miles, catching them at several points and beating them severely. One of the black men died as a result of being struck by a car as he tried to flee across a highway. Another suffered permanent blindness in one eye.³²

In the extremely heated public controversy that ensued, as much attention centered on the community of Howard Beach as on the assailants themselves. A veritable Greek chorus formed, comprised of the defendants' lawyers and resident after resident after resident of Howard Beach, all repeating and repeating and repeating that the mere presence of three black men in that part of town at that time of night was reason enough to drive them out. "They had to be starting trouble."³³ "We're a strictly white neighborhood."³⁴ "What were they doing here in the first place?"³⁵

Alfredson, . . . who was a bookkeeper, said she turned down the payment because she was forbidden to accept partial payment without the written consent of a supervisor." *Id.*

32. N.Y. Times, Jan. 6, 1987, at B1, col. 4.

33. N.Y. Times, Dec. 23, 1986, at B4, col. 6.

34. *Id.*

35. N.Y. Times, Dec. 29, 1986, at B3, col. 3. The pinnacle of legitimacy to which this particular question arose is, to me, the most frightening aspect of this case. For example, when Mayor Koch was asked why he thought the young men were walking around Howard Beach, he dignified the question with the following answer: "I don't know . . . and neither did the 12 or so people who beat them. Because they didn't ask them. They didn't talk to them." *Id.* One is left to speculate that if the attackers, these self-annointed gatekeepers, had asked and gotten an answer like "none of your business" they then would have been entitled to beat and attack in the fullness of public spirited zeal. One wonders further, what explanation really

Although the immensely segregationist instincts behind such statements may be fairly evident, it is worth making explicit some of the presuppositions behind such ululations.

Everyone who lives here is white.
 No black could live here.
 No one here has a black friend.
 No white would employ a black here.
 No black is permitted to shop here.
 No black is ever up to any good.

These presuppositions themselves are premised on lethal philosophies of life.

1. "IT'S BETTER TO BE SAFE THAN SORRY"

"Are we supposed to stand around and do nothing while these blacks come into our area and rob us?"³⁶ one woman asked a reporter in the wake of the Howard Beach attack. A twenty year old, who had lived in Howard Beach all of his life, said, "We ain't racial. . . . We just don't want to get robbed."³⁷ The hidden implication of these statements is that to be safe is not to be sorry, and that to be safe is to be white and to be sorry is to be associated with blacks. Safety and sorrow, which are inherently alterable and random, are linked to inalterable essences. The expectation that uncertain conditions are really immutable is a formula for frustration; it is a belief that feeds a sense of powerlessness. The rigid determinism of placing in the disjunctive things that are not in fact disjunctive is a set up for betrayal by the very nature of reality. The national repetition that white neighborhoods are safe and blacks bring sorrow is an incantation of powerlessness. And, as with the upside-down logic of all irrational incantations, it imports a concept of white safety that almost necessarily endangers the lives as well as the rights of blacks.

It is also an incantation of innocence and guilt, much related to incantations that affirmative action programs allow presumably "guilty" blacks to displace "innocent" whites.³⁸ (Even assuming that "innocent whites" were being displaced by blacks, does that make

would have been a sufficient "open sesame" to allow young black males to continue unmolested passage into the sanctified byways of Howard Beach?

36. *Village Voice*, Jan. 6, 1987, at 16, col. 1.

37. *Id.*

38. Professor Richard Delgado has written extensively on how such analyses are used to undercut affirmative action:

A 'we-they' analysis . . . justifies a disadvantage that *we* (the majority) want to impose on ourselves to favor *them* (the minority). This type of thinking, however, leaves the choice of remedy and the time frame for that remedy in the hands of the majority; it converts affirmative action into a benefit, not a right. It neglects

blacks less innocent in the pursuit of education and jobs? If anything, are not blacks *more* innocent in the scheme of discrimination?) In fact, in the wake of the Howard Beach incident, the police and the press rushed to serve the public's interest in the victims' unsavory "guilty" dispositions. They overlook the fact that racial slurs and attacks "objectif[y] people—the incident could have happened to any black person who was there at that time and place. This is the crucial aspect of the Howard Beach affair that is now being muddied in the media. Bringing up [defendants' past arrest records] is another way of saying, 'He was a criminal who deserved it.'"³⁹ Thus, the game of victim responsibility described above is itself a slave to society's stereotypes of good and evil.

It does no good, however, to turn race issues into contests for some Holy Grail of innocence. In my youth, segregation and antimiscegenation laws were still on the books in many states. During the lifetimes of my parents and grandparents, and for several hundred years before them, laws prohibited blacks from owning property, voting, and learning to read or write. Blacks were, by constitutional mandate, outlawed from the hopeful, loving expectations that being treated as a whole, rather than three-fifths of a human being can bring. When every resource of a wealthy nation is put to such destructive ends, it will take more than a few generations to mop up the mess.⁴⁰

the possibility that a disadvantaged minority may have a moral claim to a particular remedy.

The inner-circle commentators rarely deal with issues of guilt and reparation. When they do, it is often to attach responsibility to a scapegoat, someone of another time or place, and almost certainly of another social class than that of the writer. These writers tend to focus on intentional and determinable *acts* of discrimination inflicted on the victim by some perpetrator and ignore the more pervasive and invidious forms of discriminatory *conditions* inherent in our society. This 'perpetrator' perspective deflects attention from the victim-class, the Blacks, Native Americans, Chicanos, and Puerto Ricans who lead blighted lives for reasons directly traceable to social and institutional injustice.

Delgado, *The Imperial Scholar*, 132 U. PA. L. REV. 561, 570-71 (1984).

39. Reid, *Visible Man*, Village Voice, Jan. 6, 1987, at 15, col. 3.

40. In an interview with Alton Maddox and Vernon Mason, attorneys for the victims of the Howard Beach attack, a reporter asked if "too much" was being made of this case:

Maddox: We've had too many murders, so you can never make too much out of a case when you've seen too many other similar murders. What happens is that the rage expands and it continues to expand as the establishment continues to whitewash these cases. . . .

