Nigga Theory: Contingency, Irony, and Solidarity in the Substantive Criminal Law

Jody Armour*

INTRODUCTION

Po' niggers can't have no luck—
Nigger Jim, *Adventures of Huckleberry Finn*[1]

Some will find the N-word in my title jagged-edged and hurtful. Words can wound: more than mere vehicles for the expression of ideas or the transfer of information, words are deeds—*acts* with consequences—and the words "nigger" and "nigga" are two of the most violent and blood-soaked *verbal acts* in the English language. Nevertheless, used with the precision and reticence of a surgeon's hands, these vicious epithets can also suture the places where blood flows.

In that spirit, in profane language picked for its unparaphrasable power to focus attention on the implications of moral condemnation for racial justice and political solidarity, I use these jagged epithets here as part of a metaphoric redescription,[2] in racial terms, of the criminal law's ancient subjective culpability or mens rea requirement. In this essay, in other words, a "nigga" is a metaphor for black wickedness, black mens rea, which I will use to probe the intersection of morality, race, and class in matters of blame and punishment and politics.[3] An example of a non-racialized metaphor for mens rea would be the common law's "depraved heart" test of murderous mens rea in cases of unintentional homicide—the jury is given the depraved heart metaphor and told to use it as the litmus test

* Roy P. Crocker Professor of Law, University of Southern California Law School. I dedicate this *Ohio State Journal of Criminal Law* article to the Ohio State Law School students who in the late 1960s helped my wrongfully convicted dad find the key to his own jailhouse door in the hornbooks, casebooks, treatises and reporters that they provided. #PoeticJustice.

[1] Mark Twain, *Adventures of Huckleberry Finn*, *in* THE ART OF HUCKLEBERRY FINN 149, 129 (Hamlin Hill & Walter Blair eds., 2d ed. 1969).

[2] *See* RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 28–34 (1989) (identifying metaphoric redescription as the source of revolutions in science, morality and law).

[3] I start out using Nigga as a metaphor for mens rea in criminal matters and wind up using it as a political performative aimed at unifying non-criminals and "niggas"; that is, it goes from being a trope (for conceptual purposes) to a performative (for political purposes). As a political performative, its irony becomes most evident.

for serious subjective culpability.[4] From the standpoint of this ancient heart metaphor for moral blameworthiness, a "nigga" metaphorically is a depraved or indifferent black heart; but on another level, my metaphorical redescription of black subjective culpability and black mens rea in terms of "niggas" will be an urgent political call to bond with and support black-hearted wrongdoers.

To that end, this essay proceeds as follows. I begin in Part I expounding on the inadequacy of our current legal and moral vocabularies and my repurposing of the words "nigger" and "nigga" to engage in an oppositional discourse I call "nigga-talk." I use "nigga-talk" to help explain and problematize the need to distinguish, even within the black community, law-abiding, respectable blacks from so-called "niggas," or morally deficient and contemptible blacks. In short, there exists a type of Black Criminal Litmus Test. Part II elaborates on this litmus test by discussing what I coin "Good Negro Theory," the constellation of assumptions, beliefs, and values that undergird the bad nigga-good negro dichotomy and its contention that law-abiding blacks should distance themselves from bad niggas. Part II also advances "Nigga Theory," an argument aimed at eradicating the distinction between blacks and promoting solidarity between law-abiders and law-breakers regardless of race. I return to this core aspect of Nigga Theory in Part III, which discusses our retributive urge, causation, and our general denial of accountability.

I. ON LANGUAGE, "NIGGAS," AND THE BLACK CRIMINAL LITMUS TEST

I first "dropped the N-bomb" at a Criminal Justice and Race Workshop for the Association of American Law Schools [AALS] during the 1999 Annual Meeting in New Orleans. In the company of sedate legal scholars, I performed an N-word-laden gangsta rap song by Ice Cube titled *The Nigga Ya Love to Hate*, spitting lines like "kicking shit called street knowledge—why more niggas in the pen than in college?"[5] I told my audience that the baffling silences our professional vocabulary could not fill compelled me to use this profane alternative rather than iterate the voice of speechlessness underneath the rigor, precision, and eloquence of our scholarly marks and noises.

As criminal law professors, our primary professional vocabularies are those of morality and law—the two language games prosecutors and defense lawyers must master and deftly deploy—and thus I have thought a lot about the world of shared meanings these vocabularies create and what limits they impose; what can be done by one who speaks them and what cannot. As the son of a black prison inmate

---

[4] *See* Commonwealth v. Malone, 47 A.2d 445, 447 (Pa. 1946) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *199) ("At common law, the 'grand criterion' which 'distinguished murder from other killing' was malice on the part of the killer and [for unintentional killings] this malice was . . . 'the dictate of a wicked, depraved and malignant heart.'").

[5] ICE CUBE, *The Nigga Ya Love to Hate, on* AMERIKKKA'S MOST WANTED (Universal Music Group 1990).

given 22 to 55 years for possession and sale of marijuana, and as a close friend of many black inmates, I would characterize my relationship with the language of blame and punishment inside and outside my law school classrooms over the past twenty years as *impossible*, for I find the proud but calcified language of both the legal academy and conventional morality—"choice," "free will," "personal responsibility," "subjective culpability," "malice," "malignant heart," "moral agency," and "mens rea"—not adequate to my needs and purposes, to my sense of myself and my world, requiring me, as it plainly does, to view as wicked and irresponsible my closest friends, family, and the *up to* 90% of young black men in some inner city neighborhoods who will end up in jail, on probation, or on parole at some point in their lives.[6] For me, any language whose words and logic lock up staggering numbers of truly disadvantaged black men on the ground of their own moral deficiencies is a disabled and disabling device for grappling with meaning in moral and criminal matters, one that ignores or discounts savage inequalities in race and class and sweeps empirically demonstrable anti-black bias under the rug of jury verdicts and "findings of fact" about guilt and innocence. Prevailing legal and moral language organizes and claims a meaning for experience in a way that blocks the access of "wicked" black wrongdoers to the empathy, sympathy, care and concern of ordinary, law-abiding people; such language actively stalls conscience in relation to such wrongdoers' suffering, masking the pity and waste of mass incarceration and draconian punishment. Yet in my scholarly associations and legal journals, I see an entrenched moral and legal vocabulary content to admire its own paralysis, to accept with serenity its estrangement of underprivileged and disadvantaged masses.

As James Boyd White points out, when words lose their meaning, a speaker must make a new language, remake an old one, or radically repurpose old words to serve new ends.[7] In my N-word-laden 1999 AALS performance of *Amerikkka's Most Wanted*, I radically reconstituted my cultural resources—my possibilities for making and maintaining meaning—to make them adequate to my needs. Specifically, I repurposed "nigger" and "nigga" as terms of art in an oppositional discourse I shall call "nigga-talk." Nigga-talk uses this "troublesome"[8] word—a word Professor Randall Kennedy rightly calls the "nuclear bomb of racial epithets" in his 2002 book *Nigger: The Strange Career of a Troublesome Word*[9]—in its

---

[6] SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 7 (9th ed. 2012) ("For an inner-city black male, the lifetime risk of arrest and incarceration may approach 90 percent.") (citing JEROME G. MILLER, NAT'L CENTER ON INSTITUTIONS & ALTERNATIVES, HOBBLING A GENERATION: YOUNG AFRICAN AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM OF AMERICA'S CITIES: BALTIMORE, MARYLAND (1992)).

[7] *See* JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING 284 (1984).

[8] *See generally* RANDALL KENNEDY, NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD (2002).

[9] *Id.* at 28.

most condemnatory sense for *conceptual* purposes and in its most compassionate sense for *political* purposes.

Conceptually, nigga-talk uses the "morally deficient black man" sense of "nigga" to critique the categories, distinctions, and dichotomies of conventional morality and the substantive criminal law.[10] "Nigga" in this sense means precisely what black comedian Chris Rock means in his famous laugh line, "I love black people, but I hate niggas!", where lovable "black people" means "law-abiding, respectable blacks" and "niggas" means morally deficient and contemptible black criminals.[11] As White points out, jokes, like all texts, are invitations to share the speaker's response to the world which we accept through our laughter,[12] and implicit in Rock's joke is a *political* invitation to distinguish between a law-abiding and respectable "us" and a morally contemptible "them," an invitation to niggerize—or *nigga*rize—black wrongdoers, which black audiences in packed auditoriums heartily accepted through peals of laughter and a chorus of "amens," "uh-huhs," and "preach!" Part moral mantra, part political slogan, part sneering closing argument refrain, the phrase "I love black people but I hate niggas!" struck a resonant chord with black audiences because many do view black wrongdoers as morally condemnable "niggas."[13] No utterances in the English language more forcefully drive a political wedge between a worthy "us" and an unworthy "them" than this vile epithet—none more bluntly express and inflame that widely shared and deeply entrenched urge, to put it crudely, to retaliate and avenge, or, to dress it up in loftier language, to "return suffering for moral evil voluntarily done"[14] or to act on "the necessity of purging one's own country from depraved criminals"[15] or to see blameworthy wrongdoers "'pa[y] one's debt' to society."[16] Legal philosopher Meir Dan-Cohen aptly dubs this urge to blame and punish wicked wrongdoers "the retributive urge."[17] Because millions of Americans of all races

---

[10] A "nigga" is a personification of moral blameworthiness in the same sense that the "Reasonable Man" is a personification of moral innocence (i.e., reasonable mistakes and shortcomings are exculpatory or mitigatory under many doctrines, including negligence, recklessness, self-defense, provocation, extreme emotional disturbance, and duress). Both a "nigga" and a Reasonable Man exemplify human characteristics, including human limitations and frailties—in the case of "niggas," the deficiencies and limitations are generally viewed as not excusable; in the case of the Reasonable Man, they (by definition) are excusable.

[11] CHRIS ROCK: BRING THE PAIN (HBO television broadcast June 1, 1996).

[12] *See* WHITE, *supra* note 7, at 14–20.

[13] RANDALL KENNEDY, RACE, CRIME, AND THE LAW 306 (1997) ("According to data collected by a 1993 Gallup Poll, 82 percent of the blacks surveyed believed that the courts in their area do not treat criminals harshly enough; . . . 68 percent favored building more prisons so that longer sentences could be given.").

[14] H. L. A. HART, PUNISHMENT AND RESPONSIBILITY 231 (1968).

[15] IMMANUEL KANT, THE PHILOSOPHY OF LAW 228 (W. Hastie trans., Edinburgh, 1887).

[16] HERBERT MORRIS, ON GUILT AND INNOCENCE 39 (1976).

[17] Meir Dan-Cohen, *Causation*, *in* 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 165–66 (Sanford Kadish ed., 1983).

share that laughing black audience's contempt for black wrongdoers, so-called "niggas" inflame the retributive urge in millions of all races.

Rock's blunt moral distinction between respectable "black people" and damnable "niggas" parallels the more genteel one asserted by Professor Randall Kennedy between what he calls law-abiding "good Negroes" and criminal "bad Negroes." Specifically, Kennedy exhorts good law-abiding blacks to "distinguish sharply between 'good' and 'bad' Negroes" for the sake of safety and racial respectability.[18] His litmus test for "bad Negroes" is identical to Rock's for "niggas"—namely, criminal wrongdoing. In support of his *distinguish-and-distance*-them-from-us approach, Professor Kennedy cites black civil rights icon Thurgood Marshall. As Kennedy points out, Marshall, working on behalf of the NAACP, initially allowed it to represent only good—"innocent"[19]—Negroes. For example, Marshall refused to represent a sixteen year old black boy sentenced to death for rape and attempted prison escape on grounds that "the youngster was 'not the type of person to justify our intervention.'"[20] Recast in Rock's street vernacular, Thurgood Marshall sharply distinguished and distanced the interests of "black people" from those of "niggas." According to Professor Kennedy, even when Marshall later "loosened his policy" and represented some black defendants he believed to be guilty, Marshall's worries about black people's respectability in the eyes of whites kept Marshall from ever "tak[ing] the position that racism excuses thuggery when perpetrated by blacks."[21] So the distinguished black scholar, the venerable black Supreme Court Justice, and the iconic urban comedian converge on the Black Criminal Litmus Test of condemnable blacks, differing only in whether they call these morally odious creatures "niggas" or "bad Negroes" or "thugs." Accordingly, I will use the terms "niggas," "niggers," and "bad Negroes" interchangeably and in contradistinction to their loveable and respectable polar opposites—"black people" and "good Negroes." In sum, at the conceptual level I use these terms in their most morally judgmental and retributive-urge-inflaming sense to first pinpoint, then discredit moral condemnations of black criminals. I discredit them both on reliability grounds, given the pervasiveness of "unconscious bias,"[22] and on legitimacy grounds, given the simple reality of "moral luck."[23]

---

[18] *See* KENNEDY, *supra* note 13, at 17.

[19] *Id.* at 20.

[20] *Id.* at 20–21.

[21] *Id.* at 21

[22] Jody D. Armour, Nigga Theory: Luck, Law and Language in the Social Construction of Niggas (2014) (unpublished manuscript) (on file with author). This article is part of a larger book project currently under review by a publisher. In chapters of my book not included in this article, I extensively investigate the role of racially differential "attribution bias" and "empathy bias" in juror assessments of a defendant's subjective culpability or mens rea. *Id.*

[23] *Id.* In chapters of my book, currently under review by a publisher, I extensively investigate the phenomenon of "moral luck" identified by moral philosophers Thomas Nagel and Bernard Williams and apply it to questions of moral condemnation in the substantive criminal law. *Id.*

The reliance on mens rea in deciding criminal culpability has analogues here. Prosecutors, defense attorneys, judges and jurors routinely debate and weigh the moral blameworthiness of wrongdoers because the substantive criminal law directs them to under the ancient legal maxim, *actus non facit reum, nisi mens sit rea*—in Blackstone's translation, "an unwarrantable act without a vicious will is no crime at all."[24] Under this mens rea principle, it is unjust to punish someone who commits an "unwarrantable act"—i.e. a *wrongdoer*[25]—unless he acted with a "vicious" or wicked will.[26] As the Model Penal Code puts it, "[c]rime does and should mean condemnation."[27] Thus, under the mens rea principle, if jurors conclude that a wrongdoer[28] killed someone *without* the requisite subjective wickedness or "vicious will," they must return a verdict of not guilty. So the criminal law—through its mens rea requirement—routinely directs judges and jurors to morally distinguish between wicked and innocent wrongdoers and to differentiate degrees of wicked criminality for purposes of punishment.[29] Under the law of homicide, for instance, a wrongdoer can suffer different punishments depending on whether he is found wicked in the 1st or 2nd Degree; voluntarily or involuntarily wicked; purposely, knowingly, recklessly or negligently wicked; or wickedly depraved and indifferent. Correspondingly, under the Black Criminal Litmus Test championed by proponents of a politics of respectability in criminal

---

[24] SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 213 (8th ed. 2007). Under our substantive criminal law, an alleged harm-doer can be "innocent" in one of two ways: innocent of causing the harm or (assuming causation) morally innocent, that is, he caused the harm but did so without subjective culpability. *See Id.*

[25] I will use the term wrongdoer to refer to someone who commits a prohibited and hence wrongful *act* (i.e. commits the actus reus). One can commit a wrongful act, in this sense be guilty of wrongdoing, without subjective culpability or mens rea. Wrongdoing plus mens rea are the main ingredients of criminal guilt under this usage.

[26] Thus, a driver can hit and kill a pedestrian (thus qualifying as a "wrongdoer" by committing the prohibited act of causing a death) without moral blameworthiness or mens rea if, say, he was overwhelmed by a sudden emergency.

[27] MODEL PENAL CODE AND COMMENTARIES § 2.05 cmt. 1 at 283 (1985) ("[T]hat the defendant's act was culpable."). Not everyone who commits a prohibited or criminal *act* is culpable. For instance, a driver can kill a pedestrian—a prohibited act—without subjective culpability if the victim darted from between parked cars and the driver's reactions, even if not perfect, were those of an ordinary man or woman.

[28] Wrongdoing here means commission of the actus reus or prohibited act. Not all wrongdoers, however, act with subjective culpability. Under this usage, only wrongdoing accompanied by subjective culpability or mens rea makes an actor criminally liable under standard analysis.