Mason: I think it is a tribute in a commemorative way, almost a memorial way, that we have our dead who spiritually are rising up from their graves now—Willie Turks, Michael Stewart, Eleanor Bumpurs, Darryl Dodson [all New Yorkers killed in recent white-on-black violence] and so many other people over

We have all inherited that legacy, whether new to this world or new to this country. It survives as powerfully and invisibly reinforcing structures of thought, language, and law. Thus, generalized notions of innocence and guilt have little place in the struggle for transcendence; there is no blame among the living for the dimension of this historic crime, this national tragedy.⁴¹ There is, however, responsibility for never forgetting one another's histories, and for making real the psychic obliteration which lives on as a factor in shaping relations, not just between blacks and whites,⁴² or blacks and blacks,⁴³ but also between whites and whites. Whites must consider how much this history has projected onto blacks the blame for all criminality, and for all of society's ills. It has become the means for keeping white criminality invisible.⁴⁴

2. "DISCRIMINATION DOESN'T HURT AS MUCH AS BEING ASSAULTED" OR "A PREJUDICED SOCIETY IS BETTER THAN A VIOLENT SOCIETY"

The attempt to split bias from violence has been this society's most enduring and fatal rationalization. Prejudice does hurt, however, just as the absence of prejudice can nourish and shelter. Discrimination can repel and vilify, ostracize and alienate. White people

the ages who have been the victims of injustice. We have had to live with all of that. We have had to absorb all of that. There is something to be said about the adage that if a Black person is not psychologically ill or paranoid, then something's wrong with him. We've had to absorb all of that pain with no justice.

We as a people have had to deal with a distorted, bizarre way of dealing with our pain over a period of years. That rage that Alton was talking about, it didn't disappear; people still remember. It expands.

City Sun, Jan. 7-13, 1987, at 7-8.

41. Delgado has stated:

Emphasizing utility or distributive justice as the justification for affirmative action has a number of significant consequences. It enables the writer to concentrate on the present and the future and overlook the past. . . . The past becomes irrelevant; one just asks where things are now and where we ought to go from here, a straightforward social-engineering inquiry. . . . But . . . it robs affirmative action programs of their moral force in favor of a sterile theory of fairness or utility. No doubt there is a great social utility to affirmative action, but to base it solely on that ground ignores the *right* of minority communities to be made whole, and the *obligation* of the majority to render them whole.

Delgado, *supra* note 36, at 570.

42. During a trip to Howard Beach that was to be his effort to promote racial harmony, Mayor Koch asserted that "most robberies were committed by blacks. . . ." N.Y. Times, Dec. 29, 1986, at B3, col. 5.

43. Mayor Koch went on, moreover, to reassure his all-white audience that "most of the victims were black, too." *Id.*

44. *Id.*; see *supra* note 43.

who do not believe this should try telling everyone they meet that one of their ancestors was black. I had a friend in college who having lived her life as a blonde, grey eyed white person, discovered that she was one-sixteenth black. She began to externalize all the unconscious baggage that "black" bore for her: the self-hatred that is racism. She did not think of herself as a racist (nor had I) but she literally wanted to jump out of her skin, shed her flesh, and start life over again. She confided in me that she felt "fouled" and "betrayed." She also asked me if I had ever felt this way. Her question dredged from some deep corner of my suppressed memory the recollection of feeling precisely that, when at the age of three or so, some white playmates explained to me that God had mixed mud with the pure clay of life in order to make me.

In the Vietnamese language, "the word 'I' (toi) . . . means 'your servant'; there is no 'I' as such. When you talk to someone, you establish a relationship."⁴⁵ Such a concept of "self" is a way of experiencing the other, ritualistically sharing the other's essence, and cherishing it. In our culture, seeing and feeling the dimension of harm that results from separating self from "other" requires more work.⁴⁶ Very little in our language or our culture encourages or reinforces any attempt to look at others as part of ourselves. With the imperviously divided symmetry of the marketplace, social costs to blacks are simply not seen as costs to whites,⁴⁷ just as blacks do not share in the advances whites may enjoy.

45. D. BERRIGAN & T. NHAT HANH, *THE RAFT IS NOT THE SHORE* 38 (1975).

46. Lacan wrote:

Who, if not us, will question once more the objective status of this 'I', which a historical evolution peculiar to our culture tends to confuse with the subject? This anomaly should be manifested in its particular effects on every level of language, and first and foremost in the grammatical subject of the first person in our languages, in the 'I love' that hypostatizes the tendency of a subject who denies it. An impossible mirage in linguistic forms among which the most ancient are to be found, and in which the subject appears fundamentally in the position of being determinant or instrumental of action.

Let us leave aside the critique of all the abuses of the *cogito ergo sum*, and recall that, in my experience, the ego represents the center of all the *resistances* to the treatment of symptoms. It was inevitable that analysis, after stressing the reintegration of the tendencies excluded by the ego, in so far as they are subjugated to the symptoms that it tackled in the first instance, and which were bound up for the most part with the *failures* of Oedipal identification, should eventually discover the 'moral' dimension of the problem.

J. LACAN, *Aggressivity in Psychoanalysis*, in *ECRITS: A SELECTION* 23-24 (1977).

47. The starkest recent example of this has been the disastrous delay in responding to the AIDS epidemic; as long as AIDS was seen as an affliction affecting Haitians, Hispanics, Africans and other marginalized groups such as intravenous drug users and homosexuals, its long-term implications were ignored. *Health Experts Fault U.S. on Response to AIDS*, N.Y. Times, Aug. 12, 1987, at A20, col. 1.

This structure of thought is complicated by the fact that the distancing does not stop with the separation of the white self from the black other. In addition, the cultural domination of blacks by whites means that the black self is placed at a distance even from itself, as in the example of blacks being asked to put themselves in the position of the white shopkeepers who view them.⁴⁸ So blacks are conditioned from infancy to see in themselves only what others who despise them see.⁴⁹

It is true that conforming to what others see in us is every child's way of becoming socialized.⁵⁰ It is what makes children in our society seem so gullible, so impressionable, so "impolitely" honest, so blindly loyal, and so charming to the ones they imitate.⁵¹ Yet this conformity also describes a way of being that relinquishes the power of independent ethical choice. Although such a relinquishment can have quite desirable social consequences, it also presumes a fairly homogeneous social context in which values are shared and enforced collectively. Thus, it is no wonder that western anthropologists and ethnographers, for whom adulthood is manifested by the exercise of independent ethical judgment, so frequently denounce tribal cultures or other collectivist ethics as "childlike."

By contrast, our culture constructs some, but not all, selves to be the servants of others. Thus, some "I's" are defined as "your servant," some as "your master." The struggle for the self becomes not a true mirroring of self-in-other, but rather a hierarchically-inspired series of distortions, where some serve without ever being served, some master without ever being mastered, and almost everyone hides from this vernacular domination by clinging to the legally official definition of "I" as meaning "your equal."

In such an environment, relinquishing the power of individual ethical judgment to a collective ideal risks psychic violence, an obliteration of the self through domination by an all powerful other. In such an environment, it is essential at some stage that the self be permitted to retreat into itself and make its own decisions with self-love and self-confidence. What links child abuse, the mistreatment of

48. See Letter to the Editor, *supra* note 3.

49. See generally K. CLARK, *DARK GHETTO* (1965); K. CLARK, *PREJUDICE AND YOUR CHILD* (1955); J. COMER & A. POUSSAINT, *BLACK CHILD CARE* (1975); W. GRIER & P. COBBS, *BLACK RAGE* (1968).

50. See generally Selznick, *Law, Society and Moral Evolution*, in *READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY* 931, 947-49 (P. Shuchman ed. 1979).

51. "[T]he Oedipal identification is that by which the subject transcends the aggressivity that is constitutive of the primary subjective individuation. I have stressed elsewhere how it constitutes a step in the establishment of that distance by which, with feelings like respect, is realized a whole affective assumption of one's neighbor [sic]." Lacan, *supra* note 46, at 23.

women, and racism is the massive external intrusion into psyche that dominating powers impose to keep the self from ever fully seeing itself.⁵² Because the self's power resides in another, little faith is placed in the true self, that is, in one's own experiential knowledge. Consequently, the power of children, women and blacks is actually reduced to the "intuitive," rather than the real; social life is necessarily based primarily on the imaginary.⁵³ Furthermore, because it is difficult to affirm constantly with the other the congruence of the self's imagining what the other is *really* thinking of the self, and because even that correlative effort is usually kept within very limited family, neighborhood, religious, or racial boundaries, encounters cease to be social and become presumptuous, random, and disconnected.

This peculiarly distancing standpoint allows dramas, particularly racial ones like *Howard Beach*, to unfold in scenarios weirdly unrelated to the incidents that generated them. At one end of the spectrum is a *laissez faire* response that privatizes the self in order to remain unassailably justified. At the other end is a pattern that generalizes individual or particular others into terrifyingly uncontrollable "domains" of public wilderness, against which proscriptive barriers must be built to protect the eternally innocent self.

a. Privatizing Innocence

The prototypical scenario of the privatized response is as follows:

Cain: Abel's part of town is tough turf.⁵⁴

52. See generally A. MILLER, *THE DRAMA OF THE GIFTED CHILD* (1984).

53. An example relevant to the development of 'legal reification' can be found in any first grade classroom. It is 8:29 and children are playing, throwing food, and generally engaging in relatively undistorted communication. At 8:30 the teacher . . . calls the class to attention: it is time for the 'pledge of allegiance.' All face front, all suffer the same social rupture and privation, all fix their eyes on a striped piece of cloth. As they drone on, having not the slightest comprehension of the content of what they are saying, they are nonetheless learning the sort of distorted or reified communication that is expressed in the legal form. They are learning, in other words, that they are all abstract 'citizens' of an abstract 'United States of America,' that there exists 'liberty and justice for all,' and so forth — not from the content of the words, but from the ritual which forbids any rebellion. Gradually, they will come to accept these abstractions as descriptive of a concrete truth because of the repressive and conspiratorial way that these ideas have been communicated (each senses that all the others 'believe in' the words and therefore that they must be true), and once this acceptance occurs, any access to the paradoxically forgotten memory that these are mere abstractions will be sealed off. And once the abstractions are reified, they can no longer be criticized because they signify a false concrete.

Gabel, *Reification in Legal Reasoning*, in 3 *RESEARCH IN LAW AND SOCIOLOGY* 25, 26-27.

54. The following newspaper account describes an encounter between Mayor Koch and a

Abel: It upsets me when you say that; you have never been to my part of town. As a matter of fact, my part of town is a leading supplier of milk and honey.⁵⁵

Cain: The news that I'm upsetting you is too upsetting for me to handle. You were wrong to tell me of your upset because now I'm terribly upset.⁵⁶

Abel: I felt threatened first. Listen to me. Take your distress as a measure of my own and empathize with it. Don't ask me to recant and apologize in order to carry this conversation further.⁵⁷

This type of discourse is problematic because Cain's challenge in calling Abel's turf "tough" is transformed into a discussion of the care with which *Abel* challenges that statement. While there is certainly an obligation to be careful in addressing others the obligation to protect the feelings of those others gets put above the need to protect one's own. The self becomes subservient to the other, with no reciprocity, and the other becomes a whimsical master. Abel's feelings are deflected in deference to Cain's, and Abel bears the double burden of raising his issue properly *and* of being responsible for its impact on Cain. Cain is rendered unaccountable for as long as this deflection continues because all the fault is assigned to Abel. Morality and responsiveness thus become dichotomized as Abel drowns in responsibility for valuative quality control, while Cain rests on the higher ground of a value neutral zone.

Caught in conversations like this, blacks as well as whites will

black congregation in Jamaica, Queens: "In discussing the Howard Beach incident, Mr. Koch asked the people in Morning Star [Baptist Missionary Church] whether, if three white men were walking in Harlem after midnight, 'do you believe they would be absolutely safe?'"

"'Yes,' the congregation chorused. The Mayor did not think so, but said he was glad they did." N.Y. Times, Dec. 29, 1986, at B3, col. 6.

In reading this, I had trouble discerning the Mayor's motivation in asking such a question. Was the Mayor implying that blacks *would* support racial violence if it occurred in reverse? If, as the story implies, Koch thought the congregation would say 'no,' what he then would have "shown" is that racism is just human nature after all; that public absolution is simply a matter of pointing a finger and wailing "well you did it too"; and that death in "turf wars"—or over eviction notices—isn't really racism, but just part of life.

55. Rev. Dr. Timothy Mitchell, pastor of Ebenezer Missionary Baptist Church stated, "What happened to Michael Griffith [who was killed in the Howard Beach incident] can happen to any of us. . . . The issue is whether we are free to walk around in our city and be seen and accepted and protected as God's children." N.Y. Times, Dec. 29, 1986, at B3, col. 1.

56. Dr. Gerald Schulze, a physician at Coney Island Hospital stated, "I don't want to continue to hear Howard Beach is a hotbed of racial violence because it isn't." N.Y. Times, Dec. 23, 1986, at B4, col. 4.