[29] Criminal conviction stigmatizes because it is meant to. As the Supreme Court has recognized, criminal "felony" is "as bad a word as you can give to man or thing." Morissette v. United States 342 U.S. 246, 260 (1952) (citation omitted). Thus the moral credibility of the criminal law and its processes depends entirely on whether, first, it criminalizes only *acts* that deserve moral condemnation and, second, it only blames and punishes *actors* who deserve moral condemnation and even then it only blames and punishes them the amount they deserve.

matters like Kennedy and Rock,[30] a jury could find a morally blameworthy black wrongdoer to be a "nigga" in the First or Second Degree, a Voluntary or Involuntary "nigga," a purposeful, knowing, reckless, or negligent "nigga," or a "nigga" with a depraved and malignant heart. In fact, most "official niggas" (i.e., blacks formally convicted of a crime) have been found subjectively wicked in one of these ways beyond a reasonable doubt by a jury or other fact finder, so criminal conviction provides assurance—backed by the full faith and credit of the U.S. criminal justice system—that only black wrongdoers who deserve our most corrosive contempt achieve the status of felonious "official niggas."

Politically, a key insight of the law and literature movement is that the true center of value of a word, text, or performance of language, its most important meaning, is to be found not in any factual information that it conveys—not in what is *says*—but in what it *does*, specifically, in the community that it establishes with its audience. "It is here," says James Boyd White, "that the author offers his reader a place to stand, a place from which he can observe and judge the characters and events of the world . . . ."[31] The place I offer my reader to stand through the many repetitions and juxtapositions and performances of the "N-word"—a place made solid by my substantive, conceptual uses of the term to pinpoint unwarranted moral condemnation[32]—is one beyond such condemnation, one from which it can be seen that a person's self is a tissue of contingencies whose moral record is determined by the union of fortuity and human frailty rather than mere "free will." It is a place that prioritizes compassion, concern, and mercy over retribution, retaliation, and revenge. Hence, it is a place from which disproportionately poor black criminals can be understood as tragic social facts for which we as a class and race-driven nation are accountable, rather than as wicked wrongdoers mired in self-destruction for which they alone are to blame. Accordingly, I use the N-word in this essay as a brush stroke in a new political landscape, one in which the very meaning of the word—its substantive content and range of application—is part of a fierce contest over the "us" and "them" of politics, over the formation and transformation of individual and collective black identities.

Allow me to go a step further. Politically conscious black urban poets and N-word virtuosos—The Last Poets, Tupac Shakur, dead prez, Nas, NWA, Ice Cube,

---

[30] And assuming the moral universe of proponents of the Black Criminal Litmus Test is not Manichean, binary, all or none. *See supra* p. 13.

[31] WHITE, *supra* note 7, at 17.

[32] *See* Armour, *supra* note 22. I fully develop my substantive or conceptual arguments against the reliability and legitimacy of moral condemnations of black wrongdoers in companion pieces to this general outline that make up the book I have written that is currently under review by a publisher. The first applies the phenomenon of "moral luck" to the entire body of the substantive criminal law. The second radically overhauls the prevailing model of *mens rea* to expose the places where bias lives in the substantive criminal law and adjudication of just deserts. The third applies the work of Wittgenstein, J.L. Austin, Donald Davidson, and George Lakoff to the question whether the N-word can transcend its racist roots and play a leading role in changing how we think about criminals and in helping us stand in solidarity with them.

Jay Z—vividly illustrate how people use words, sometimes the very same word, to embrace or push away, recognize or deny, others. In the hands of these poets gangsta rap is N-word laden oppositional political discourse; for them "nigga talk" is language smitheryed[33] to challenge conventional characterizations of black criminals with ironies, inversions, and invitations to bond with them. These oppositional black poets provide the inspiration for my metaphoric redescription of mens rea and moral blame in terms of the N-word. After all, as Richard Rorty observes in his philosophical essays on language through the lenses of Wittgenstein, Davidson, and Nietzsche, viewing human history as the history of successive metaphors lets us "see the poet, in the generic sense of the maker of new words, the shaper of new languages, as the vanguard of the species" and of revolutionary science, morality, and legal theory.[34] The common insight animating the word work of these philosophers and "gangsta" poets—Nas and Nietzsche, Davidson and dead prez, Wittgenstein and Ice Cube, Lakoff and The Last Poets—is that "truth" in matters of morality and justice is "a mobile army of metaphors," a ceaseless struggle over metaphorical re-description, a pitched political battle over the range of application of words and symbols.

II. ON "GOOD NEGRO THEORY" AND "NIGGA THEORY"

Drawing on the N-word's conceptual and political utility, this Part constructs a model, which I will call "Good Negro Theory," of the values, beliefs, and assumptions that underlie efforts to morally and politically distinguish between law-abiding "good Negroes" and law-breaking "Niggas." But first, to fiercely contest Good Negro Theory, I will expound "Nigga Theory."

A. *On "Nigga Theory" and the Centrality of Class*

I use the term "Nigga Theory" to refer to a group of interlocking proofs and performances aimed at destroying the distinction between disproportionately privileged law-abiding blacks and disproportionately poor black criminals and promoting solidarity between them. To be sure, many of the proofs and performances underling Nigga Theory have the potential to also promote solidarity between all law-abiders and all criminals regardless of race or class. However, because black males bear the brunt of our current blame and punishment practices, because stereotypes and prejudice make black criminals especially likely to stoke the retributive urge in ordinary Americans, and because many misguided black leaders, lawmakers, scholars, and prosecutors have supported and still support the mass incarceration of young black males at the core of the crack plague and its

---

[33] Toni Morrison, Lecture Upon the Award of the Nobel Prize for Literature (Dec. 7, 1993), *available at* http://www.nobelprize.org/nobel_prizes/literature/laureates/1993/morrison-lecture.html.

[34] RORTY, *supra* note 2, at 20, 37.

aftermath, it is apposite to term this group of proofs and performances Nigga Theory.

Now, a model. Nigga Theory:

> 1) Focuses on the moral and criminal condemnation of largely poor black males whose criminal status makes them "niggas" or "bad Negroes" according to critics;
>
> and
>
> 2) Addresses itself especially—though certainly not exclusively—to black leaders, lawyers, jurors, voters and ordinary folk.

Critical to an understanding of Nigga Theory is an understanding of the role class has played and continues to play in the social construction of "niggas." As the careful studies of Ruth Peterson and Lauren Krivo on the links between race, place, class and crime in the urban black community demonstrate, the vast majority of "violent crimes" Americans worry most about—murder, manslaughter, robbery, aggravated assault—are committed by "extremely" disadvantaged blacks, not the black bourgeoisie, whose crime rates are much closer to those of their white middle and upper-middle-class counterparts.[35] In terms of violent crime, bad Negroes are disproportionately truly disadvantaged blacks living in extremely disadvantaged neighborhoods.

Good Negroes, by contrast, disproportionately come from the ranks of middle and upper-middle class blacks living in much better neighborhoods. As one of both the wealthiest and wealthiest majority black areas in the United States, and as part of the single largest geographically contiguous middle and upper-middle class black area in the United States, the hills of View Park that I call home might be the Good Negro capitol of America—it is brimming with well-to-do and hence relatively law-abiding Negroes.

For going on two generations now, the working class and poor black neighborhoods that surround my own predominantly black and prosperous "Golden Ghetto"[36]—including South Central, The Jungle, Inglewood, Watts, and Compton—have hemorrhaged staggering numbers of young black men into prison

---

[35] *See generally* Lauren J. Krivo & Ruth D. Peterson, *Extremely Disadvantaged Neighborhoods and Urban Crime*, 75 SOC. FORCES 619 (1996); Lauren J. Krivo & Ruth D. Peterson, *The Structural Context of Homicide: Accounting for Racial Differences in Process*, 65 AM. SOCIOL. REV. 547 (2000) [hereinafter *The Structural Context of Homicide*]; Ruth D. Peterson & Lauren J. Krivo, *Macrostructural Analyses of Race, Ethnicity, and Violent Crime: Recent Lessons and New Directions for Research*, 31 ANNU. REV. SOCIOL. 331 (2005) [hereinafter *Macrostructural Analyses of Race, Ethnicity, and Violent Crime*]; Ruth D. Peterson & Lauren J. Krivo, *Race, Residence, and Violent Crime: A Structure of Inequality*, 57 KAN. L. REV. 903 (2009).

[36] As one of the wealthiest predominately black areas in the country, View Park has been called the Black Beverly Hills as well as Golden Ghetto.

yards and juvenile detention centers. The flow of poor blacks from bleak streets to cell blocks turned torrential in the mid-1980s with the onset of the crack plague and enactment of laws like the Anti-Drug Abuse Act of 1986, which ushered in a new era of *mandatory minimum* sentences for possession of specified amounts of cocaine and a *100-to-1 sentencing disparity* between distribution of powder and crack cocaine. Ironically or fittingly, depending on the interpretation of the observer, these laws were co-sponsored by Mickey Leland, chair of the Congressional Black Caucus, and Harlem congressman Charles Rangel and supported by most members of the Congressional Black Caucus.[37] Truly disadvantaged black males took the brunt of these severe new sanctions. Thanks in part to the actions and attitudes of these and other largely middle-class black leaders toward largely poor black male wrongdoers, nearly two generations of poor black males have been hobbled if not lost. That so many black leaders and lawmakers, i.e., good negroes, played a leading role in the mass incarceration of black wrongdoers—especially young black males—should come as no surprise in view of the aforementioned "niggerization" of black criminals in both popular culture and legal discourse during the crack plague and in its festering aftermath.

Class plays a central role in the social construction of "niggas"—in whether we explain their wrongdoing in terms of their own internal moral deficiencies or instead in terms of external social factors and structural determinants—because being broke, like being a criminal, means being viewed as morally deficient by millions of Americans. Put differently, millions blame poverty solely on blameworthy poor people just as they blame wrongdoing solely on blameworthy criminals.[38]

Fifty years ago Michael Harrington's extraordinarily influential book, *The Other America*, debunked the then-popular belief that America was a classless society by shining a light on the "invisible" poor, especially inner-city blacks, Appalachian whites, farm workers, and the elderly.[39] But his explanation of poverty absolved middle-class America of accountability for the plight of the poor by attributing poverty not to macro-level social factors like social inequality or the simple absence of jobs but instead to the absence of proper values and dispositions in poor people themselves, that is, to their twisted proclivities and "culture of

---

[37] Brian Mann, *Timeline: Black America's Surprising 40-Year Support for the Drug War*, PRISONTIME (Aug. 12 2013), http://prisontime.org/2013/08/12/timeline-black-support-for-the-war-on-drugs/; NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA 124 (2014) ("13 of 20 voting members of the CBC had voted for the Anti-Drug Abuse Act of 1986.").

[38] Put differently, millions of Americans reject macro-level social explanations of the poor just as they reject social explanations of black criminals. So the urge to blame criminals and the urge to blame the poor are very close cousins. Viewing the poor in light of the retributive urge may explain why we may deny causal responsibility for their plight and why we may feel a diminished sense of urgency or obligation to rescue. Both poor people and criminals inflame the urge to blame them for their respective conditions and hence help us deny collective accountability for their plight.

[39] *See generally* MICHAEL HARRINGTON, THE OTHER AMERICA: POVERTY IN THE UNITED STATES (1964).

poverty."[40] In Harrington's words, "[t]here is . . . a language of the poor, a psychology of the poor, a worldview of the poor. To be impoverished is to be an internal alien, to grow up in a culture that is radically different from the one that dominates the society."[41]

The celebrated Moynihan advanced a similar view, attributing inner-city poverty to deficiencies in the structure of the "Negro family."[42] Harvard urban government professor Edward C. Banfield—head of the Presidential Task Force on Model Cities under Nixon and advisor to Presidents Ford and Reagan—put it this way, "the lower-class individual lives from moment to moment. . . . Impulse governs his behavior . . . . He is therefore radically improvident: whatever he cannot consume immediately he considers valueless. . . . [He] has a feeble, attenuated sense of self . . . ."[43]

In the Reagan years, the "culture of poverty" hypothesis ripened into plump orthodoxy; it became received wisdom that the cause of poverty was not macro-level social factors like meager wages, galloping unemployment, and economic inequality, but rather the internal deficiencies of the poor, who, as Barbara Ehrenreich points out, were viewed as "dissolute, promiscuous, prone to addiction and crime, unable to 'defer gratification,' or possibly even set an alarm clock."[44] Even Bill Clinton formulated and implemented policies guided by "culture of poverty" thinking.[45] Indeed, much legislation enacted by both Democratic and Republican lawmakers today remains imbued with this perspective.[46]

So from the standpoint of Nigga Theory, those who deny our collective accountability for the plight of both criminals and the poor—call them Deniers—

---

[40] *Id.* at 15.

[41] *Id.* at 17.

[42] DANIEL PATRICK MOYNIHAN, OFFICE OF POLICY PLANNING AND RESEARCH, UNITED STATES DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965) *available at* http://web.stanford.edu/~mrosenfe/Moynihan's%20The%20Negro%20Family.pdf.

[43] EDWARD C. BANFIELD, THE UNHEAVENELY CITY REVISITED 61–62 (1974).

[44] Barbara Ehrenreich, *Rediscovering Poverty: How We Cured "The Culture of Poverty," Not Poverty Itself*, TOMDISPATCH (Mar. 15, 2012), http://tomdispatch.com/blog/175516/. As Barbara Ehrenreich points out, Charles Murray argued in his popular 1984 book *Losing Ground* that "any attempt to help the poor with their material circumstances would only have the unexpected consequence of deepening their depravity." *Id.*

[45] In 1992 Bill Clinton famously campaigned on the promise to "end welfare as we know it." Douglas Besharov, *End Welfare Lite as We Know It*, N.Y. TIMES (Aug. 15, 2006), http://nytimes.com/2006/08/15/opinion/15besharov.html. On August 22, 1996, Clinton signed into law the historic welfare legislation the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104—193, 110 Stat. 2105 (codified as amended at 42 U.S.C. § 1305) [hereinafter "PROWORA]. The PROWORA rewrote six decades of social policy, ending the federal guarantee of cash assistance to the poor and turning welfare programs over to the states. Clinton and Joe Biden also spearheaded the 1994 Omnibus Crime Bill (Violent Crime Control and Law Enforcement Act of 1994). *See, e.g.*, Carrie Johnson, *20 Years Later, Parts of Major Crime Bill Viewed As Terrible Mistake*, NPR (Sept. 12, 2014), http://www.npr.org/2014/09/12/347736999/20-years-later-major-crime-bill-viewed-as-terrible-mistake.

[46] Ehrenreich, *supra* note 44.

are bi-partisan and committed to the same logic of denial. A logic that discounts macro-level social explanations of crime and poverty, and instead adopts (or gives undue weight to) individual-level explanations centered on the "moral poverty" of the poor, the "moral poverty" of criminals, and hence the hyperconcentrated "moral depravity" of poor black criminals, who get whipsawed by both class and race stereotypes[47] and thus are especially likely to stoke the retributive urge. From the perspective of Nigga Theory, poor black criminals belong to a special category of hyperconcentrated *otherness* that makes them easy to hate—a profound *otherness* that the words "nigger" and "nigga" capture with fierce felicity.

The retributive urge, even in the black community, to blame and punish "niggas," fueled by ingrained stereotypes of black wrongdoers as morally deficient and depraved,[48] and further stoked by their niggerization in popular stage acts, books, and op-eds by black entertainers, scholars, and commentators, makes the claims of Deniers more persuasive to many ordinary law-abiding Americans. This urge makes it harder for them to recognize the structural determinants of—and hence our collective accountability for—what I will call "the cataclysmic crack plague and its festering aftermath," a monumental and roughly 30-year-long crime and incarceration disaster that first struck black America in the mid 1980s, and which has inflicted as much misery on the black community as a thousand Hurricane Katrinas slamming a thousand Ninth Wards. To be more concise, our urge to blame and punish black wrongdoers helps ordinary Americans deny our collective accountability for the foreseeable criminal acts of poor blacks stranded in forsaken neighborhoods brimming with guns and drugs. I will show, in other words, how an inflamed retributive urge toward so-called niggas causes voters, jurors, judges, lawmakers, and others to ignore, deny, or downplay the role of macro-level social factors (for which we are collectively accountable) in both the production and construction[49] of black criminals. I will trace the following links between the process of niggerization, the retributive urge, and America's collective denial of accountability:

---

[47] Just as with criminal "others," the plight of poor "others" can be explained either from an internal, micro-level perspective that reinforces their deficient "otherness," or from an external, macro-level perspective that disputes their alien otherness by looking at the poor as just ordinary people who lack jobs with living wages, resources, and prospects.

[48] Recall the Willie Horton ad featured in the 1988 Bush-Dukakis presidential race that unapologetically played on the "wicked and depraved black recidivist" stereotype. *See Willie Horton 1988 Attack Ad*, YOUTUBE (Nov. 3, 2008), https://www.youtube.com/watch?v=Io9KMSSEZ0Y.