57. When Alan Hendrickse, the leader of the mixed race chamber of the South African Parliament, decided to go swimming at a "whites only" beach, President Botha demanded that he either apologize or resign, or he would "have no choice but to dissolve the Parliament. . . . When he started marching in on the beach, he embarrassed me and broke the rules of Parliament. . . . It is a question of procedure." N.Y. Times, Jan. 22, 1987, at A3, col. 6.

feel keenly and pressingly circumscribed. Perhaps most people never intend to be racist, oppressive, or insulting. Nevertheless, by describing zones of vulnerability and by setting up fences of rigidified politeness, the unintentional exile of individuals as well as races may be quietly accomplished.

b. Publicizing Guilt

Another scenario of distancing self from the responsibility for racism is the invention of some great public wilderness of others. In the context of Howard Beach, the specter against which the self must barricade itself is violent: seventeen year old, black males wearing running shoes and hooded sweatshirts. It is this fear of the uncontrollable, overwhelming other that animates many of the more vengefully racist comments from Howard Beach, such as, "We're a strictly white neighborhood. . . . They had to be starting trouble."⁵⁸

These statements set up angry, excluding boundaries. They also imply that the *failure* to protect and avenge is bad policy, bad statesmanship, and an embarrassment. They raise the stakes beyond the unexpressed rage arising from the incident itself. Like the Cain and Abel example, the need to avenge becomes a separate issue of protocol and etiquette—not a loss of a piece of the self, which is the real cost of *real* tragedies, but a loss of self-regard. By self-regard, I do not mean self-concept as in self-esteem; I mean that view of the self that is attained by the self stepping outside the self to regard and evaluate the self. It is a process in which the self is watched by an imaginary other, a self-projection of the opinions of real others, where "I" means "your master" and where the designated other's refusal to be dominated is felt as personally assaultive. Thus, the failure to avenge is felt as a loss of self-regard. It is a psychological metaphor for whatever trauma or original assault that constitutes the real loss to the self.⁵⁹ It is therefore more abstract, more illusory, more constructed, and more invented. Potentially, therefore, it is less powerful than "real" assault, in that with effort it can be unlearned as a source of vulnerability. This is the real message of the attempt to distinguish between prejudice and violence: names, as in the old "sticks and stones" ditty,

58. N.Y. Times, Dec. 23, 1986, at B4, col. 6.

59. "Inner rage tends to burn out our connections to the real world. It tends to overwhelm reason and to destroy the faces and beings of others. In our anger we can only see ourselves. The inability to imagine the experience of the stranger, of the other, was exactly what made the Holocaust possible. The Nazi success in dehumanizing their victims has left us with such rage that we too can dehumanize, erase the individual faces of others. We must find a way to let our anger burn freely, openly without consuming or perverting . . . otherwise we remain victims forever." Roiphe, *The Politics of Anger*, 1 TIKKUN 18, 22 (1986).

although undeniably and powerfully influential, can be learned or undone as motivation for future destructive action.⁶⁰ As long as they are *not* unlearned, however, the exclusionary power of such free-floating emotions makes its way into the gestalt of prosecutorial and jury decisions and into what the law sees as crime, or as justified, provoked or excusable.⁶¹ Law becomes described and enforced in the spirit of our prejudices.⁶²

3. THE EVIDENTIARY RULES OF LEGITIMATING TURF WARS

The following passage is a description of the arraignment of three of the white teenagers who were involved in the Howard Beach beatings:

The three defense lawyers also tried to cast doubt on [the prosecutor's] account of the attack. The lawyers questioned why the victims walked all the way to the pizza parlor if, as they said, their mission was to summon help for their car, which broke down three miles away. . . . At the arraignment, the lawyers said the victims passed two all-night gas stations and several other pizza shops before they reached the one they entered.

60. Professor Robert Cover discussed the relation of "name-calling" to the power of the judiciary as follows:

The judge in imposing a sentence normally takes for granted the role structure which might be analogized to the 'transmission' of the engine of justice. The judge's interpretive authorization of the 'proper' sentence can be carried out as a deed only because of these others; a bond between word and deed obtains only because a system of social cooperation exists. That system guarantees the judge massive amounts of force—the conditions of effective domination—if necessary. It guarantees—or is supposed to—a relatively faithful adherence to the word of the judge in the deeds carried out against the prisoner. . . . If the institutional structure—the system of roles—gives the judge's understanding its effect, thereby transforming understanding into 'law,' so it confers meaning on the deeds which effect this transformation, thereby legitimating them as 'lawful.' A central task of the legal interpreter is to attend to the problematic aspects of the integration of role, deed, and word, not only where the violence (i.e., enforcement) is lacking for meaning, but also where meaning is lacking for violence.

Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1619 (1986).

61. *Id.* at 1629.

62. In describing the degree to which subway gunman Bernhard Goetz was made a folk hero after he shot four young black men, Kenneth Clark stated:

There is no question that society must be protected from those who assault, rob or otherwise violate others. These forms of lawless behavior must be punished. But they cannot be punished constructively by the lawlessness of another individual. Frustration, fear and outrage afflict both the rejected and the 'respectables.' This common predicament blurs the boundaries between the lawful and the lawless. As a society adjusts to, or rewards, its accepted cruelties and continues to deny their consequences, it makes heroes of lawless 'respectables' and in so doing develops a selective form of moral indignation and outrage as a basis for the anomaly of a civilization without a conscience.

Clark, *In Cities, Who Is the Real Muggers?* N.Y. Times, Jan. 14, 1987, at A19, col. 1.

A check yesterday of area restaurants, motels and gas stations listed in the Queens street directory found two eating establishments, a gas station and a motel that all said they were open and had working pay phones on Friday night.

A spokesman for the New York Telephone Company, Jim Crosson, said there are six outdoor pay telephones . . . on the way to the pizzeria.⁶³

In the first place, lawyers must wonder what relevance this has. Does the answer to any of the issues the defense raised serve to prove that these black men assaulted, robbed, threatened or molested these white men? Does it even prove that the white men *reasonably* feared such a fate? The investigation into the number of phone booths per mile does not reveal why the white men would fear the black men's presence. Instead, it is relevant to prove that there is *no* reason a black man should walk or just wander around the community of Howard Beach. This is not semantic detail; it is central to understanding burdensomeness of proof in such cases. It is this unconscious restructuring of burdens of proof into burdens of white over black that permits people who say and who believe that they are not racist to commit and condone crimes of genocidal magnitude. It is easy to rationalize this as linguistically technical, or as society's sorrow. As one of my students said, "I'm so tired of hearing the blacks say that society's done them wrong." Yet these gyrations kill with their razor-toothed presumption. Lawyers are the modern wizards and medicine people who must define this innocent murderousness as crime.

Additionally, investigations into "closer" alternatives eclipse the possibility of other explanation. They assume that the young men were not headed for the subway (which was in fact in the same direction as the pizzeria), and further, that black people must have documented reasons for excursions into white neighborhoods and out of the neighborhoods to which they are supposedly consigned.

It is interesting to contrast the implicit requirement of documentation imposed on blacks walking down public streets in Howard Beach with the implicit license of the white officers who burst into the private space of Mrs. Bumpurs' apartment. In the Bumpurs case, lawmakers consistently dismissed the availability of less intrusive options as presumption and idle hindsight.⁶⁴ This dismissal ignored the fact that police officers have an actual burden of employing the least harmful alternatives. In the context of Howard Beach, however, such an analysis invents and imposes a burden on nonresidents to stay

63. N.Y. Times, Dec. 24, 1986, at B4, col. 6.

64. See *supra* note 16 and accompanying text.

out of strange neighborhoods. It implies harm in the presence of those who do not specifically “own” something there. Both analyses skirt the propriety and necessity of public sector responsibility. Both redefine public accountability in privatized terms. Whether those privatized terms act to restrict or expand accountability is dichotomized according to the race of the actors.

Finally, this factualized hypothesizing was part of a news story, not an editorial. “News,” in other words, was reduced to hypothesis based on silent premises: they should have used the first phone they encountered; they should have eaten at the first “eating establishment;” they should have gone into a gas station and asked for help; surely they should have had the cash and credit cards to do any of the above or else not travel in strange neighborhoods. In elevating these to relevant issues, however, *The New York Times* did no more than mirror what was happening in the courtroom.

4. THE APPROPRIATION OF PSYCHIC PROPERTY

In an ill-fated trip to the neighborhood of Jamaica, in the borough of Queens, Mayor Koch attempted to soothe tensions by asking a congregation of black churchgoers to understand the disgruntlement of Howard Beach residents about the interracial march by 1400 protesters through “their” streets. He asked them how they would feel if 1400 white people took to the streets of the predominantly black neighborhood of Jamaica.⁶⁵ This remark, from the chief executive of New York City, accepts and even advocates a remarkable degree of possessiveness about public streets. This possessiveness, moreover, is racially rather than geographically bounded. In effect, Koch was pleading for the acceptance of the privatization of public space. This is the de facto equivalent of segregation. It is exclusion in the guise of deep-moated private property “interests” and “values.” In such a characterization, the public nature of the object of discussion, the street, is lost.⁶⁶

Mayor Koch’s question suggests that 1400 black people took to the streets of Howard Beach. In fact, the crowd was integrated—blacks, browns, and whites, residents and nonresidents of Howard Beach. Apparently, crowds in New York are subject to the unwritten equivalent of Louisiana’s race statutes (which provide that 1/72 black

65. See *supra* note 35 and accompanying text.

66. Walt Whitman recognized a world in which nature knows no boundaries:

I guess [the grass] is a uniform hieroglyphic, And it means, Sprouting alike in broad zones and narrow zones, Growing among black folks as among white, . . . I give them the same, I receive them the same.

W. WHITMAN, *Song of Myself*, in *LEAVES OF GRASS* 39 (1977).

ancestry renders a person black) and to the Ku Klux Klan's "contamination by association" standard ("blacks and white-blacks" was how one resident of Forsythe County, Georgia described an interracial crowd of protesters there).

On the other hand, if Mayor Koch intended to direct attention to the inconvenience, noise, and pollution of such a crowd in those small streets, then I am sympathetic. My sympathy is insignificant, however, compared to my recognition of the necessity and propriety of the protestors' spontaneous, demonstrative, peaceful outpouring of rage, sorrow, and pain.

If, however, Mayor Koch intended to ask blacks to imagine 1400 angry white people descending on a black community, then I agree, I would be frightened. This image would also conjure up visions of 1400 hooded white people burning crosses, 1400 Nazis marching through Skokie, and 1400 cavalry men riding into American Indian lands. These visions would inspire great fear in me, because of the possibility of grave harm to the residents. But there is a difference, and that is why the purpose of the march is so important. That is why it is so important to distinguish mass protests of violence from organized hate groups that openly threaten violence. By failing to make this distinction, Mayor Koch created the manipulative specter of unspecified mobs sweeping through homes in pursuit of vague and diffusely dangerous ends. From this perspective, he appealed to thoughtlessness, to the pseudoconsolation of hunkering down and bunkering up against the approaching hoards, to a glacially overgeneralized view of the unneighborhooded "public" world.

Moreover, the Mayor's comments reveal that he is ignorant of the degree to which the black people have welcomed, endured, and suffered white marchers through their streets. White people have always felt free to cruise through black communities and to treat them possessively. Most black neighborhoods have existed only as long as whites have permitted them to exist. Blacks have been this society's perpetual tenants, sharecroppers, and lessees. Blacks went from being owned by others, to having everything around them owned by others. In a civilization that values private property above all else, this effectuates a devaluation of humanity, a removal of blacks not just from the market, but from the pseudospiritual circle of psychic and civic communion. As illustrated in the microcosm of my experience at the store,⁶⁷ this limbo of disownedness keeps blacks beyond the pale of those who are entitled to receive the survival gifts of commerce, the

67. The microcosm to which I am referring is the experience of being excluded, not that of not being able to get into that store per se.

property of life, liberty, and happiness, whose fruits our culture places in the marketplace. In this way, blacks are positioned analogically to the rest of society, exactly as they were during slavery or Jim Crow.⁶⁸

There is a subtler level to the enactment of this dispossession. The following story may illustrate more fully what I mean: Not long ago, when I first moved back to New York after some twenty years, I decided to go on a walking tour of Harlem. The tour, which took place on Easter Sunday, was sponsored by the New York Arts Society, and except for myself, was attended exclusively by young, white, urban, professional, real estate speculators. They were pleasant looking, with babies strapped to their backs and balloons in their hands. They all seemed like very nice people.

Halfway through the tour, the guide asked the group if they wanted to "go inside some churches." The guide added, "It'll make the tour a little longer, but we'll probably get to see some services going on . . . Easter Sunday in Harlem is quite a show." A casual discussion ensued about the time that this excursion might take.

What astonished me was that no one had asked the people in the churches if they minded being stared at like living museums. I wondered what would happen if a group of blue-jeaned blacks were to walk uninvited into a synagogue on Passover or St. Anthony's of Padua in the middle of High Mass. Just to peer, not pray. My overwhelming instinct is that such activity would be seen as disrespectful.