[49] It may be useful to distinguish between criminal construction and production as follows: Social factors and other factors beyond the control of the wrongdoers may *produce* criminals in the sense of provoking or tempting or pressuring them to voluntarily do wrong. In contrast, those who must judge the subjective culpability or *mens rea* of these voluntary wrongdoers—jurors, judges, lawmakers and laymen alike—may *construct* criminals in the sense of making biased normative judgments about their subjective culpability and just deserts. *Production* focuses on the impact of social forces on the behavior of wrongdoers, on increasing their number. *Construction* focuses on the impact of stereotypes and prejudice on decision makers who must assess a wrongdoer's moral guilt or innocence and the grade or degree of his crime.

- The better wrongdoers fit the "depraved nigga" stereotype, the more they stir the retributive urge for blame and punishment;
- The more wrongdoers stir the retributive urge, the easier it is for Americans to deny a causal connection between the specific criminal acts of poor black wrongdoers and general social facts like racism and joblessness;
- Finally, the easier it is to deny that social forces cause criminal wrongdoing, the easier it is to deny our collective accountability for the crack plague and its legacy.[50]

In short, I will show how the powerful urge to damn and condemn "niggas" induces us to deny our collective accountability for the criminal consequences of being broke, black and hopeless in post-civil rights America.

However, Nigga Theory is not just descriptive. Nigga Theory is also prescriptive, and rests on the hopeful and optimistic premise that once the moral basis for the retributive urge toward black criminals is shown to be illegitimate, irrational and unreliable, it may become easier for fair-minded Americans to curb the urge to condemn such wrongdoers and recognize our collective accountability for their plight and the causal links leading to their plight. For example, consider the last 30 years of crime and incarceration that constitute the crack epidemic and its legacy. There are causal links between those 30 years of crime and the following five macro-level social facts:

- Extreme social and economic inequality in the setting of a cultural belief system sociologists call the American Dream[51]
- The massive flow of jobs from dying rustbelt cities and the stampede of the black bourgeoisie from economically integrated black neighborhoods

---

[50] To be more concise, I will show how niggerizing black criminals inflames the retributive urge and thus keeps us as a nation from recognizing our collective accountability for their wrongdoing. According to Deniers, because the intervening and morally deficient choices of criminals and poor people break the causal link between social forces on the one hand and poverty or crime on the other, we as a nation are absolved of accountability for the crime and poverty foreseeably resulting from criminogenic social forces. *See infra* Part III.

[51] "It is when a system of cultural values extols, virtually above all else, certain *common* success goals *for the population at large*, while the social structure rigorously restricts or completely closes access to approved modes of reaching these goals *for a considerable part of the same population*, that deviant behavior ensues on a large scale." ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 200 (1968); *see also* Robert Merton, *Social Structure and Anomie*, 3 AM. SOCIOL. REV. 672 (1938); STEVEN MESSNER & RICHARD ROSENFELD, CRIME AND THE AMERICAN DREAM 9–10 (5th ed. 2013).

to economically segregated formerly white ones like my own in View Park[52]

• Well-documented decisions by high ranking U.S. officials during the Reagan and George H. Bush administrations to fight communism by prioritizing foreign policy over drug enforcement and thus knowingly—though not conspiratorially—helping flood poor black neighborhoods with crack in the name of national security,[53]

• Political posturing and opportunism by lawmakers from the Democratic Party, Congressional Black Caucus, and Republican Party on the Anti-Drug Abuse Act of 1986 in response to the cocaine-induced death of Boston-bound basketball star Len Bias, resulting in "the criminalization

---

[52] [T]he growing problem of joblessness in the inner city . . . [is] partly created by the changing social composition of inner-city neighborhoods. . . . In the 1940s, 1950s, and even the 1960s, lower-class, working-class, and middle-class black urban families all resided more or less in the same ghetto areas, albeit on different streets. . . . The exodus of black middle-class professionals from the inner city has been increasingly accompanied by a movement of stable working-class blacks to higher-income neighborhoods in other parts of the city and to the suburbs. Confined by restrictive covenants to communities also inhabited by the urban black lower classes, the black working and middle classes in earlier years provided stability to inner-city neighborhoods and perpetuated and reinforced societal norms and values. In short, their very presence enhanced the social organization of ghetto communities.

WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 143 (1987).

Yana Kucheva and Richard Sander reach conclusions consistent with this view in their analysis of the relationship between *Shelley* and the hyper-concentration of criminogenic disadvantage in poor black neighborhoods:

> We find strong and fairly consistent support for the "*Shelley*" hypotheses, while the "white abandonment" hypotheses are generally unsupported or weakly supported. Our data suggests that almost immediately after *Shelley* in 1948, blacks began to enter middle-class covenanted neighborhoods that were adjacent to existing black enclaves. The "blockbusting" phenomenon, we suspect, quickly became the institutional midwife for much of the white-to-black transition. Over the next twenty years, black districts dramatically increased in size, substantial portions of the black middle-class became homeowners, and the old ghettos became poorer and more economically isolated from affluent blacks.

Yana Kucheva & Richard Sander, *The Misunderstood Consequences of* Shelley v. Kraemer, 48 SOC. SCI. RES. 212, 227 (2014).

[53] *See* S. REP. NO. 100-165, at 1–14 (1988) [hereinafter Kerry Committee Report]. In addition to the Kerry Committee Report's documentation of links between government agencies like the CIA and groups involved in cocaine distribution, a useful discussion can be found in what historian Arthur Schmidt calls a limited but "important starting point" for understanding links between U.S. policies and cocaine trafficking in the 1980s. *See* Arthur Schmidt, *An Unhealthy Prescription*, H-NET REVIEWS (April 1999), http://www.h-net.org/reviews/showpdf.php?id=3016 (reviewing JONATHON MARSHALL & PETER DALE SCOTT, COCAINE POLITICS: DRUGS, ARMIES, AND THE CIA IN CENTRAL AMERICA (1991)); *see also* Peter Kornbluh, *Crack, the Contras, and the CIA: The Storm over "Dark Alliance"*, COLUM. JOURNALISM REV. (January/February 1997), *available at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB2/storm.htm.

of U.S. foreign policy" through *mandatory minimums* and gross sentencing disparities for crack-related crimes,[54]

---

[54] Len Bias was a University of Maryland student and star basketball player who died from a powder cocaine overdose less than 48 hours after he was drafted in the first round by the Boston Celtics as heir apparent to Larry Bird as the face of the franchise. As Dan Baum observes in his book:

> Immediately upon returning from the July 4 recess, Tip O'Neill called an emergency meeting of the crime-related committee chairmen. Write me some goddamn legislation, he thundered. All anybody up in Boston is talking about is Len Bias. The papers are screaming for blood. We need to get out front on this now. This week. Today. The Republicans beat us to it in 1984 and I don't want that to happen again. I want dramatic new initiatives for dealing with crack and other drugs. If we can do this fast enough, he said to the Democratic leadership arrayed around him, we can take the issue away from the White House.
>
> In life, Len Bias was a terrific basketball player. In death, he became the Archduke Ferdinand of the Total War on Drugs. What came before had been only skirmishing; the real Drug War had yet to begin. Within weeks, the country would be marching, bayonets fixed.

DAN BAUM, SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE 225 (1996).

The result was the Anti-Drug Abuse Act of 1986, complete with mandatory minimums and sentencing disparities. Eric E. Sterling, who was counsel to the U.S. House Committee on the Judiciary and was involved in the passage of mandatory minimum sentencing laws, is now President of the Criminal Justice Policy Foundation. Eric E. Sterling, *Drug Laws And Snitching: A Primer*, FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/snitch/primer/.

His first-hand account of what happened, told to PBS's Frontline, confirms Baum's description in Smoke and Mirrors:

> In 1986, the Democrats in Congress saw a political opportunity to outflank Republicans by "getting tough on drugs" after basketball star Len Bias died of a cocaine overdose. In the 1984 election the Republicans had successfully accused Democrats of being soft on crime. The most important Democratic political leader, House Speaker "Tip" O'Neill, was from Boston, MA. The Boston Celtics had signed Bias. During the July 4 congressional recess, O'Neill's constituents were so consumed with anger and dismay about Bias' death, O'Neill realized how powerful an anti-drug campaign would be.
>
> O'Neill knew that for Democrats to take credit for an anti-drug program in November elections, the bill had to get out of both Houses of Congress by early October. That required action on the House floor by early September, which meant that committees had to finish their work before the August recess. Since the idea was born in early July, the law-writing committees had less than a month to develop the ideas, to write the bills to carry out those ideas, and to get comments from the relevant government agencies and the public at large.
>
> One idea was considered for the first time by the House Judiciary Committee four days before the recess began. It had tremendous political appeal as "tough on drugs." This was the creation of mandatory minimum sentences in drug cases. It was a type of penalty that had been removed from federal law in 1970 after extensive and careful consideration. But in 1986, no hearings were held on this idea. No experts on the relevant issues, no judges, no one from the Bureau of Prisons, or from any other office in the government, provided advice on the idea before it was rushed through the committee and into law. Only a few comments were received on an informal basis. After bouncing back and forth between the Democratic controlled House and the Republican controlled

And finally

> • Empirically demonstrable unconscious bias in direct moral judgments of black wrongdoers by judges, jurors, lawmakers, police officers, prosecutors, voters and other powerful social decision makers.[55]

These five factors explain both the dramatically disproportionate rates of criminal wrongdoing among poor black males and the lack of empathy for them in jury boxes, legislative chambers, and voting booths.

To help us curb the urge to condemn blameworthy blacks long enough to recognize these five macro-level social factors as the causes of the crack plague and its consequences, I will discredit the twin convictions that undergird the retributive urge toward so-called niggas, namely:

> A) our self-congratulatory substantive conviction that persons deserve credit and blame for what they do irrespective of contingency
>
> and
>
> B) our naïve epistemological conviction that judges, jurors, and others called upon to make moral judgments of black wrongdoers can do so without conscious or unconscious racial bias.[56]

These twin convictions sanctify[57] the retributive urge by reassuring us that any "niggas" blamed and punished to satisfy it deserve their state-inflicted pain and suffering and solitary confinement and sometimes death. Under Nigga Theory, however, the twin phenomena of moral luck and ubiquitous unconscious bias subvert the support for these convictions both in theory and in practice. My hope is that once the absence of any rational or reliable moral ground for distinguishing wicked from worthy blacks has been exposed, once the urge to

---

Senate as each party jockeyed for political advantage, The Anti Drug Abuse Act of 1986 finally passed both houses a few weeks before the November elections. *Id.*

The astounding spike in black arrests and convictions after passage of this act, especially between 1986 and 1999, is well-documented and mind-boggling. *See e.g.*, Alyssa L. Beaver, Note, *Getting a Fix on Cocaine Sentencing Policy: Reforming the Sentencing Scheme of the Anti-Drug Abuse Act of 1986*, 78 FORDHAM L. REV. (2010).

[55] This includes empirically demonstrable unconscious empathy-bias and racially differential attribution bias.

[56] The first conviction goes to the substantive question of whether there is a legitimate and rational difference between praise and blame. The second goes to the "epistemic" one of (assuming for the sake of argument that there is a substantive difference between them), whether we can accurately come to know which category any particular case should fall into.

[57] *See* JAMES FITZJAMES STEPHEN, 2 A HISTORY OF THE CRIMINAL LAW OF ENGLAND, 81–82 (1883).

blame and punish "niggas" loses its footing in logic and fairness,[58] readers can more clearly see black wrongdoers not as radically "other" moral monsters to be damned, but rather as "social facts"[59] to be deplored and, if necessary, incapacitated and, if possible, rehabilitated, but never, as now, harshly punished in the name of revenge, retaliation, or retribution.[60]

Having described Nigga Theory, I now turn to Good Negro Theory.

B. *On "Good Negro Theory" and the "Ostracizer"*

For greater precision and clarity, I have coined the term "Good Negro Theory" to refer to the constellation of assumptions, beliefs, and values that undergird the bad Negro-good Negro dichotomy and its corollary contention that law-abiding blacks should socially and politically ostracize black criminals. This interconnected assortment of values, beliefs, and assumptions can be viewed as interlocking tools in an apparatus—call it an "Ostracizer"—designed to advance the social interests of disproportionately privileged law-abiding blacks. The Ostracizer includes:

1. Calibrated **Nigga Detector**, outfitted with
   A) *Warning System*
   and
   B) *Blaming System*,
2. Built-in **Excuse Deflector**,
3. Double Barreled **Distinguish and Distance Device**,
4. **Good Negro Code of Ethics**, and
5. **Cost-Benefit, Wealth-Maximizing Moral Compass.**

In addition to promoting the social interests of law-abiding blacks, the Ostracizer also helps America, as a collective social actor, deny accountability for the foreseeable consequences of its criminogenic social conditions and state actions. It does this by reducing crime to the bad choices of morally deficient

---

[58] It is patently unjust to blame and punish people whose blameworthiness we cannot fairly or justly determine. This is precisely the point of the venerable "presumption of innocence" and ancient "mens rea" or subjective culpability requirement in criminal cases—both rest on the premise that only blameworthy wrongdoers are proper objects of our desire for vengeance or retribution.

[59] As "human-all-too-human" social facts in the sense of being the result of human frailty subjected to certain social forces and other factors beyond their control.

[60] In viewing criminal matters through macro-level social lenses, this article adopts an unapologetically determinist perspective in that it views criminal wrongdoing as ultimately determined by social forces (for which America, as a collective social actor, is accountable) and other factors beyond the control of wrongdoers. As moral philosophers Thomas Nagel and Bernhard Williams show, morally we are at the mercy of luck. Thomas Nagel, *Mortal Questions*, *in* ETHICS: THE ESSENTIAL WRITINGS 446 (Gordon Marino ed., Modern Library 2010); BERNARD WILLIAMS, *Moral Luck*, *in* MORAL LUCK: PHILOSOPHICAL PAPERS 1973–1980 20 (1981).

individuals at whom the retributive urge should be aimed and on whom it should be satisfied.

Below, I describe in more detail each of the Ostracizer's devices.

1. Nigga Detector

The most important device in the Ostracizer is the calibrated Nigga Detector, for bad Negroes must be positively identified before being distinguished, distanced, and disgraced. The calibrated Nigga Detector consists of two separate systems for assessing blacks in criminal matters—a *warning system* for "suspicious blacks" whom ordinary people would view as posing a heightened risk of wrongdoing, and a *blaming system* for blacks who actually have done wrong. As part of its warning system, the Detector identifies "patently good" and "suspicious" Negroes. As part of its blaming system, the Nigga Detector identifies "real" Niggas. In keeping with this distinction between warnings and condemnations, the two sources of error that can undermine the Detector's results are: 1) inaccurate predictions about whether a given black person is committing or about to commit a crime and 2) unreliable inferences about the wickedness or mens rea of a black person who has clearly committed a past wrongful act.

i. The Warning System: Assessing Riskiness

First, consider the Detector's *warning system*, whose sole function is to assess an ambiguous black person's riskiness, specifically the risk that he is committing—or is about to commit—a wrongful act.[61] In this respect the Detector's operation raises issues commonly couched in terms of "racial profiling," "reasonable suspicion," "probable cause," "the Fourth Amendment," and "criminal procedure." What is more, the Detector's race-sensitive predictions and warnings reflect ordinary people's risk assessments of ambiguous blacks. In *Negrophobia and Reasonable Racism*, I dubbed the social price blacks must pay as targets of racial profiling, rooted in racial stereotypes and statistical generalizations, the "Black Tax."[62]

The Detector's *warning system* operationalizes the Black Tax by using different sounds, lights, and scrolling electronic ticker tape displays to differentiate blacks according to the kind and degree of criminal risk they appear to pose to ordinary people. Thus, when pointed at "patently Good Negroes" (that is, blacks who ordinary people would view as posing no meaningful risk of wrongdoing, say,

---

[61] Risks of criminality can figure in predictions of future criminal acts (e.g. in self-defense cases) and ex post facto determinations of the likelihood that a particular defendant committed the prohibited act of which he is accused. This analysis applies mostly to predictions of imminent wrongdoing or inferences of current, ongoing wrongdoing.

[62] JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 13–15 (1997).

nattily clad black Brahmins at a Jack and Jill cotillion in the "Black Beverly Hills"[63]), the Detector's warning system warbles melodiously, glows good-Negro green, and scrolls "Safe Negro" across its electronic ticker tape display.