Apparently, the disrespect was invisible to this well-educated, affable group of people. They deflected my observations with comments such as, "We just want to look"; "No one will mind"; "There's no harm intended." As well intentioned as they were, I was left with the impression that no one existed for them whom their intentions could not govern.⁶⁹ Despite the lack of apparent malice in their demeanor,⁷⁰ it seemed to me that to live so noninteractively is a liabil-

68. It is in understanding the degree to which black buying power is nevertheless a sustaining component in even the strongest white economies that reveals the logic behind the controversial boycott of white-owned businesses, called for by some black leaders in the wake of Howard Beach. Rev. Calvin O. Butts 3d of the Abyssinian Baptist Church said, "We're talking about getting the kind of respect that comes from the power of our vote and our buying power." N.Y. Times, Jan. 22, 1987, at B3, col. 4.

69. For an analysis that elevates precisely this thinking to normative principles of "good intentions" in the law, see Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 156 SAN DIEGO L. REV. 1041 (1978).

70. Professor Charles Lawrence aptly described this lack of malice in the following:

It is common for racial minorities, especially those who find themselves relatively isolated in predominantly white institutions, to have white colleagues express stereotyped or derogatory views either by way of direct statements or by unstated but implicit assumptions. . . . It is obvious to the minority person that the

ity as much as a luxury. To live imperviously to one's impact on others is a fragile privilege, which depends ultimately on the inability of others to make their displeasure known.

III. THE GIFT OF INTELLIGENT RAGE

A. *Owning the Self in a Disowned World*

Reflecting on Howard Beach brought to mind a news story from my fragmentary grammar school recollections of the 1960's: a white man acting out of racial motives killed a black man who was working for some civil rights organization or cause. The man was stabbed thirty-nine times, a number which prompted a radio commentator to observe that the point was not just murder, but something beyond.

What indeed was the point, if not murder? I wondered what it was that would not die, which could not be killed by the fourth, fifth, or even tenth knife blow; what sort of thing that would not die with the body but lived on in the mind of the murderer. Perhaps, as psychologists have argued, what the murderer was trying to kill was a part of his own mind's image, a part of himself and not a real other. After all, statistically and corporeally, blacks as a group are poor, powerless, and a minority. It is in the minds of whites that blacks become large, threatening, powerful, uncontrollable, ubiquitous, and supernatural.

There are certain societies that define the limits of life and death very differently than our own. For example, death may occur long before the body ceases to function, and under the proper circumstances, life may continue for some time after the body is carried to its grave.⁷¹ These non-body-bound, uncompartmentalized ideas recognize the power of spirit, or what we in our secularized society might describe as the dynamism of self as reinterpreted by the perceptions of

speaker has not intended a racial slight—his tone is friendly and candid—and that he is unaware of the attitudinal source of the inadvertent derogation. And when other whites are present, they are unlikely to hear or be sensitive to the connotations of the demeaning remark.

Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 341, n.100.

71. Death under these circumstances is, in the mythology of most cultures, associated with some sort of initiatory transformation. Shamanism, fraternities and Christianity thus all share elements of suffering, death, and resurrection.

[T]he same symbolism occurs again in the Buddhist tradition: the monk gives up his family name and becomes a 'son of Buddha'. . . because he is 'born among the saints.' . . . But this initiatory birth implied death to profane existence. . . . [I]n Hinduism as well as in Buddhism . . . the yogi 'dies to this life' to be reborn into another mode of being, that which is represented by 'liberation.'

M. ELIADE, *MYTHS, DREAMS AND MYSTERIES* 227 (P. Mairet trans. 1975).

other.⁷² These ideas comprehend the fact that a part of ourselves is beyond the control of pure physical will and resides in the sanctuary of those around us. A fundamental part of ourselves and of our dignity is dependent upon the uncontrollable, powerful, external observers who constitute society.⁷³ Surely a part of socialization ought to include a sense of caring responsibility for the images of others that are repositied within us.⁷⁴

Taking the example of the man who was stabbed thirty-nine times out of the context of our compartmentalized legal system, and considering it in the hypothetical framework of a legal system that encompasses and recognizes morality, religion, and psychology, I am moved to see this act as not merely body murder but spirit-murder as well. I see it as spirit-murder, only one of whose manifestations is racism—cultural obliteration, prostitution, abandonment of the elderly and the homeless, and genocide are some of its other guises. I see spirit-murder as no less than the equivalent of body murder.

One of the reasons that I fear what I call spirit-murder, or disregard for others whose lives qualitatively depend on our regard, is that its product is a system of formalized distortions of thought. It produces social structures centered around fear and hate; it provides a

72. Such ideas are found in many cultures other than our own:

In the West, the loss of the sense of self . . . is often regarded as a sign of madness, but in India the loss of the sense of Self . . . as distinct from God . . . is the key to enlightenment. . . .

Because they move as far away as possible from the terrifying brink of solipsism, Indians tend to rush to the other extreme of attributing an external reality to the internal mental constructions of other people. . . . In this way, it is possible to get gobbled up by dragons that *other* people believe in.

W. O'FLAHERTY, *DREAMS, ILLUSION AND OTHER REALITIES* 121 (1984).

73. Creating a self-identity through the eyes of others is not a new phenomenon:

[A]ll the sociologists of the 'primitive mind' busy themselves around this profession of identity, which, on reflexion [sic], is no more surprising than declaring, 'I'm a doctor' or 'I'm a citizen of the French Republic', and which certainly presents fewer logical difficulties than the statement, 'I'm a man', which at most can mean no more than, 'I'm like he whom I recognize to be a man, and so I recognize myself as being such.' In the last resort, these various formulas are to be understood only in reference to the truth of 'I is an other', an observation that is less astonishing to the intuition of the poet than obvious to the gaze of the psychoanalyst.

J. LACAN, *Aggressivity in Psychoanalysis*, in *ECRITS: A SELECTION*, *supra* note 46, at 23.

74. Lacan permits us to explore the relations between the unconscious and human society.

One way of describing his work is to say that he makes us recognize that the unconscious is not some kind of seething, tumultuous, private region 'inside' us, but an effect of our relations with one another. The unconscious is, so to speak, 'outside' rather than 'within' us—or rather it exists 'between' us, as our relationships do.

T. EAGLETON, *LITERARY CRITICISM* 173 (1983).

tumorous outlet for feelings elsewhere unexpressed.⁷⁵ For example, when Bernhard Goetz shot four black teenagers in a New York City subway, an acquaintance of mine said that she could understand his fear because it is a "fact" that blacks commit most crimes. What impressed me, beyond the factual *inaccuracy* of this statement,⁷⁶ was the reduction of Goetz' crime to "his fear," which I translate to mean *her* fear. The four teenage victims became all blacks everywhere, and "most crimes" clearly meant that most *blacks* commit crimes.

In the process of devaluing its image of black people, the general white population seems to have been socialized to blind itself to the horrors inflicted by white people. One of the clearest examples of the mechanics of this socialized blindness is the degree to which the public and the media in New York repeatedly and relentlessly bestialized Goetz' victims. Images of the urban jungle, of young black men filling the role of "wild animals," were favorite journalistic constructions. Young white urban professionals were mythologized, usually wrapped in the rhetorical apparel of lambs or sheep, as the tender, toothsome prey.⁷⁷ The corollary to such imagery is that the fate of those domesticated white innocents is to be slaughtered in confrontation, the dimensions of which thus become meaninglessly and tragically sacrificial.⁷⁸ Locked into such a reification, no act of the sheep against the wolves can ever be seen as violent in its own right, because active sheep are so *inherently* uncharacteristic, so brave, so irresistibly and triumphantly parabolic. Thus, when prosecutor Gregory Waples cast Goetz as a "hunter" in his final summation, juror Michael Axel-

75. "Undoubtedly, something that is not expressed does not exist. But the repressed is always there—it insists, and it demands to come into being. The fundamental relation of man with this symbolic order is precisely the same one which founds this symbolic order itself—the relation of non-being to being." Lacan, *Sign, Symbol, Imaginary*, in *ON SIGNS* 209 (M. Blonsky ed. 1985).

76. In 1986, whites were arrested for 71.7% of all crimes; blacks and all other races accounted for the remaining 28%. *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* 300 (T. Flanagan & K. Jamieson eds. 1986). Furthermore, there is evidence that "whites commit more crimes, and that white offenders have consistently lower probabilities of arrest than do either blacks or Mexican-Americans. This is particularly striking for armed robbery and burglary." J. PETERSILIA, *RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM* 44 (1983). "Controlling for the factors most likely to influence sentencing and parole decisions, the analysis still found that blacks and Hispanics are less likely to be given probation, more likely to receive *prison* sentences, more likely to receive longer sentences, and more likely to serve longer time." *Id.* at xxiv.

77. A typical example of this was the front page story of the *New York Post* of June 15, 1987, two days before the jury returned a verdict which cleared Goetz of all but illegal gun possession. The article, excoriating the prosecutor's office for even *bringing* the case, ran under an enormous heading referring to the victims as "predators."

78. Black attempts to invert this imagery have been logical but largely lost efforts. *See, e.g.,* Flake, '*Blacks Are Fair Game*', *N.Y. Times*, June 19, 1987, at A35, col. 3.

rod said that Waples "was insulting my intelligence. There was nothing to justify that sort of [characterization]. Goetz wasn't a hunter."⁷⁹

Furthermore, most white people do not seem to feel as criminal the dehumanizing cultural images of sterile, mindless white womanhood and expressionless, bored but righteous, assembly line white manhood.⁸⁰ For example, although it is difficult to document in any scientific way, I think many whites do not expect other whites to rape, rob, or kill them.⁸¹ They are surprised when it happens. Perhaps they blind themselves to the warning signals of approaching assault. Some do not even recognize it when it does happen; they apologize for the assailant, think it must have been their fault; *they* misperceived the other's intent.⁸²

The following vignette may better illustrate what I mean:

A lone black man was riding in an elevator in a busy downtown department store. The elevator stopped on the third floor and a crowd of noisy white high school students got on. The black man took out a gun and shot as many of them as he could before the doors opened on the first floor . . . the rest fled for their lives. The black man later explained to the police that he could tell from the students' "body language," from their "shiny eyes and big smiles,"

79. N.Y. *Newsday*, June 17, 1987, at 5, col. 2.

80. The short stories of Joyce Carol Oates and Raymond Carver often present characters who provide the prototype of what I mean. They describe people of warmth, compassion and variety trapped in lives whose permitted limits flatten them like the roles of a situation comedy. These people adjust their exteriors to required expectations, but every now and then the repressed passion flares in sometimes wonderful, but more often destructive or self-destructive ways. See R. CARVER, *WILL YOU PLEASE BE QUIET, PLEASE?* (1978); J. OATES, *MARRIAGES AND INFIDELITIES* (1972).

81. According to the Bureau of Justice Statistics, fifty-four percent of violent crimes are committed by friends, acquaintances or relatives of the victims. "In the last four years, fewer than half, or 46 percent, of reported violent crimes were committed by complete strangers. . . ." N.Y. *Times*, Jan. 22, 1987, at A24, col. 1. A most tragic example of this is the strangulation death in Central Park of college student Jennifer Levin. If public response is a measure of anything at all, what fueled the fascination with that case was the fact that David Chambers, the socialite who allegedly killed her, wasn't supposed to be the *type* of person who robbed, raped or murdered. Such typology interferes with a lot of people seeing a lot of reality. See Riley, *An Aggressive Defense—or 'Obscene' Quest?* NAT'L L.J., April 13, 1987, at 1.

82. In a now famous videotape, Bernhard Goetz described to police in New Hampshire his intention to inflict as much harm as he could. He detailed his wish to see his victims dead; said that if he had to do it over again, he'd do the same or worse, and expressed a retrospective desire to gouge their eyes out. Yet in finding him "not guilty" of each of twelve counts of attempted murder, assault and reckless endangerment, the jury entirely discounted this confession. "We felt he said a lot of things he was unsure about. He had nine days of thinking about what happened and reading newspapers, and combined with the guilt, we felt that he may have gotten confused. His own confusion coupled with his feelings of guilt might have forced him to make statements that were not accurate." N.Y. *Times*, April 30, 1987, at B6, col. 2.

that they wanted to "play with him, like a cat plays with a mouse." Furthermore, the black man explained, one of the youths had tried to panhandle money from him and another asked him, "How are you?" "That's a meaningless thing," he said in his confession, "but in certain circumstances, that can be a real threat." He added that a similar greeting had preceded the vicious beating of his father, a black civil rights lawyer in Mississippi, some time before. He confessed that he intended to murder the high school students.

My guess is that most white Americans would view the severe contextual misapprehensions of the black gunman as a form of serious insanity. Although degrees of sympathy might vary, I suspect that the social consensus would be nearly unanimous that he presents a danger to himself and to others and should therefore be institutionalized or imprisoned. The above story is, however, with minor character alteration, consistent with a videotaped confession by Bernhard Goetz.⁸³ Nevertheless, the public overwhelmingly presumed Goetz innocent. Most accounts did *not* propose that he be institutionalized, but pointed instead to the failure of public institutions to engage in *more* such punitive activities. Bernhard Goetz' defense blatantly reflected this consensus in its claim, not that Goetz was temporarily insane, but rather that he acted *reasonably* under the circumstances.⁸⁴ It is reflected as well in the degree to which the public devoured, ex post facto, stories about the deviant behavior of the victims in this case.⁸⁵ Goetz became a cited authority and favorite interviewee on the subject of crime in New York. "Criminals," he declared, must realize that being shot is a "risk they are going to have to take."⁸⁶ I can think of no better example of the degree to which criminality has become lodged in a concept of the black "other."