When aimed at blacks who ordinary people would view as dangerous (say, a "big, black man" under ambiguous circumstances), it activates flashing yellow caution lights and differentiates three different kinds of "suspicious Negroes":

1. *Somewhat suspicious* Negroes, who elicit a scrolling **nigga advisory** and a deep monotonous drone like a bee on the wing or humming refrigerator;
2. *Very suspicious* Negroes, who trigger a scrolling **nigga alert** and a stream of midrange horn honks; and
3. *Imminently dangerous* Negroes, who activate a scrolling **nigga alarm** and high-pitched emergency sirens.

Bear in mind that nigga alarms, alerts, and advisories are predictions and risk assessments rooted in the beliefs, assumptions and perceptions of ordinary men and women. Because the law defines the perceptions and responses of ordinary people as "reasonable,"[64] the Detector's warnings reflect "reasonable" risk assessments of the dangerousness of ambiguous blacks. Of course, appearances can be deceiving, so law-abiding Negroes can trigger false alarms, alerts, and advisories in ordinary people. Nevertheless, in the eyes of the law such false warnings are "reasonable mistakes" as long as they are the kind that ordinary people would make under similar circumstances.[65]

---

[63] Another nickname that, in addition to the "Golden Ghetto," View Park goes by.

[64] *See* ARMOUR, *supra* note 62, at 22–27; Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 782–83 (1994) [hereinafter *Race Ipsa Loquitur*].

[65] Case in Point and Cautionary Tale:

Call it arresting irony or just improbable farce, but midday Black Friday of 2011, while laying out these lucubrations on "suspicious Negroes" on my laptop, I had an eerie nigga-alarm-laden visitation, complete with a portable steel cage and cocked assault weapons. I was ruminating in the rumpus room of our upper-middle class Hillside home in our economically gated all-black neighborhood when my dogs started barking, which at midday means The Mailman Cometh. Our dogs hate to hear the postman clang the door on our mailbox shut after stuffing it mostly with junk mail and come-on schemes—**M E G A B U C K S** *You Could Be Our Next Millionaire!*—that pander to the poverty all about this privileged enclave. (Buried in the small print are the impossibly long odds against winning: *505,000,000 to one*). To spare the dogs that acoustic insult, as usual I walked over to the foyer, swung open the front door, and stepped outside to intercept the mail. But, by striding across our doorsill into a cloudless Southland afternoon, everything thrown into brilliant visibility by the impassive slant of our southwestern sun, I set off wailing sirens and scrolling nigga-alarms in the hearts and minds of a small cluster of Sheriff's deputies, provoking several to draw and train their handguns on my head and torso. "Freeze" and "Get your hands up" were their simultaneous but mutually contradictory commands—if you "freeze," of course, you cannot "get your hands up"—but as I was about to share this snarky observation with my gun-wielding interlocutors I noticed that the nearest one held his cocked firearm in a tremulous hand, a sign that he

Self-defense claims illustrate how the substantive criminal law treats false nigga alarms. Self-defense doctrine privileges both private citizens and police personnel to use lethal defensive force against persons who reasonably appear to pose an imminent threat of serious harm.[66] The reach of this privilege to shoot scary black males can be exceedingly long, as illustrated by cases like Bernard Goetz,[67] Amadou Diallo,[68] Sean Bell,[69] and Trayvon Martin.[70] Professors E.

---

was in the throes of an instinctive and fuel-injected fight-or-flight reaction. It struck me that despite my grey beard and two sons in college, by standing 6'5", weighing two hundred pounds, and brazenly brandishing nappyness from crown to jowl, I was to these armed and alarmed officers a "big, black man" who "looked like a criminal." It turns out that here in the Good Negro capitol of America, nappy performatives and celebrations of the African-American soul are worn at one's own peril.

With "nigga alarms" wailing, me and my impertinent performative were patted down and locked in the backseat of a police cruiser with the heavy-handed disrespect that is the common lot of "suspect Niggas." As I peered through the police car partition cage, more deputies arrived, a sharpshooter posted up across the street, and a phalanx of officers swept through our home with drawn assault weapons. With implacable forces swirling around me, I inwardly moved toward the quiet "eye" of this sudden tempest, that unruffled region at a storm's center about which winds rage and rotate, but which itself remains calm. From this serene eye I gazed at the links between my own rolling "prisoner transport cage" and those wrapped in concrete and barbed wire called correctional institutions. In this stillness I heard echoes of long ago captivities—plantations brimming with blacks in bondage—commingling with current-day captivities of both black inmates and law-abiding Negroes who appear imminently dangerous to ordinary police officers equipped with guns and rolling cages.

I was eventually told that someone had reported hearing a gunshot, although the way echoes reverberate through these densely-populated hills, its location necessarily involved guesswork. As the sweep uncovered no evidence of foul play, only the sole other occupants of the home in addition to me, namely, a playful chocolate Lab and gray-flannel Weimaraner, with a certain detached reflection I watched the deputies' "nigga alarm" sirens first deescalate into "nigga alert" honks, then dissolve into "nigga advisory" drones, and finally melt into the melodious "safe-negro" warble that for many years has been music to the ears of innocent but "suspicious" blacks. The door of my custom built cage swung open as "Safe Negro" scrolled across their ticker tape displays and I emerged like an Easter chick from its shell, stretching my legs and counting my blessings. Yet, had the Deputy's surge of adrenaline made his trigger finger any *twitchier*, or had his stereotypes about big, black men made it any *itchier*, our encounter could easily have ended not in a warble but a dirge.

[66] The "serious harms" that typically justify lethal defensive force are death, serious bodily injury, and rape. These justificatory grounds for self-defense involving deadly force have been expanded in some jurisdictions to include robbery (as in the Bernhard Goetz case) and "standing your ground" (as in Florida and other "stand your ground" jurisdictions that extend the "castle doctrine's" privilege not to retreat when attacked in one's own home to public spaces). *See e.g.*, FLA. STAT. § 776.012; People v. Goetz, 497 N.E.2d 41, 46–48, 54 (N.Y. 1986); Cora Currier, *23 Other States Have 'Stand Your Ground' Laws, Too*, THE WIRE (Mar. 22, 2012, 4:20 PM), http://www.thewire.com/national/2012/03/23-other-states-have-stand-your-ground-laws-too/50226/.

[67] *Goetz*, 497 N.E.2d at 41.

[68] Precisely the same analysis applies to police officers, as illustrated by the case of Amadou Diallo, the 22-year-old Guinean immigrant in New York City who was shot and killed in 1999 by four New York City Police Department plain-clothed officers, who mistook his wallet for a gun and fired 41 shots, hitting Diallo nineteen times. Michael Cooper, *Officers in Bronx Fire 41 Shots, And an Unarmed Man Is Killed*, N.Y. TIMES (Feb. 5, 1999), http://www.nytimes.com/1999/02/05/nyregion/officers-in-bronx-fire-41-shots-and-an-unarmed-man-is-killed.html. The internal NYPD investigation ruled that the officers' mistaken beliefs

Ashby Plant and B. Michelle Peruche have conducted experiments with police officers which showed that officers were quicker to decide to shoot an *unarmed* black target than a similarly situated *unarmed* white target.[71] Because such discriminatory reactions often occur in the cognitive unconscious,[72] bypassing the actor's voluntary or conscious control,[73] racially liberal and well-meaning officers (and ordinary citizens) arguably cannot help shooting ambiguous blacks more hastily. Because self-defense doctrine excuses ordinary mistakes rooted in ordinary human frailty, the law of self-defense thus allows ordinary police officers and civilians alike to use lethal defensive force more hastily against ambiguous but innocent blacks than against similarly situated whites. So long as ambiguous black men make the trigger finger of ordinary citizens or law enforcement personnel itchier or twitchier in uncertain situations than that finger would be for similarly situated white men, more hasty applications of deadly force to black men will qualify as reasonable and privileged. In the end, then, under current law, the quicker use of lethal force against blacks by ordinary—hence reasonable—and

---

were reasonable under the circumstances, and a criminal jury acquitted them on the same grounds. *See* Jane Fritsch, *The Diallo Verdict: The Overview; 4 Officers in Diallo Shooting Are Acquitted of All Charges*, N.Y. TIMES (Feb. 26, 2000), http://www.nytimes.com/2000/02/26/nyregion/diallo-verdict-overview-4-officers-diallo-shooting-are-acquitted-all-charges.html. *See also* Alan Feuer, *$3 Million Dollar Deal in Police Killing of Diallo in '99*, N.Y. TIMES (Jan. 7, 2004), http://www.nytimes.com/2004/01/07/nyregion/3-million-deal-in-police-killing-of-diallo-in-99.html ("The department accepted recommendations by two internal investigative panels, which found that the officers, although they fired at an unarmed man, had not breached police guidelines because they believed that Mr. Diallo held a weapon and that their lives were in danger.").

[69] The Sean Bell shooting incident took place in Queens, New York on November 25, 2006; three men were shot a total of fifty times by a team of both plainclothes and undercover NYPD officers, killing one of the men, Sean Bell, and severely wounding two of his friends, Trent Benefield and Joseph Guzman. Cara Buckley & William K. Rashbaum, *A Day After a Fatal Shooting, Questions, Mourning and Protest*, N.Y. TIMES (Nov. 27, 2006), http://www.nytimes.com/2006/11/27/nyregion/27shot.html. The incident sparked fierce criticism of the police from some members of the public and drew comparisons to the killing of Diallo in 1999. *Id.* Three of the five detectives involved in the shooting went to trial on charges ranging from manslaughter to reckless endangerment but were found not guilty. *Not Guilty—Detectives Charged in Sean Bell Shooting Acquitted on All Charges*, N.Y.1 NEWS (Apr. 25, 2008), http://www.ny1.com/content/news/80881/not-guiltydetectives-charged-in-sean-bell-shooting-acquitted-on-all-charges/. *See also* Michael Wilson, *Judge Acquits Detectives in 50-Shot Killing of Bell*, N.Y. TIMES (Apr. 26, 2008), http://www.nytimes.com/2008/04/26/nyregion/26bell.html?ref=nyregion.

[70] *See* Greg Botelho & Holly Yan, *George Zimmeran found not guilty of murder in Trayvon Martin's Death*, CNN (July 14, 2013, 11:50 AM), http://www.cnn.com/2013/07/13/justice/zimmerman-trial/.

[71] SAUL KASSIN, STEVEN FEIN & HAZEL ROSE MARKUS, SOCIAL PSYCHOLOGY 185 (7th ed. 2007) (citing E. Ashby Plant & Michelle Peruche, *The Consequences of Race for Police Officers' Responses to Criminal Subjects*, 16 PSYCHOL. SCI. 180, 181–82 (2005)). That the targets were unarmed makes it clear that we are focusing on mistakes and excuses rather than justifications. What's more, subjects were also quicker to decide to shoot an *armed* black target than a similarly situated *armed* white target. *Id.*

[72] Jody D. Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV 733, 738 (1995).

[73] *Id.*

well-meaning police officers and private citizens is an inexorable expression of the Black Tax that black men must simply grin and bear without civil compensation[74] or criminal vindication.[75]

ii. On Race, Place, Class, Crime, and Profiling

Allow me a brief side note. Interestingly, instead of criticizing the use of such profiling, of what I term the general deployment of a Nigga Detector, many in the black community critique only its unfair use on them. It is not the Nigga Detector they object to, but rather the fact that it is still too blunt an instrument, not sufficiently calibrated to exclude all good negroes. These critics add that the disproportionate misdeeds of bad niggas hurt the interests of good law-abiding Negroes by providing the statistical justification for the "Black Tax." As Ellis Cose chronicles in *The Rage of a Privileged Class*, the Black Tax is the bane of the existence of the black bourgeoisie and one big reason black Brahmans feel so enraged.[76] Indifferent as lightning, the Black Tax strikes both black haves and black have-nots, both good and bad Negroes. But unlike natural lightning, which in myth never strikes twice in the same place, bolts of Black Tax lightning repeatedly strike the same targets again and again. This phenomenon is shown by a Community Service Society of New York's analysis of 2009 stop-and-frisk data for the New York police: there were 132,000 stops of black men 16–24 in 2009 (94 percent of which did not lead to an arrest).[77] According to Census Bureau data, only 120,000 black men of that age lived in New York City in 2009![78] Thus, "on average, every young black man can be expected to be stopped and frisked by the police each year."[79] Put differently, young black men in New York are law-

---

[74] Self-defense is a privilege to a battery claim in tort. *See* RESTATEMENT (SECOND) OF TORTS, § 63 (1965). We could recognize strict liability in tort for reasonable mistakes about the need for deadly defensive force; specifically, we could adopt the logic of *Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456, 459 (1910) and hold that a deliberate appropriation of another's well-being to promote and protect one's own interests triggers a duty to compensate the injured party even though the injurer acted reasonably and was in no way at fault. Alternatively, perhaps we could think of law enforcement as an ultra-hazardous activity subject to strict liability vis-à-vis innocent blacks in light of demonstrable unconscious bias.

[75] However, unlike strict tort liability, legally *vindicating* innocent victims of reasonable mistakes through imposing strict *criminal* liability on their injurers would be impossible without fundamentally violating the culpability principle that is the cornerstone of our criminal jurisprudence. *See* Morissette v. United States, 342 U.S. 246, 250–51 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. . . . A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to.'").

[76] *See* ELLIS COSE, THE RAGE OF A PRIVILEGED CLASS 95 (1993).

[77] Lazar Treschan, Letter to the Editor, *Police Stop-and-Frisks*, N.Y. TIMES (Dec. 29, 2011), www.nytimes.com/2011/12/30/opinion/police-stop-and-frisks.html.

[78] *Id.*

[79] *Id.*

enforcement lightning rods who can expect to be struck over and over by blue surge bolts of Black Tax lightning.

Some privileged blacks would not find the Black Tax so infuriating if it were more targeted, tailored, and regressive, that is, more limited to *poor* blacks, whose disproportionate misdeeds establish and maintain the statistical link between race and crime in the first place. Black Brahmin icon, Bill Cosby, stressed the class factor in his address at the NAACP on the 50th anniversary of *Brown v. Board of Education*: "Ladies and Gentlemen, the lower economic and lower middle economic people are not holding their end in this deal."[80] Statistically at least, these better off critics of poor blacks have a point: the vast majority of black street criminals are from "extremely" disadvantaged neighborhoods.[81] From this statistical perspective, by committing street crimes at such disproportionately high rates, "poor black criminals" make *blackness itself*, in the language of evidence law, *relevant* evidence of criminal wrongdoing or criminal intent. The disproportionate misdeeds of poor blacks—to paraphrase the evidence code—make the proposition that someone did or will do a crime statistically more likely to be true given his blackness than it would be without that factor. This cold but cogent math—chiefly bottomed on the criminal wrongdoing of blacks from truly disadvantaged neighborhoods—has prompted my Black Beverly Hills neighbors to openly declare "We don't want Compton up here"; in eerily similar language it also prompted an L.A. County Sheriff's Deputy to warn an event planner that "We

---

[80] Bill Cosby, Address at the NAACP on the 50th Anniversary of Brown v. Board of Education, at Constitution Hall, Washington D.C. (May 17, 2004), *available at* http://www.americanrhetoric.com/speeches/billcosbypoundcakespeech.htm. Cosby's speech is often called the "Pound Cake" speech because of the following lines in which he drives a sharp and deep wedge between morally "innocent" victims of Jim Crow and their champions ("the ones up here in the balcony"), on the one hand, and morally culpable common black criminals, on the other:

> But these people, the ones up here in the balcony fought so hard. Looking at the incarcerated, these are not political criminals. These are people going around stealing Coca-Cola. People getting shot in the back of the head over a piece of pound cake! And then we all run out and are outraged, "The cops shouldn't have shot him." What the hell was he doing with the pound cake in his hand? I wanted a piece of pound cake just as bad as anybody else, and I looked at it and I had no money. And something called parenting said, "If you get caught with it you're going to embarrass your mother." Not "You're going to get your butt kicked." No. "You're going to embarrass your family."

Id. Note that the socially conservative but popular position Cosby expresses here flatly rejects, on moral grounds, Michelle Alexander's contention that the mass incarceration of black criminals constitutes a form of unwarranted social and political oppression analogous to Jim Crow. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

[81] *See generally* Krivo & Peterson, *Extremely Disadvantaged Neighborhoods and Urban Crime*, *supra* note 35; Krivo & Peterson, *The Structural Context of Homicide*, *supra* note 35; Peterson & Krivo, *Macrostructural Analyses of Race, Ethnicity, and Violent Crime*, *supra* note 35; Peterson & Krivo, *Race, Residence, and Violent Crime: A Structure of Inequality*, *supra* note 35.

don't want South Central up here."[82] The cogent math linking extremely disadvantaged black neighborhoods and violent crime means that, from the perspective of these good negroes, someone from such a neighborhood should pose a much greater risk of serious street crime than his Golden Ghetto doppelganger.[83] These good negroes thus embrace something akin to a mapping of the link between race, place, class, and crime, something akin to a "nigga geography" or "nigga cartography."[84] Not surprisingly, there's an app for that—a service originally launched under the name "Ghetto Tracker" and relying on crowd sourced information (locals rate which parts of town are safe and which ones are ghetto, or unsafe) to help people avoid unsafe areas.[85]

For these good negroes, the Nigga Detector would be less blunt and more finely calibrated if it also included a Ghetto Tracker. For these good negroes, "class" and "place" profiling—"spatial profiling"—is perfectly rational, reasonable, and right. They can echo defenders of racial profiling and say, with the cool precision of Mr. Spock or Data, "it is regrettable but rational to profile on the basis of geography—nothing personal. As long as there remains a statistically rational relationship between extremely disadvantaged neighborhoods and violence, we cannot escape the logical link between geography and dangerousness. Simply put, we must distinguish and distance ourselves from Jungle-South Central-Compton-Inglewood-Watts blacks because doing so enhances our safety; it's not about race or class but safety—again, nothing personal."[86] Thus an

---

[82] I, along with Eddie Harris (former Santa Monica police officer) and Chris Cuben (producer and event planner), witnessed the Sheriff's remarks.

[83] What's more, inasmuch as black criminals are morally condemnable, then, *by hypothesis*, not only are denizens of truly disadvantaged neighborhoods more dangerous, they are also much more often morally condemnable; in other words, they are morally suspect. Put differently, under the Black Criminal Litmus Test of a morally condemnable "nigga," it turns out that the moral boundary that runs between law-abiding "black people" and wicked "niggas" tightly tracks the geographical boundaries between black haves and have-nots.

[84] Massey and Denton have argued and shown that residential segregation serves to channel the racial inequality in rewards (e.g., high income) and disadvantages (e.g., poverty) evident in a racially stratified society into distinct neighborhood environments. DOUGLAS S. MASSEY & NANCY A DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 122–23 (1993).

[85] Heather Kelly, *Ghetto Tracker Site Offends, Dies and Returns*, CNN (Sep. 6, 2013, 5:17 PM), http://www.cnn.com/2013/09/06/tech/web/ghetto-tracker-controversy/; Lydia O'Connor, *'Ghetto Tracker,' App That Helps Rich Avoid Poor, Is as Bad as It Sounds*, THE HUFFINGTON POST (Sept. 5, 2013, 4:50 PM), http://www.huffingtonpost.com/2013/09/04/ghetto-tracker_n_3869051.html. Ghetto Tracker's ratings of neighborhoods weren't based on any hard crime data but rather on the impressions (and perhaps biases) of ordinary people. Would Ghetto Trackers remain objectionable if they changed the name—say, to "Good Part of Town," as was done by the site founder—and rested the ratings on hard data? In the words of the site owner, "This website is not about race or income, as some of the PC myrmidons have asserted . . . . Again, it's about safety." Kelly, *supra*.

[86] I call such black apologetics for spatially profiling other blacks "talking white"—deploying the same arguments against poor blacks to justify class profiling that whites use against blacks to justify racial profiling. Hypocrisy seeps through these class-based discriminations, however. In

enraged "privileged class" that rails against too blunt racial profiling *itself* routinely practices spatial profiling without compunction or even a hint of irony.

iii. The Black Tax as a Tithe That Binds

Allow me another side note. Although I have attacked the Black Tax in books,[87] blogs,[88] and law reviews,[89] a silver lining runs through it. To appreciate the consolation I find in racial profiling, start with the well-supported empirical premise that extreme disadvantage breeds street crime. Then add the observation that so long as truly disadvantaged blacks continue to disproportionately commit street crime, their disproportionate misdeeds will continue to statistically justify the use of a Nigga Detector and the resulting Black Tax, and generate the false nigga warnings that rankle and enrage the privileged class. Now add the recognition that more sophisticated Nigga Detectors will never adequately reduce the false warnings visited upon the enraged class of privileged blacks. The silver-lining implication of these three propositions is that the only way for enraged black Brahmins to pay or sing less of the Black Tax[90] blues is to destroy its statistical foundation by lifting poor blacks out of extremely disadvantaged neighborhoods, fixing their crumbling schools, and addressing other criminogenic social conditions that besiege them. In fact, whenever members of the black bourgeoisie are struck by bolts of Black Tax lightning (whenever, say, they nearly get tennis elbow from trying to flag down cabs that won't stop), their rage should give way to a "moment of Zen"—they should reflect on reasons for the sometimes cogent

---

Rage of a Privileged Class, Ellis Cose chronicles the seething festering resentment of many in the black bourgeoisie whose socio-economic privilege provides no immunity to a steady barrage of indignities and micro-aggressions rooted in racial stereotypes and suspicions. *See* COSE, *supra* note 76, at 11–14. Yet this righteous rage over racial profiling rings hollow when that same privileged class practices spatial profiling against other blacks. Black-on-black spatial profiling cannot be justified any more than white-on-black racial profiling. Teens from poor black neighborhoods have no more control over the class they were born into than members of the black bourgeoisie have over their skin pigment. Kids and teens are not poor because they are bad anymore than people are black because they are bad, so neither poor black teens nor privileged black adults can control the social characteristic profilers use against them.

[87] *See* Armour, *Race Ipsa Loquitur*, *supra* note 64, *as reprinted in* KADISH ET AL., *supra* note 6, at 826–27; *id.*, *as reprinted in* CRITICAL RACE THEORY: THE CUTTING EDGE 180 (Richard Delgado & Jean Stefancic eds., 3d ed. 2013); *see* ARMOUR, *supra* note 62.

[88] *See* David Schraub, *Blogging in Full Armour* (Sept. 13, 2006), http://firstmovers.blogspot.com/2006/09/blogging-in-full-armour.html (discussing Jody David Armour, *West Coast Nigga Thinking Parts I-IV* (on file with author)).

[89] Armour, *Race Ipsa Loquitur*, *supra* note 64, at 782–83.

[90] The Black Brahmin Blues—the genre of the Black Tax Blues sung by View Park Negroes—could go something like this:

Black Tax rising, *despite* my degrees I can't buy no relief
I said, Black Tax rising, *despite* my degrees I don't get no relief
Blue surge bolts of Black Tax lightning don't respect my good Negro pedigree.

statistical disparities in rates of crime by race that can be advanced to justify racial profiling and its attendant indignities, namely, the hopelessness, frustration, alienation, and despair of truly disadvantaged blacks stranded in neighborhoods abandoned long ago by the "privileged class" itself.[91] The relatively law-abiding black bourgeoisie should view the Black Tax as a "tithe" that binds their fate to that of extremely disadvantaged blacks, a relentless reminder that as long as "they" don't look good, "we" don't look good. That is the silver lining, at least in theory.

iv. The Blaming System: Weighing Wickedness

Next, consider the Nigga Detector's *blaming system*, the primary focus of this essay and of the substantive criminal law. When aimed at a black person who has already committed a prohibited act or *actus reus* (for instance, a black defendant in a criminal trial who clearly caused a death or some other serious social harm), the Detector no longer needs drones, honks, or sirens to warn of the *risk* of someone committing a prohibited act. At this point, the risk of wrongdoing has been realized—the jury believes beyond a reasonable doubt that the defendant committed a wrongful act. So in this phase of its operation, the Detector shifts from assessing someone's riskiness, suspiciousness, and dangerousness to assessing his moral fault, blameworthiness, and subjective culpability.[92] Since the sole function of the Detector's blaming system is to assess a black wrongdoer's wickedness, its operation and application raises concerns commonly couched in terms of "mens rea" (i.e. "criminal intents," "vicious wills" and "depraved hearts"), "individual choice," "personal responsibility" and "substantive criminal law." Once again, the Detector's assessments of a wrongdoer's wickedness or mens rea reflect the moral judgments, perceptions and beliefs of ordinary men and women.[93]

---

[91] *See* WILSON, *supra* note 52; Kucheva & Sander, *supra* note 52.

[92] The wrongdoer's "character" can influence both the warning and blaming judgments of fact finders. "Character" as propensity to commit a crime in the evidentiary sense can be seen as relevant to the warning system. The "character" part of subjective culpability and mens rea analysis is also relevant to the blaming system. Evidence of a defendant's character to prove propensity and hence to prove he committed the actus reus is generally screened out of criminal adjudications. However, drawing inferences of bad character traits from the commission of an actus reus or prohibited act is, as George Fletcher points out, a standard part of mens rea analysis. GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 799–800 (1978).

[93] Many black commentators and decision makers who criticize ordinary, widespread, "common sense" beliefs about blacks when it comes to the Detector's warning system nevertheless warmly embrace such beliefs when it comes to its blaming system. When it comes to the warning system's race-based predictions and risk assessments (that is, when it comes to the Black Tax), the interests of disproportionately privileged law-abiding blacks and those of disproportionately poor black criminals converge more, making it easy for privileged black scholars, commentators, and ordinary people to energetically attack a harmful social practice—like that of racial profiling—that falls especially hard on poor black males trapped in aggressively policed low income neighborhoods. However, when it comes to other harmful social practices that especially hurt poor black males—like

So, when aimed at a black who has already committed a wrongful act, the Detector activates a flashing red "Presumptive Nigga" light while broadcasting the click-clack sound of double barrel hammers cocking in rapid succession. This cocking sound acoustically represents the typical or ordinary inference that someone who commits a wrongful act is wicked, so it acoustically represents our *readiness* to condemn and ostracize the wrongdoer if and when he fails to refute that ordinary inference of subjective culpability.[94] As Professor George Fletcher observes, if someone commits a prohibited act—say, a jewelry store clerk opens a safe and turns over all the jewels to an unauthorized stranger, or a driver runs over someone lying in the street, or a State Department employee turns over vital state secrets to a foreign government—we typically infer from his wrongful act that he is wickedly dishonest, indifferent, or greedy.[95] More succinctly, we typically infer a bad actor from a bad act.[96] In this sense, someone who commits a prohibited act is presumptively blameworthy. And this is particularly true of black wrongdoers, in part because of the implicit biases we all have. Accordingly, when the Detector is aimed at a black wrongdoer, it scrolls "*Prima Facie* Nigga" across its display along with an acoustic cascade of click-clacks.

Of course, this typical inference of culpability or presumptive wickedness can be defeated. If the clerk, the driver, and the State Department employee commit their prohibited acts *at gunpoint*, we cannot infer from their wrongful act anything about their dishonesty, indifference, or greed. All three could claim a full excuse of duress.[97] Excuses, in the words of George Fletcher, "preclude an inference from

---

our blame and punishment practices—the interests of disproportionately privileged law-abiding blacks and those of disproportionately poor black wrongdoers in critical ways *diverge*, making it easier for Good Negroes to energetically endorse "lock 'em up and throw away the key" approaches toward their "bad 'brothers.'"

[94] This presumption of subjective culpability or mens rea may seem at odds with the "presumption of innocence" guaranteed under the Due Process Clause of the Fourteenth Amendment. In re Winship, 397 U.S. 358, 364 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). Compare *Patterson v. New York*, which seems to permit legislators to make mens rea factors affirmative defenses and hence shift the burden of proof on those matters of guilt and innocence to the accused. 432 U.S. 197, 225–32 (1977) (Powell, J., dissenting). That is, assuming that Due Process requires the state to prove that the defendant committed a prohibited act beyond a reasonable doubt, the state may then shift to the defendant the burden of proving his moral innocence, of proving that his act was not accompanied by intent or any other form of mens rea. *Id.* So characterizing someone who commits a prohibited act as presumptively blameworthy would not necessarily violate the soft, anemic presumption of innocence recognized in *Patterson*. *Id.*

[95] FLETCHER, *supra* note 9.

[96] *Id.*

[97] Model Penal Code would allow a duress excuse for someone who ran over another person with a gun at his head, but most courts would not allow the excuse for the intentional taking of human life. *See* MODEL PENAL CODE AND COMMENTARIES § 2.09(2) cmt. 3 at 375–78 (1985).

the act to the actor's character."[98] But can a *Prima Facie* Nigga destroy the ordinary inference of wickedness that accompanies wrongdoing by raising or interposing a valid excuse?

A wrongdoer may be unable to assert a valid excuse either because the law does not recognize the kind of excuse he wants to assert or because the jury does not think he deserves the benefit of an excuse the law does recognize. In either case, without an effective excuse, he will be found wicked beyond a reasonable doubt. Accordingly, when the Detector points toward a black wrongdoer unable to raise a valid excuse and hence found wicked beyond a reasonable doubt by a jury, the Detector scrolls "real Nigga" across its ticker while acoustically broadcasting the Blam-Blam of the distinguish and distance barrels discharging twin rounds of Bad Negro buckshot.

v. An Illustration-Application-Demonstration: The Reasonable Poor Black Man Test of Mens Rea

To see the Detector tools in action, let's apply the apparatus thus far to the longstanding debate over *broad* excuses for black criminals from disadvantaged social backgrounds. Of course, any analysis of criminal excuses must begin with a prohibited act or *actus reus*—like causing death or giving away vital state secrets.[99] Again, blacks who commit such prohibited acts trigger the Detector's cascading click-clacks and scrolling "Prima Facie Nigga" ticker.

At this point a prima facie bad Negro can seek to assert either a broad *partial* excuse like provocation and "extreme emotional disturbance"[100] or a broad *full* excuse like duress and self-defense. In claims of provocation and extreme emotional disturbance, a wrongdoer is partially excused if a "reasonable person in the situation" would have been sorely tempted to lose self-control; in duress and self-defense, he is fully excused if a "reasonable person" (i.e. a person of average courage, firmness and backbone) in the wrongdoer's situation" would have been overwhelmed by the threats or apparent threats. So both kinds of excuse[101] turn crucially on the "reasonable person in the situation" test of subjective

---

[98] FLETCHER, *supra* note 92, at 798–99 (claiming that something about the wrongdoer's circumstances drove a wedge between his true self and the contingent self who committed the prohibited act or more concisely they claim that their wrongdoing was the result of ordinary human frailty).

[99] Accordingly, excuse claims involve the Detector's "blaming system," not its "warning system." Of course, failure to act when under a duty to act also constitutes an act.

[100] I know that provocation doctrine can be narrowly limited to a few adequate forms, but I'm following the *Maher* line of cases that allow most claims of provocation to reach the jury subject to the judge playing the role of gatekeeper. *See* Maher v. People, 10 Mich. 212, 222 (1862).

[101] Other fully exculpatory excuse claims include criminal negligence and criminal recklessness: Sanford Kadish rightly views negligence and recklessness as "excuses in mens rea clothing." Sanford H. Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257, 260–61 (1997).

culpability.[102] Thus, the reasonable person test provides judges and jurors with a flexible legal vehicle by which they can excuse a wrongdoer on the moral ground that his circumstances, in the words of Mark Kelman, drove a wedge between his "contingent" self—the self that came forward under the unjust pressures of the situation in which he found himself—and some underlying "true" self that could have manifested itself and maintained control if not for those unjust pressures.[103]

The "reasonable or ordinary person in the situation" test of wickedness[104] can be either rigid and "invariant"[105] (i.e. a typical person drawn from the general population, average in mental, emotional, psychological and dispositional make up) or flexible and "individualized" (a typical person drawn from a social subgroup, like a typical battered woman or a typical person suffering from a post-traumatic stress disorder or a typical impoverished, poorly educated and chronically unemployed person). Whether the test is invariant or individualized,[106] the underlying question of legal excuses can be distilled to this: "Should the 'reasonable person in the situation' test of blameworthiness in cases of duress and extreme emotional disturbance be individualized to make allowances for the wrongdoer's disadvantaged social background?" Alternatively, in instructing on the reasonable person standard: "Should courts instruct jurors on an 'ordinary

---

[102] Jurors excuse or condemn on the basis of this decision rule. Decision rules are addressed to the fact finder and guide their judgments of defendant at trial; conduct rules are addressed to the general public and guide their behavior as citizens outside the courtroom. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984); Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. CHI. L. REV. 729 (1990).