If Americans are subject to such utter emotional devastation, it is no wonder that the urge to act as a victimizer is so irresistible; it

83. *Id.*

84. See Fletcher, *Goetz: Crazy Gunman or Good-Guy Defender?*, L.A. Times, May 17, 1987, § V, at 1, col. 4; Restak, *The Fiction of the Reasonable Man*, Wash. Post, May 17, 1987, at C3, col. 1.

85. The criminal propensities of Goetz' victims—ranging from allegations of rape to robbery—were used not just in the context of whether deadly force should have been used defensively, but were used to show why the four young men *deserved* to be the objects of his intent to kill. N.Y. Times, April 28, 1987, at B1, col. 5. (Imagine in the case of the black gunman in the elevator, a public inquiry that focused attention on any prior racist statements of the white high schoolers, on their history of drinking and driving, on how they treated their girlfriends, on whether any of them had ever shoplifted and whether they were only in the department store to do so again. Imagine what might have happened if the black men in the Howard Beach case, even after the first few beatings, had decided to "defend" themselves by pulling guns and shooting repeatedly, to kill.)

86. L.A. Times, Mar. 24, 1987, Part 1, at 4, col. 3.

appears to be the only right thing, the only defensible thing to do. It is no wonder that society has created in blacks a class of ready-made, prepackaged victims. To discount as much violence as we do in this society must mean that we have a very angry population suppressing explosive rage. Most white Americans, at least those in urban areas, have seen the angry, muttering "lunatic" black person who beats the air with his fists and curses aloud. Most people cross the street to avoid him; they don't choose him to satisfy their need to know the time of day. Yet for generations, and particularly in the wake of the foaming public response to incidents like Howard Beach, the Goetz shooting,⁸⁷ and Forsythe County, that is precisely how white America has looked to many black Americans.

For these reasons, I think we need to elevate what I call spirit-murder to the conceptual, if not punitive level of a capital moral offense.⁸⁸ We need to see it as a cultural cancer; we need to open our eyes to the spiritual genocide it is wreaking on blacks, whites, and the abandoned and abused of all races and ages. We need to eradicate its numbing pathology before it wipes out what precious little humanity we have left.

B. *Mirrors and Windows*

The night after the Bumpurs story became public, I dreamed about a black woman who was denied entry to a restaurant because of her color. In response, she climbed over the building. The next time she found a building in her way, she climbed over it, and the next time and the next and the next. In time, she became famous, as she roamed the world, traveling in determined straight lines, wordlessly scaling whatever lay in her path, including skyscrapers. Well-meaning white people came to marvel at her and gathered in crowds to watch and applaud. She never acknowledged their presence, but went about her business in unsmiling silence. The white people grew angry and condemned her for failing to appreciate their praise and rejecting their gift of her fame. I stood somewhere on the periphery of this dream and wondered what unspoken rule, what deadened curiosity kept anyone from ever asking why.

87. There is a doorway on East 13th Street in New York City that for months had a huge piece of brown paper taped to it, and the legend "Goetz" written across it. It reminded me of the banners hung in windows for the parades of astronauts and other heroes. In fact, a parade was all that the Goetz hoopla lacked to make it into a proper festive event. After delivering their verdict, "defense attorney Nark Baker said the jurors asked for and received Bernhard Goetz' autograph on their jury certificates." N.Y. *Newsday*, June 17, 1987, at 40, col. 2.

88. See, e.g., Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

Upon waking, I asked myself a progression of "why's" about the Bumpurs death. My life experiences had prepared me better to comprehend and sympathize with the animating force behind the outraged, dispossessed knifewielding of Mrs. Bumpurs.⁸⁹ What I found more difficult to focus on was the "why," the animus that inspired such fear, and such impatient contempt in a police officer that the presence of six other heavily armed men could not allay his need to kill a sick old lady fighting off hallucinations with a knife. It seemed to me a fear embellished by something beyond Mrs. Bumpurs herself; something about her enlarged to fill the void between her physical, limited presence and the "immediate threat and endangerment to life" that filled the beholding eyes of the officer. Why was the sight of a knife-wielding woman so fearfully offensive to a shotgun-wielding policeman that he felt that blowing her to pieces was the only recourse, the only way to preserve his physical integrity? What offensive spirit of his past experience raised her presence to the level of a physical menace beyond real dimensions? What spirit of prejudgment and of prejudice provided him with such a powerful hallucinogen?

However slippery these questions may be on a legal or conscious level, unresponsiveness to them does not make these issues go away. Failure to resolve the dilemma of racial violence merely displaces its power. The legacy of killing finds its way into cultural expectations, archetypes, and "isms." The echoes of both dead and deadly others acquire a hallucinatory quality; their voices speak of an unwanted past, but also reflect for us images of the future. Today's world condemns those voices as superstitious and paranoid. Neglected, they speak from the shadows of such inattention, in garbles and growls, in the tongues of the damned and the insane. The superstitious listen, and perhaps in the silence of their attention, they hear and understand. So-called enlightened others who fail to listen to the voices of demonic selves, made invisibly uncivilized, simply make them larger, more barbarously enraged, until the nearsightedness of looking glass

89. I know few blacks who have not had some encounter with police intimidation. My earliest remembrance of such an instance was when I was about nine and my sister was about seven. My family was driving to Georgia to see my father's relatives. Two highway patrolmen stopped our car on a deserted stretch of highway in South Carolina. They were attracted to the Massachusetts license plate, and they wanted to know what "y'all" were doing in those parts. They inquired about the weather in Boston, they fondled my father's driver's license with great curiosity and they admired the lines of the car. They were extremely polite, their conversation a model of southern hospitality and propriety. Throughout the entire fifteen or twenty minutes of our detention, one officer questioned my mother and father in soothing, honeyed tones; the other held a double-barreled shotgun through the rear window, pointed at my sister and me. If he had "accidentally" shot us both, our deaths would have been, like that of Eleanor Bumpurs, entirely legal in the state of South Carolina.

existence is smashed in upon by the terrible dispossession of dreams too long deferred.