[103] Mark Kelman, *Reasonable Evidence of Reasonableness*, 17 CRITICAL INQUIRY 798, 802 (1991). As Martin Wasik puts it, in cases of duress "the accused claims that there was no act by *him*." Martin Wasik, *Duress and Criminal Responsibility*, CRIM. L. REV. 453, 453 (1977); *see also* State v. Woods, 357 N.E.2d 1059, 1066 (Ohio 1976) ("The essential characteristic of coercion . . . is that force, threat of force, strong persuasion or domination by another, necessitous circumstances, or some combination of those, has overcome the mind or volition of the defendant so that he acted other than he ordinarily would have acted in the absence of those influences."), *vacated in part*, 438 U.S. 910, 910 (1978), *and overruled on other grounds by* State v. Downs, 364 N.E.2d 1140, 1144 (Ohio 1977), *vacated in part*, 438 U.S. 909 (1978). By this logic, we must ascertain a wrongdoer's true character before we can justly blame him, and the reasonable person test provides the legal basis for jurors to assess his blameworthiness by either attributing his misdeeds to his "contingent self" and thus excusing him or attributing them to his "true" self—to an inner depravity, malignity and wickedness—and thus condemning him.

[104] Some contend that the reasonable person test is a form of strict liability that does not get at subjective culpability like the aware mental state forms of mens rea do. This claim is not supported by the case law and substantive doctrine. GLAVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 122–23 (2d ed. 1961) (cited and quoted in KADISH ET AL., *supra* note 24 at 423).

[105] HART, *supra* note 14, at 153–54.

[106] Which one it is depends on case law, the trial judge, and even the legislature (in self-defense law, for instance, legislatures have required courts to recognize evidence of battered women's syndrome, essentially requiring courts to individualize the reasonable person test in such cases). *See, e.g.*, VA. CODE ANN. § 19.2-270.6.

impoverished black man trapped behind ghetto walls' test of reasonableness in claims of putative self-defense, duress, provocation, or extreme emotional distress?" Bear in mind that, at bottom, the "reasonable person in the situation" approach to excuses and subjective culpability depends on jury sympathy. In the words of a Model Penal Code Comment on the reasonable person test in provocation cases, "*[i]n the end, the question is whether the actor's loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen.*"[107] Sympathy, or its absence, drives our moral judgments of wrongdoers at least as much as—if not far more than—reason or logic or categorical imperatives.[108] "Nigga" from this standpoint is a conclusory label that the object of assessment inspires no sympathy in the observer, commentator or decision maker: individuals are not unsympathetic because they are bad Negroes, they are bad Negroes because they are unsympathetic.[109]

2. Excuse Deflector

The above illustration brings me to the remaining components of the Ostracizer apparatus, beginning with the Excuse Deflector. In seeking to assert excuses based on duress, heat of passion, or an individualized reasonable person test, our posited wrongdoer activates the Nigga Detector's built-in Excuse Deflector, which deflects excuses for blacks on *moral, legal, psychological*, and *political* grounds.

i. Morally

The Excuse Deflector brushes aside excuses on two often heard grounds. First, in keeping with the widespread view that sympathy for *wrongdoers* in criminal matters is misplaced, the Deflector channels sympathy away from the human frailty of the wrongdoer and solely toward the terrible suffering of his victims.[110] From this standpoint, sympathy for victims flatly trumps that for

---

[107] *See* KADISH ET AL., *supra* note 6, at 459 (citing MODEL PENAL CODE AND COMMENTARIES, § 210.3 cmt. at 62–63 (1980) (emphasis added). The Model Penal Code states this in the setting of the Extreme Emotional Distress defense, but it applies equally to self-defense, duress, recklessness and negligence. *Id.*

[108] Inasmuch as condemnation of and sympathy for wrongdoers pull in opposite directions, this issue of how individualized to make the standard of care really boils down to what exculpatory or mitigating factors jurors will hear about in reaching their decision on whether to withhold or give sympathy.

[109] More generally, individuals are not unsympathetic because they are wicked. They are wicked because they are unsympathetic.

[110] *See, e.g.*, Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1339–40, 1354, 1365–66 (1997) (concluding that the Model Penal Code's formulation has aggravated the unfairness to women of the provocation defense by expanding greatly the kinds of frictions in intimate settings that may suffice to reduce a killing from murder to manslaughter). Of course, excuse claims will not persuade judges, jurors and laypeople who

victimizers. Second, in keeping with another widespread viewpoint, the Deflector brushes aside most excuses for black criminals on the ground that excuses insult the dignity of their intended beneficiaries—black criminals—by treating them like animals or things or Pavlovian bundles of conditioned reflexes rather than as *persons*, that is, as moral agents capable of meaningful choice.[111] Both these classic and oft-repeated reasons for rejecting most excuses (even limited and long-standing excuses like heat of passion on sudden provocation) are captured in the following comment by Professor Stephen Morse:

> I would abolish [the provocation defense] and convict all intentional killers of murder. Reasonable people do not kill no matter how much they are provoked, and even enraged people generally retain the capacity to control homicidal or any other kind of aggressive antisocial desires. We cheapen both life and our conception of responsibility by maintaining the provocation/passion mitigation. This may seem harsh and contrary to the supposedly humanitarian reforms of the evolving criminal law. But this . . . interpretation of criminal law history is morally mistaken. It is humanitarian only if one *focuses sympathetically on perpetrators and not on their victims*, and views the former as mostly *helpless objects of their overwhelming emotions and irrationality*. This *sympathy is misplaced*, however, and is *disrespectful to the perpetrator*. As virtually every human being knows because we all have been enraged, it is easy not to kill, even when one is enraged.[112]

ii. Legally

For reasons like those expressed by Professor Morse, the Deflector turns aside all but a few narrowly framed legal excuses, like involuntary act, *maybe* limited insanity, *maybe* very limited duress,[113] and no provocation or extreme emotional

---

commiserate solely with the suffering of victims. From this standpoint, sympathy for victims trumps sympathy for victimizers, even though from a broader frame of reference, the victimizers can be seen as victims, too. This victim-centered approach is incident-focused and begins the narrative with the crime. Like critiques of torts and contract law, the critique of this approach is that it ignores background inequalities in the formulation and application of its rules of decision and in the normative assessment of those decision rules; changes in the status quo ante are all that are considered.

[111] My moral luck analysis in my forthcoming book embraces rather than flees this charge. *See* ARMOUR, *supra* note 22.

[112] Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 33–34 (1984) (emphasis added) (citations omitted).

[113] *See* ARMOUR, *supra* note 62, at 92–94.

disturbance.[114] Many courts arbitrarily—from the standpoint of the culpability principle—limit the scope of excuse claims *as a matter of law* so that wrongdoers never get to present them to a jury.[115] The Deflector reflects and gives effect to these artificial legal limitations on what kinds of extenuating factors a wrongdoer can get before a jury to potentially arouse their sympathy.

iii. Psychologically

The Deflector more readily rejects and deflects excuses for black wrongdoers than for white ones in order to reflect the role of unconscious bias in moral

---

[114] *See* Morse, *supra* note 112; *see also* Nourse, *supra* note 110, at 1331–34 (contending that provocation and EED doctrines redound to the detriment of female assault victims and so should be severely circumscribed or abolished).

[115] For instance, the commentary to Section 2.09 of the Model Penal Code explains the operation of duress doctrine with the following illustration:

> (a) X is unwillingly driving a car along a narrow and precipitous mountain road, falling off sharply on both sides, under the command of Y, an armed escaping felon. The headlights pick out two persons, apparently and actually drunk, lying across the road in such a position as to make passage impossible without running them over. X is prevented from stopping by the threat of Y to shoot him dead if he declines to drive straight on. If X does go on and kills the drunks in order to save himself he will be excused [under duress doctrine] if the jury should find that "a person of reasonable firmness in his situation would have been unable to resist," although he would not be justified under the lesser evil principle of [necessity doctrine].

MODEL PENAL CODE AND COMMENTARIES § 2.09(2) cmt. 3 at 378 (1985).

X's choice in this hypothetical situation to kill the people lying across the road rather than sacrifice himself is deemed to be determined. However, courts strictly cabin the duress defense by requiring that the defendant face immediate and specific threats, usually of death or severe bodily injury, and that the threats come from specific human agents who seek to compel the defendant to commit the particular crime for which he is charged. The Model Penal Code illustrates the incoherence (from the moral standpoint of his deserts) of these restrictions on the duress defense in the following variation on their earlier hypothetical:

> (b) The same situation as above except that X is prevented from stopping by suddenly inoperative brakes. His alternatives are either to run down the drunks or to run off the road and down the mountainside. If X chooses the first alternative to save his own life and kills the drunks he will not be excused under [duress doctrine] *even if a jury should find that a person of reasonable fortitude would have been unable to do otherwise.*

Id. (emphasis added).

From the standpoint of the defendant's blameworthiness, it is impossible to distinguish between these two hypothetical situations. By hypothesis, even if a reasonable person could not have avoided doing exactly what the defendant did, he must be legally condemned because of morally irrelevant doctrinal limitations. From the standpoint of the culpability principle, the following distinction between the two cases offered in the commentary to the Model Penal Code is embarrassingly beside the point: "In the former situation, the basic interests of the law may be satisfied by prosecution of the agent of unlawful force; in the latter circumstance, if the actor is excused, no one is subject to the law's application." *Id.* at 379.

Also in keeping with conservative formulations of the black letter law, the Deflector deflects excuses peculiar to someone's social subgroup by using only an invariant or so-called "objective" reasonable person test and rejecting an individualized one.

judgments of blacks by ordinary people. Studies on unconscious discrimination—both in the form of attribution bias[116] and in-group empathy bias[117]—show that ordinary people are more likely to reject excuses for blacks than for similarly situated whites.

iv. Politically

The Deflector rejects excuses because successful ones gum up both barrels of the Ostracizer's double barreled distinguish and distance "them" from "us" response to black criminals.[118] Full excuses like duress clog up the "distinguish" barrel by making it impossible to "differentiate" the character of blacks who commit prohibited acts from those who do not; partial excuses like provocation clog up the "distance" barrel by reducing murder to manslaughter and hence reducing the moral distance between an intentional killer and the law-abiding rest of us.[119] By deflecting most excuses for black wrongdoers, the Deflector keeps both barrels of the double-barreled anti-lumping political reaction to black criminals unclogged and ready.[120]

---

[116] In a classic experiment, Birt Duncan showed white subjects a videotape depicting one person (either black or white) ambiguously shoving another (either black or white). Birt L. Duncan, *Differential Social Perception and Attributes of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 595–97 (1976). Subjects who characterized the shove as "violent" more frequently attributed the wrongdoing to personal, dispositional causes when the harm-doer was black, but to situational causes when the harm-doer was white. *Id.* A recent study of juvenile offenders found a pronounced difference in court officials' attributions about the causes of crime by black versus white youths: Court officials are significantly more likely to perceive blacks' crimes as caused by internal factors and crimes committed by whites as caused by external ones. George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554, 557, 561 (1998). In the words of the researchers, "[b]eing black significantly reduces the likelihood of negative *external* attributions by probation officers and significantly increases the likelihood of negative *internal* attributions, even after adjusting for severity of the presenting offense and the youth's prior involvement in criminal behavior." *Id.* at 563–64.

[117] Jennifer N. Gutsell & Michael Inzlicht, *Empathy Constrained: Prejudice Predicts Reduced Mental Simulation of Actions During Observation of Outgroups*, J. EXP. SOC. PSYCHOL. 841, 842 (2010); Vani A Mathur et al., *Neural Basis of Extraordinary Empathy and Altruistic Motivation*, 51 NEUROIMAGE 1468, 1468 (2010).

[118] Part of the political reason for distinguishing and distancing good and bad Negroes is to look better in the eyes of whites and enhance our racial reputation. KENNEDY, *supra* note 13, at 17. This kind of political rationale will apply to cases of minorities who must care about their subgroup's reputation. But a more general political reason for a "distinguish and distance" approach to wrongdoers may be the need for proponents of "law and order," retribution, stiffer sentencing, and more prisons to maximize the contempt and indignation stirred by the objects of the longer sentences and harsher treatment that they advocate.

[119] What's more, successful excuses clog both barrels by focusing attention on the human frailty of wrongdoers and inviting decision makers to show them sympathy as well as their victims.

[120] Accordingly, Good Negro Theory and its proponents must assume that there is a stark dichotomy, a "sharp" distinction, between criminals and non-criminals.

3. Double Barreled Distinguish and Distance Device

Once the Deflector has rejected the excuse claims of most black wrongdoers, the resulting absence of valid excuses means the jury will confirm the Detector's prima facie readings by finding the wrongdoer a blameworthy bad Negro beyond a reasonable doubt, thereby triggering the implacable BLAM-BLAM of the distinguish and distance barrels while the words "Real Nigga" scroll across their collective electronic ticker display.

4. Good Negro Code of Ethics

Because the Detector—the conceptual and operational embodiment of the Black Criminal Litmus Test of a Nigga—rejects most excuses for black criminals, any racial justice advocate who "makes excuses" for such odious creatures violates the Ostracizer's Good Negro Code of Ethics, under which *ethical* advocates must remain faithful to the kind of "morality of means"[121] that inspired Justice Marshall to refuse to make excuses for "thuggery when perpetrated by blacks."[122] In other words, for Good Negro Theory, distinguishing and distancing good and bad Negroes is an ethical obligation, one that imposes ethical limits on how racial justice advocates should treat black criminals and approach criminal matters. Under Good Negro Ethics, racial justice advocates who fail to morally and legally distinguish and distance black criminals from law-abiding blacks breach their most basic duty to *help* rather than *hurt* Black People.

For convenience, let me emphasize that I am using the term "Good Negro" to refer to law-abiding blacks who "ethically" wield whatever influence they have in criminal matters to sharply distinguish morally and legally between black law abiders (other good negroes) and black criminals (bad niggas). Thus, there can be Good Negro Presidents, Senators, Attorneys General, Judges, and Jurors. Good Negro Sheriffs, District Attorneys, Parole Board Members and Probation Officers. Good Negro Scholars, Bloggers and Pundits.[123] And finally, there can be Good Negro Associations and Advocates, like the NAACP under Thurgood Marshall,[124] dedicated to ethically advancing the social interests of African Americans in criminal matters through strategies that "sharply distinguish" between Good and Bad Negroes.[125] From the standpoint of Good Negro Ethics, black activists must not defend black criminals, for it *hurts* Black People when racial justice advocates carry briefs for niggas.

---

[121] KENNEDY, *supra* note 13, at 20.

[122] *Id.* at 21.

[123] Even Good Negro Ordinary Citizens—a category encompassing ordinary blacks who, for instance, eschew public displays of solidarity with black criminals. *Id.*

[124] *See id.* at 20–21.

[125] And these strategies also maximize the distance between them in the eyes of whites.

5. Good Negro Cost-Benefit Wealth-Maximizing Moral Compass

Finally, according to the cost-benefit moral compass of the Ostracizer,[126] excuses—such as an "ordinary impoverished black man trapped behind ghetto walls" test of the "reasonable man"—are bad policy for blacks as a group because excuses keep criminal wrongdoers, including drug dealers, users, and gangbangers, out of jail and on the street, where they can claim more mostly black victims. In short, "A thug in prison can't shoot your sister."[127] Good Negro legal scholar Randall Kennedy puts it this way: "[i]n terms of misery inflicted by direct criminal violence," blacks "suffer more from the criminal acts of their racial 'brothers' and 'sisters' than they do from the racist misconduct of white police officers."[128] This wry remark may very well be true. It is not hard to imagine that a given Black gangbanger could inflict more pain and suffering on other blacks than a given bigot with a badge and a gun.[129] It may even be true that, to quote another Good Negro commentator, "Racist white cops, however vicious, are ultimately minor irritants when compared to the viciousness of the black gangs and wanton

[126] To settle conflicts of interests between subdivisions, do what maximizes the general welfare of the Black community. Of course, criticisms of black criminals are partly rooted in notions of personal responsibility, choice, free will, just deserts, and retribution, and partly rooted in utilitarian notions of welfare maximization. Because my discussions elsewhere of moral luck and unconscious bias in judging the just deserts of black wrongdoers will destroy the "personal responsibility" and "individual choice" bases for distinguishing between Good and Bad Negroes, not a principle of justice but rather the welfare principle will be the only remaining plausible normative support for Good Negro Theory.

[127] John J. Dilulio, Jr., *Prisons Are a Bargain, by Any Measure*, N.Y. TIMES, Jan. 16, 1996, at A17, *reprinted in* KADISH, *supra* note 24, at 102. According to Dilulio, research shows "it costs society at least twice as much to let a prisoner loose than to lock him up." *Id.* As proof that "prisons pay big dividends," Dilulio cites Patrick Langan's calculation that "tripling the prison population from 1975 to 1989 may have reduced 'violent crime by 10 to 15 percent below what it would have been,' thereby preventing [many serious crimes]." *Id.* So by reducing the prison population, excuses reduce the big dividends prisons pay to Black People. Put differently, if more unexcused Black criminals mean more Niggas in prison, then rejecting excuses and landing more Niggas in prison may be good policy for Black People in that, according to cost-benefit thinking about criminal matters, "prisons are a real bargain." KADISH, *supra* note 24, at 102 (citation omitted). This logic applies even to "relatively minor, nonviolent infractions," like broken windows, curfew violations, or nonviolent drug activity. *See* KENNEDY, *supra* note 13, at 304.

[128] KENNEDY, *supra* note 13, at 20.

[129] Statement of Decision, Request for Clemency by Stanley Williams, (Dec. 12, 2005) (corrected version) *available at* http:/perma.cc/K3PZ-QNKK. After twenty-two years on death row he was executed in 2005 after then Governor Schwarzenegger refused to stay his execution officially on the ground that Mr. Williams had not achieved *personal redemption*. Hence, Mr. Williams, from the standpoint of Good Negro Theory, was an officially irredeemable Nigga. Sarah Kershaw, *Governor Rejects Clemency for Inmate on Death Row*, N.Y. TIMES (Dec. 13, 2005), http://www.nytimes.com/2005/12/13/national/13tookie.html.

violence."[130] From this perspective, calling destructive criminals like gangbangers racial "brothers" or "sisters"—words of solidarity and in-group love—rings as false as calling viciously racist white cops "brothers" or "sisters."

From a cost-benefit standpoint, many criminal matters pit the interests "us" Black People against "them" Niggas. Thus, "colorblind criminal laws"—that is, laws silent on race and not enacted for the purpose of treating one racial group different than another—whose *effects* disproportionately burden Niggas can be good social policy for law-abiding blacks. For instance, laws that punish crack offenders much more harshly than powder cocaine offenders (who more often are white) may *help* Black People more than they *hurt* Niggas, say Good Negro Theorists, "by incarcerating for longer periods those who use and sell a drug that has had an especially devastating effect on African-American communities."[131] By the same logic, because urban curfews that disproportionately fall upon black youngsters also help some black residents feel more secure, such disparities may *help* Black People more than they *hurt* Niggas.[132] Similarly, because crackdowns on gangs that disproportionately affect black gang members also reduce gang-related crime, Black People may be *helped* more than Niggas *hurt* by such racial disparities.[133] And because prosecutions of pregnant drug addicts that disproportionately fall on pregnant black women also may deter conduct harmful to black unborn babies, Black People may be *helped* more than Niggas *hurt* by such racial disparities.[134]

Under this cost-benefit or welfare principle—and positing that *most* blacks in the aggregate are law-abiding—there is no reason to give any special weight to the interests and frustrations of black criminals. As David Lyons describes this approach in *Ethics and the Rule of Law*, when interests conflict "we should serve the greater aggregate interest, taking into account all the benefits and burdens that might result from the decisions that are available to us."[135] By this logic, because the social, political and safety costs of excusing black criminals fall mainly on the larger Black People subdivision while the benefits of excusing them are reaped mainly by the smaller Nigga contingent, recognizing general excuses for black wrongdoers fails the cost-benefit test of desirability by burdening Black People

---

[130] KENNEDY, *supra* note 13, at 20 (quoting Jerry G. Watts, *Reflections on the King Verdict*, *in* READING RODNEY KING READING/READING URBAN UPRISING 244 (Robert Gooding-Williams ed., 1993)).

[131] *Id.* at 10.

[132] *See id.*

[133] *See id.*

[134] *Id.* Viewing laws like these as "social policy" propositions, Kennedy concludes that "it is often unclear whether social policy that is silent as to race and devoid of a covert racial purpose is harmful or helpful to blacks as a whole since, typically, such a policy will burden some blacks and benefit others. *Id.* at 11.

[135] DAVID LYONS, ETHICS AND THE RULE OF LAW 112 (1984).

more than they benefit Niggas. [136] From this perspective, even if judges, jurors, voters, policymakers and the rest of us make racist, biased or otherwise irrational moral judgments of black wrongdoers, laws and other social practices that *help* the larger Black People subdivision more than they *hurt* the smaller Nigga subgroup are nevertheless cost-justified and desirable, no matter how unfair from the standpoint of retribution or the culpability principle.

This completes my outline of Good Negro Theory, an interlocking set of values, beliefs and assumptions rooted in moral and legal theories that conveniently advance the interests of disproportionately privileged law-abiding blacks at the expense of those who are disproportionately extremely disadvantaged.

At the conceptual level, the object of Nigga Theory is to attack every one of these values, beliefs and assumptions and thereby expose the blame and punishment problem for what it really is—not a moral or personal responsibility problem but a political and social one, all the way down. To that end, in other work I attack the legitimacy and reliability of moral and legal condemnations of black wrongdoers on philosophical and empirical grounds. I turn now to the broader social and political implications of not critically interrogating our moral condemnation of black wrongdoers and hence of giving in to the "retributive urge."

---

[136] When the interests of these two subdivisions collide, the moral and legal principle that should settle the conflict, according to Good Negro Theory, is the welfare principle—the principle that laws are good if they increase the satisfaction of the larger Black People subdivision more than they increase the frustration of the smaller Nigga subdivision. One great attraction of the welfare principle is that it does not play favorites—the principle does not require the interests of Bad Negroes to be discounted on account of their moral blameworthiness. Each person's welfare figures in the rough calculations of costs and benefits that shape social policy—no one's may be discounted. In the words that John Stuart Mill attributed to Jeremy Bentham, "everybody [is] to count for one, nobody for more than one." JOHN STUART MILL, UTILITARIANISM 93 (Cambridge University Press 1899).

If an interest can be served, that creates a reason to do whatever would serve it. Interests can be ordered in terms of the degree of satisfaction or frustration serving them would produce. There is good reason, then, to promote satisfaction as much as possible. Thus, the welfare principle seems to provide a reasonable, *neutral* moral and legal principle for adjudicating conflicts of interests between subdivisions of any social group—it says that when interests conflict, we should serve the greatest aggregate interest. The principle thus expresses benevolence in the sense of concern for all humans—an attractive moral attitude. (But why regard benevolence as the most basic moral attitude—attractive as it is—rather than a concern or passion for justice?!) And it provides clear, general guidance to policymakers seeking to advance the interests of blacks in criminal matters. Applied to racially burdensome criminal laws, the welfare principle provides moral and legal support for viewing such laws as good for "blacks as a group" inasmuch as the costs of such laws (blame and punishment) fall disproportionately on the smaller Nigga subdivision while their benefits (increased safety and respectability) accrue primarily to the larger subdivision of Good Negroes. The interests of Good Negroes, in other words, can be tantamount to those of "the black community" and "blacks as a group" in criminal matters. Racially burdensome laws can represent, in Kennedy's words, a "net plus . . . for African-Americans as a group." *See* KENNEDY, *supra* note 13, at 11.

III. THE RETRIBUTIVE URGE, CAUSATION AND AMERICA'S DENIAL OF ACCOUNTABILITY

Deniers reject our collective accountability for the crack plague and its festering aftermath on two standard grounds:

A) impersonal social forces cannot *cause* people to choose to do wrong

or

B) even if empirical evidence proves that such forces do *cause* voluntary wrongdoing in the sense of increasing the rate at which people make wicked criminal choices, the very fact that some or many similarly situated non-criminals *chose* not to commit similar crimes—the very fact of a wicked choice—cuts off our collective accountability on "proximate cause" grounds.

I critique each of these grounds below.

A. *Impersonal Social Forces Cannot Cause Persons to Make Wicked Choices*

The first defense Deniers raise against our collective accountability for the crack plague and its legacy is the common assertion that voluntary criminal acts cannot be *caused* by impersonal macro-level social factors like poverty and social inequality. Stated more generally, the assertion is that voluntary human action cannot be "determined" by social factors or external influences and thus that there can be no "social determinism." In keeping with this approach, Deniers attribute wrongful behavior to *persons* and their individual choices rather than to social *situations* and factors beyond their control. A bad *person*, Deniers declare, is different than a bad thing, bad event, or bad social fact. We may *deplore* tsunamis, avalanches or shark attacks, but we would not morally *blame* these impersonal destructive forces any more than we would blame a rock for falling on one's head, for we reserve blame and praise for *persons* with wills and character traits.[137] Deniers contend that macro-level approaches offend the personal dignity of wrongdoers by treating them as things or events or Pavlovian bundles of conditioned reflexes without hearts or minds or wills. For Deniers and other proponents of personal responsibility, this is the Achilles heel of all macro-level explanations of wrongdoing and the flaw in the logic of all broad excuses for criminal misconduct: Such explanations and excuses, they contend, deny the personhood of criminals by treating them as bad "social facts" rather than bad

[137] And persons have the capacity to recognize the difference between right and wrong and to act for moral reasons. *See generally* Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511 (1992).

persons.[138] Accordingly, personal responsibility champions tell us we must condemn black criminals to show them respect and damn them in the name of their own personal dignity.

Nevertheless, if sound empirical evidence compels the conclusion that criminal wrongdoing *is* caused by social forces such as extreme social disadvantage, as it overwhelmingly does, then responsibility for the crack plague and its calamitous aftermath cannot so hastily be shifted to individual wrongdoers themselves. A clear causal link between social facts and voluntary wrongful acts paves the way for holding all beneficiaries of the boon we call the American way of life accountable for its criminogenic social conditions. Social science proves the existence of a clear causal link between social facts and personal, private, individual acts. For instance, in his pioneering work, *Suicide: A Study in Sociology*, Emile Durkheim showed how the seemingly most personal, private, and even "anti-social" decision of someone to end his own existence rather than continue to suffer a weary life—a decision ostensibly rooted only in individual psychology, private thought processes, and personal demons—actually reflects social currents and *at bottom* is primarily a social (not psychological or biological) fact.[139] The social character of deliberate acts of violent self-destruction can remain hidden if we look only at a separate individual and his melancholy musings; but the social character of suicide leaps into bold relief when we look at *rates* of suicide. These suicide *rates* differ among societies, and among different groups in the same society, and they show regularities over time, with changes in them often occurring at similar times in different societies. "Each society," Durkheim observes, "is predisposed to contribute a definite quota of voluntary deaths."[140] These regular, predictable, stable patterns of "personal and private" decisions to shuffle off this mortal coil—in short, these systematic suicidal tendencies—cannot be explained purely in terms of psychological facts, individual mental states or random aggregations of dire deeds. Rather, these patterns point to underlying causes that produce suicidal thoughts and acts in *groups* of

[138] Making it seem natural to ordinary Americans to focus on the *person* over the social *situation* when assessing black wrongdoing are two basic psychological tendencies shared by most Americans, namely, "fundamental attribution error" (the general psychological tendency to explain human behavior in terms of personality traits rather than situational factors) and race-based attribution bias (the special tendency of observers to attribute wrongdoing by blacks to personality traits rather than to situational pressures). *See* Bridges & Steen, *supra* note 116, at 554–57. So our racially biased and *person*-centered social psychology, on the one hand, and the popular *person*-centered politics of personal responsibility and rugged individualism, on the other, combine to make millions of ordinary Americans skeptical of macro-level social explanations of crime.

[139] EMILE DURKHEIM, SUICIDE: A STUDY IN SOCIOLOGY 297–99 (George Simpson ed., John A. Spaulding & George Simpson trans., The Free Press 1897) (wishing to show that social factors could explain much about anti-social phenomena).

[140] *Id.* at 51.

individuals.[141] The decisive question then is, "what factors explain these group-level patterns of voluntary self-destruction?"[142] Earlier, I identified five macro-level social factors that explain the crack epidemic and the empirical evidence that points to them.[143] But even if empirical studies persuasively establish that crime is driven by social factors like the five I identified, Deniers commonly fall back on the following seductive but false "proximate cause" defense against collective accountability for the voluntary misdeeds of wrongdoing.

B. *Even if Social Facts Can Cause Crime, the Wicked Choices of Criminals Break the Causal Chain and Absolve Us as a Nation*

Deniers' second and most formidable defense against America's accountability for undoing an entire generation of blacks through unnecessary and unwarranted mass incarceration runs thus: "Even if we acknowledge what the empirical evidence clearly demonstrates, namely, that macro-level social factors can *cause* people to commit voluntary criminal acts in the sense of dramatically increasing the *rate* of wrongdoing in certain neighborhoods and for certain social subgroups, why don't criminogenic social forces cause everyone subject to them to turn to crime? Why doesn't everyone who is poor, hungry, and socially marginalized rob convenience stores or post up under lampposts with palms full of dope? Why do so many poor and jobless people in general—and poor jobless blacks in particular—wade through criminogenic social currents without turning to violence or larceny or other wrongdoing?" To bolster the persuasive force of these denials of accountability, the person posing these skeptical questions may himself or herself be someone poor and black and extremely disadvantaged—a political poster child for bi-partisan Deniers and other champions of personal responsibility—who nevertheless resisted temptation and provocation to remain law-abiding and hence righteously critical of have-nots who have not. From this perspective, the very fact that many or most people subject to 'criminogenic' social factors do not commit such acts proves that such factors leave ample room for peoples' wills and moral character and moral agency to determine what they do. By this logic, the reason poor but law-abiding Americans suffer the slings and arrows of outrageous fortune with self-control while criminals do not is simply

---

[141] Durkheim's method is empirical; he searches through various sorts of data and evidence to find factors associated with suicide, but he searches for social causes or conditions that are expressed through these associations. *Id.* at 297–99.

[142] Durkheim tests and rejects a variety of possible non-social explanations for these stable and variable *rates* of suicide, such as heredity, climate, and mental illness, until he whittles down the possibilities to one, namely, the social explanation. *Id.* By eliminating other explanations, Durkheim claims that these tendencies must depend on social causes and must be collective phenomena. *Id.* at 149. He points out that a suicide *rate* is a "numerical datum" that measures and expresses each society's "aptitude for suicide," that is, "the suicidal tendency with which each society is collectively afflicted." *Id.* at 48–51.

[143] *See supra* notes 51–55 and accompanying text.

because the non-criminals have more moral fiber. For Deniers, the "vicious wills," depraved hearts, and blameworthy choices of black criminals *break the causal chain* between criminogenic social facts and individual criminal acts and thus absolve America of accountability for the crack plague and its aftermath.[144]

Deniers can find strong support in law and everyday morality for their contention that voluntary human action breaks the causal chain and thus cuts off the accountability of earlier individuals or entities that "set the stage" for subsequent wrongdoing. A core tenet of American civil and criminal law is that for an individual or entity to be accountable for harm resulting from destructive forces it unleashes (including destructive social forces), those forces must be the "factual cause" and the "proximate cause" of the resulting harm. Factual cause (sometimes called the "but-for" or "sine qua non" requirement) means that the resulting harm (here, the cataclysmic crack plague and its festering aftermath) would not have occurred without the defendant's acts (here, without the five macro-level social facts attributable to America's collective life and social reality). Proximate cause means that the defendant's acts, in addition to being a but-for cause, must be adequately or properly related to the resulting harm in the eyes of ordinary judges and jurors. So, for Deniers and other personal responsibility proponents, even if macro-level social forces are a factual cause of voluntary crack-connected criminal conduct in that such forces can cause dramatic spikes in crime rates as a function of neighborhood demography, these social forces are not a proximate cause of the extra criminal acts. According to these Deniers, this is because the wicked choices of wrongdoers intervened between the extreme disadvantage, on the one hand, and the individual holdups, drive-bys, and street crimes, on the other.

For instance, if a gasoline truck and trailer unit spills a massive amount of gas on an open highway and malicious bystanders willfully kindle a conflagration with a book of matches, some courts refuse to hold the truck owner accountable to innocent burn victims (much less to the malicious match-strikers themselves) because these courts conclude that the volatile spill was not the "proximate cause" of the resulting flames, even though it was clearly a necessary condition or factual cause of the fire. These courts say that the malicious match-strikers are the "superseding," "efficient," or "proximate" cause of the fiery destruction, thus shifting the entire responsibility for the flames to the willful wrongdoers and away from the truck owner whose volatile spill set the stage. For these courts, results (here, fiery destruction) that follow from the voluntary actions of the subsequent persons (here, the malicious match strikers) are caused by them *alone*.[145]

---

[144] "Surely," say personal responsibility proponents, "American society cannot be held accountable for the wicked choices, bad moral character, and 'vicious wills' of a crime-prone subdivision of its population."

[145] *See* Commonwealth v. Root, 170 A.2d 310, 312 (Pa. 1961) (explaining that a drag racing victim's death was caused "by him *alone*," not his fellow drag racer) (emphasis added); KADISH,

This notion is sometimes called the doctrine of *novus actus interveniens*. Under the *novus actus* doctrine, later voluntary human action "displaces the relevance of prior conduct by others and provides a new foundation for causal responsibility."[146] Glanville Williams provides the classic defense of the doctrine:

> A person is primarily responsible for what he himself does. He is not responsible, not blameworthy, for what other people do. The fact that his own conduct, rightful or wrongful, provided the background for a subsequent voluntary and wrong act by another does not make him responsible for it. What he does may be a but for cause of the injurious act, but he did not do it. His conduct is not an imputable cause of it. Only the later actor, the doer of the act that intervenes between the first act and the result, the final wielder of human autonomy in the matter, bears responsibility (along with his accomplices) for the result that ensues.[147]

From this perspective, the violent and non-violent criminal acts of blacks during and after the cataclysmic crack plague are caused *solely* by them.

By analogy, for the 30 years encompassing the crack plague and it's still festering aftermath, America flooded black neighborhoods with combustible criminogenic conditions like extreme and concentrated social disadvantage; moreover, according to Senate transcripts and other reliable sources,[148] in the critical period between 1982 and 1988, this nation, through its policymakers and high ranking government officials, helped jumpstart and fuel the crack epidemic by knowingly (but not maliciously or hatefully) helping supply many matchbooks in the form of guns and drugs to young black males wading through these volatile conditions. But, whereas combustible gas spills do not penetrate the skin of those it contacts, merely providing *opportunities* for wrongdoers to manifest pre-existing malice, combustible criminogenic conditions penetrate to the mental states of those immersed in them—these conditions mold mental states and thus manufacture malice itself. Specifically, extreme and hyperconcentrated disadvantage produced the hopelessness, resentment, hostility, and alienation—in a word, the malice—that *motivate* law-breaking, while an ample supply of guns and drugs, at least partly

---

supra note 24, at 529 (emphasis added) ("The results that follow from the second person's actions are caused by him or her *alone*.").

[146] KADISH ET AL., *supra* note 24, at 529.

[147] Glanville Williams, Finis *for* Novus Actus?, 48 CAMBRIDGE L.J. 391, 391 (1989). As he goes on to explain: "The legal attitude, in general, rests on what is known to philosophers as the principle of autonomy, which enters deeply into our traditional moral perceptions, reinforced by language." *Id.* "The autonomy doctrine, expressing itself through its corollary the doctrine of *novus actus interveniens*, teaches that the individual's will is the autonomous (self-regulating) prime cause of behaviour." *Id.* at 392.

[148] *See supra* note 53 and accompanying text (addressing the Contra-CIA link).

traceable to U.S. foreign policy priorities in the critical early years of the crack epidemic, provide the *means* and *opportunities* for the malice to find expression in law-breaking. In short, at the level of motivations and at that of opportunities for wrongdoing, strong empirical evidence points to our collective responsibility for flooding black neighborhoods with combustible criminogenic conditions that tempt, pressure, and provoke, then helping supply rafts of matchbooks to the young black residents in the name of national security.[149]

This is precisely where Deniers invoke the *novus actus* doctrine as a "proximate cause defense" and assert that the wicked decisions of the individuals slogging through combustible social currents to pick up matchbooks and spread fiery destruction cuts off our collective accountability for their foreseeable and even statistically inevitable but nonetheless voluntary match-striking. For Deniers, in other words, the willful and wicked intervention of match-striking wrongdoers—the voluntary rubbing of each white phosphorous match head against a rough surface to produce a flame—breaks the causal chain between social facts and criminal acts. The results that follow from their voluntary actions are caused *solely* by them. For Deniers, however abundant the opportunities of the situation or strong the socially molded motivations of the person, choosing to strike a match constitutes a personal and individual "moral moment" that severs the link between social forces and crimes and erects a boundary between social facts and personal responsibility.

Thus, as applied to the crack plague that bore down upon and destroyed black communities in the 80s and 90s like a raging wildfire, Deniers can concede at the level of factual causation that social forces (such as the five macro-level social factors discussed earlier) dramatically increased the *rate* of crime and incarceration in black America and hence orchestrated the general movement of the fire, the general symphony of the conflagration, but they may nevertheless contend that each individual decision to dance to that malicious melody by striking a match breaks the causal chain between America's volatile social currents and the crackling flames. Put differently, mediating the relationship between social facts and criminal acts are criminal intents and vicious wills and depraved hearts, and for Deniers, these wicked inner states cut off our collective accountability for the criminal acts produced by our collective existence.

C. *Competing Doctrine: Later Voluntary Wrongdoing Does Not Break Causal Chain*

On the other hand, courts and juries and legislatures often refuse to treat subsequent voluntary human action as outside of causal law—that is, they refuse to treat such action as the *sole* cause of criminal results—and so are perfectly willing

---

[149] *See generally Kerry Committee Report, supra note* 53; GARY WEBB, DARK ALLIANCE: THE CIA, THE CONTRAS, AND THE CRACK COCAINE EXPLOSION (1998).

to say that blameworthy intervening action does *not* break the chain of causation or constitute an "independent intervening cause," so long as the subsequent wrongdoing was *foreseeable.* In *State v. Bier*,[150] for instance, when the defendant's wife said she wanted to commit suicide, he placed a loaded, cocked pistol within her reach, and she used it to kill herself.[151] The defendant's conviction for negligent homicide was upheld on appeal—foreseeability was enough to establish proximate cause;[152] a driver who negligently leaves his car idling and unattended can be the proximate cause of death or serious bodily harm resulting from a car thief on a joy ride[153]—the foreseeability of thieves and joy rides establishes proximate cause; the owner of an apartment building in a crime-ridden location who fails to install locks on entrance doors or provide exterior lighting can be the proximate cause of robberies, rapes, and other violent assaults on tenants by intervening human agents who intentionally act to produce the forbidden result—foreseeability establishes accountability;[154] one drag racer can be liable for causing the death of his racing partner despite his partner's voluntary choice to drive recklessly—again on grounds of foreseeability;[155] in a game of Russian roulette, the surviving player will be liable for killing his partner even though the deceased freely chose to put the gun to his head and squeezed the trigger[156]—foreseeability suffices; and finally courts routinely ignore or reject the *novus actus* or intervening-act doctrine and hold drug suppliers accountable for the foreseeable, though freely chosen, acts of their purchasers, including their purchasers' drug overdoses and resulting deaths.[157]

So just like everyday morality, the law does not follow a hard fixed rule about causation and accountability when subsequent voluntary human actions intervene between forces that set the stage for criminal acts and the criminal acts themselves. Rather, the law remains ceaselessly torn between two competing perspectives.

---

[150] 591 P.2d 1115, 1120 (Mont. 1979).

[151] KADISH ET AL., *supra* note 24 at 527 n.6.

[152] It should be noted that this is a minority position in cases of suicide. This is contrary to the standard common law treatment of assisted suicides; under common law courts refused to find causation on *novus actus* grounds. *See* People v. Campbell, 335 N.W.2d 27 (Mich. Ct. App. 1983); People v. Kevorkian, 527 N.W.2d 714, 739 (Mich. 1994). Although a minority position, Bier shows the willingness of courts to take a flexible approach to causation in cases of voluntary intervening human action. *See supra* note 149 and accompanying text.

[153] Herrera v. Quality Pontiac, 73 P.3d 181, 196 (N.M. 2003).

[154] *See* Doe v. Gunny's Ltd. P'ship, 593 N.W.2d 284, 294 (Neb. 1999); Knoll v. Bd. of Regents, 601 N.W.2d 757, 764–65 (Neb. 1999); Sharkey v. Bd. of Regents, 615 N.W.2d 889, 901–02 (Neb. 2000).

[155] State v. McFadden, 320 N.W.2d 608, 611–13 (Iowa 1982).

[156] Commonwealth v. Atencio, 189 N.E.2d 223, 223–25 (Mass. 1963).

[157] People v. Galle, 573 N.E.2d 569, 570–71 (N.Y. 1991); *Causation: R v. Kennedy*, 1999 CRIM. L. REV. 65, 65–67 (1999); *see generally* Mary Kreiner Ramirez, *Homicide Liability for the Furnishing of Dangerous Narcotics*, 6 ST. LOUIS U. PUB. L. REV. 161 (1987) (analyzing numerous cases where the state court held a provider of heroin liable for the death of another party).

Pulling one way is the perspective that underlies the *novus actus* or intervening act doctrine—indeed underlies all retributive approaches to blame and punishment—and is enthusiastically endorsed by tough-on-crime advocates, namely, the view that humans are solely and fully responsible for their freely chosen actions. As tough-on-crime advocates see it, any departure from this principle of sole and full responsibility puts us on the slippery slope to social determinism and the complete abdication of personal responsibility. Accordingly, this perspective refuses to see freely chosen human action as *caused* by preceding forces or factors. Pulling the other way is the perspective underlying the many exceptions to the *novus actus* doctrine and endorsed by advocates for the damned, a perspective which views "freely chosen" wrongdoing as caused by a combination of preceding social facts and the wrongdoer's ordinary human frailty. Accordingly, this perspective has no problem seeing voluntary human action as *caused* by preceding forces and factors. Pendulum-like, the law and our everyday moral intuitions swing back and forth between these competing conceptions of causation and accountability.

This raises the pivotal question in all debates about where to draw the line between societal accountability and personal responsibility for the harmful results of voluntary wrongdoing: What factors determine which way the causation pendulum swings in the minds of ordinary judges, jurors, lawmakers, voters and other Americans who must think about such matters in reaching decisions? What determines whether the subsequent voluntary acts of wrongdoers are deemed the *sole* causes of the criminal results? What makes ordinary people in some cases view the voluntary wrongdoing of criminals as breaking the causal chain between external factors and criminal acts (hence shifting all the responsibility for the criminal acts and harmful results to individual wrongdoers) while in other cases social perceivers and decision makers view such wrongdoing as caused by preceding factors (hence shifting accountability for those criminal acts and harmful results back to the earlier acts, facts, and circumstances)? To put it most simply, what determines how people think about proximate causation in criminal matters?

The answer is this: the perceived wickedness of wrongdoers and the urge they arouse in ordinary people for vengeance and retribution. The way perceptions of wickedness and vengeance drive our conclusions about causation is this: the more wicked wrongdoers seem, the more they stir "the retributive urge" to blame and punish; the more they stir "the retributive urge," the more likely ordinary people are to view them as "independent intervening causes" or "superseding causes" of criminal harms disconnected from earlier forces and factors.[158] Contrary to what we might expect, first come judgments about wrongdoers' blameworthiness, then come conclusions about whether preceding forces and factors caused the results of their voluntary wrongdoing. This sounds backward and counterintuitive because

[158] This analysis assumes that we don't find the conduct of earlier actors and agents extremely wicked and reprehensible (we may even find it innocent). For if the earlier actors stir a strong retributive urge, the same logic may apply to them and there could be a pull toward finding the earlier actors to be the proximate cause of the resulting harm on that basis.

we expect the conclusion that A should be blamed for B's death to be partly based on the judgment that A caused B's death—"you can't blame me for a death I never caused" sounds sensible and implies that first we exhaust all questions of causation (these become threshold questions of accountability) and only then, after finding that A *caused* B's death, do we weigh A's blameworthy wickedness. Nevertheless, the everyday reality of our actual decision making reverses the idealized roles usually assigned to blame and causation, for we routinely blame individuals *before* we decide whether to call them "independent," "superseding," or "efficient" causes of voluntary criminal actions; in other words, we base our conclusions about causation on earlier conclusions about the wrongdoers' wickedness; once more, we base our conclusions about whether preceding forces and factors are the proximate cause of voluntary wrongdoing on conclusions about the wickedness and moral turpitude of the voluntary wrongdoers.[159] However counterintuitive this pattern may initially sound, it pervades all moral and legal thinking. In the words of Meir Dan-Cohen,

> [T]he statement that A caused B's death may, in ordinary speech, be as much a conclusory statement, based on the prior tacit judgment that A deserves to be punished for B's death, as it is an independent statement of fact which leads to that conclusion.
>
> Put differently,
>
> [T]he conclusion that A deserves to be punished may be directly and intuitively generated by *the retributive urge*, preceding and merely rationalized by the finding of a sufficient causal relationship between A's acts and B's death.[160]

---

[159] Dan-Cohen, *supra* note 17, at 165–66.

[160] *Id.* at 166 (emphasis added). Meir Dan-Cohen focuses here on the impact of the retributive urge on our judgment of whether a wrongdoer who set the stage for othe forces and actors to bring about a forbidden result "proximately caused" that result. I am extending his insight to include the impact of the retributive urge on another "proximate cause" judgment, namely, our judgment of whether a wrongdoer for whom the stage was set by other forces and actors was nevertheless the "superseding," "efficient," "sole" cause of the forbidden result. So, the retributive urge can influence proximate cause determinations by social and legal decisionmakers on two different levels: when focused primarily on earlier actors who set the stage for later wrongdoing by subsequent actors, an inflamed retributive urge can increase the willingness of decisionmakers to hold these earlier actors accountable for the later actions of subsequent wrongdoers; alternatively, when focused primarily on the subsequent actors in a causal sequence who more immediately cause the crime in question (the crime's "immediate perpetrators"), an inflamed retributive urge can induce decisionmakers to view them as the superseding—i.e. proximate—causes of the crime, and hence to hold them *solely* responsible, thereby relieving earlier wrongdoers (and the criminogenic conditions they create) of *any* causal responsibility. When the retributive urge is aroused on both levels (that is, by both earlier and later wrongdoers), judgments about the comparative blameworthiness of such wrongdoers (along with other factors) will drive judgments about whether only the later actor was the proximate cause of the harm (its *sole* cause) or instead whether causal accountability rests on both.

In short, the retributive urge—rooted in contempt for wicked and blameworthy wrongdoers—routinely determines how we think about causation.[161]

From this very practical perspective on how ordinary people inside and outside courtrooms actually think about and determine causation, the question of whether A was the sole or superseding cause of B's death boils down to the question of whether punishing A is necessary to satisfy the retributive urge he arouses in us: If the fact of B's death at the hands of A does not produce a strong retributive urge—that is, if we are willing to partially or fully excuse A for bringing about the prohibited result—then we are more willing to call other factors preceding or surrounding A's act (including macro-level factors) the proximate cause of B's death.[162] Conversely, the more we view wrongdoers as wickedly depraved, the more they stir the retributive urge for vengeance and retribution, the easier it is for us to conclude that their voluntary wrongdoing breaks the causal chain between earlier factors and their crime, shifts responsibility for crime entirely to them, and absolves us as a nation of accountability for the abundantly foreseeable results of our own social forces and currents.

All of this has particular consequences for this project, and for Nigga Theory more broadly. Quite simply, the more we view wrongdoers as that most distilled and concentrated form of wickedness, namely, morally condemnable niggers, the easier it is for us to deny accountability for their plight, for moral judgments drive our conclusions about causation and thus drive our conclusions about our collective accountability for the criminogenic effects of extreme disadvantage. Niggerizing black wrongdoers, in other words, helps us deny our accountability for the foreseeable effects of being extremely poor, hopeless, and black in America.

But again, a core aspect of Nigga Theory is hope. Once the moral basis for the retributive urge is shown to be illegitimate, irrational, and unreliable, it may become easier for fair-minded Americans to curb (at least temporarily) their urge to condemn long enough to recognize and acknowledge the causal links between crime and our own macro-level social forces, paving the way for us to accept collective accountability for the crack plague and its consequences. Macro-level perspectives—which an inflamed retributive urge obscures—can help law-abiding Americans see the common humanity in wrongdoers by helping them think beyond the boundaries of good and evil and praise and blame in criminal matters. Of

---

[161] And also routinely determines accountability.

[162] "Posed in connection with the retributive goal of punishment, the question of causation (namely, 'Is there a causal relation between A's conduct and B's death?') amounts to asking whether punishing A is necessary to satisfy the retributive urge aroused by the fact of B's death." *Id.* This explains why the *novus actus* doctrine breaks the causal chain more easily for intentional intervening wrongdoing than for merely reckless or negligent intervening wrongdoing, for although both intentional and reckless wrongdoing involve voluntary action, a reckless intervening act is generally less blameworthy than an intentional intervening act. The retributive urge may also drive our tendency to attribute wrongdoing to the situation or person in applications of the "reasonable person in the situation" test.

course, it flatters those of us who are prosperous and law-abiding to believe that our material well-being and good name reflect virtue and pluck, not luck. But from the macro-level perspective, such thinking is unwarranted but nevertheless widespread and pregnant with political implications for our treatment of the truly disadvantaged.