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Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes

Jody D. Armour*

In this article, Professor Armour explores some of the legal implications of the disturbing notion that, given the perception that blacks are more prone to commit violent acts than nonblacks, it is rational for criminal defendants claiming self-defense to consider race in assessing the risk of violence posed by a supposed assailant. Professor Armour identifies three distinct types of self-defense claims that a defendant may advance, each of which requires the introduction of race-based evidence and arguments to establish the reasonableness of the defendant's actions. While recognizing that a supposed assailant's race may be formally relevant under self-defense doctrine, Professor Armour argues against legal recognition of race-based self-defense claims. Professor Armour's thesis implicates a wide array of jurisprudential concerns: the nature of the moral norm implicit in the reasonable person test; the acceptability of using statistical generalizations in adjudication; and the conflict between instrumental and noninstrumental thinking about legal liability. Professor Armour ultimately concludes that admitting race-based evidence in self-defense cases gives effect to private prejudice in violation of the Equal Protection Clause.

It is a stormy night in a combined residential and commercial neighborhood in a predominantly white upper-middle-class section of a major city. The time is 10:30 p.m. Although most of the fashionable shops and boutiques in the neighborhood have closed, the neighborhood bank contains an automatic teller. The machine is located in a lobby between two sets of glass doors; the first set opens directly into the bank and is locked at closing each day, while the second leads to the public sidewalk and remains open twenty-four hours.

A middle-aged resident of the neighborhood enters the bank's lobby, inserts her bank card into the machine, and requests $200. As she waits for her trans-

* Assistant Professor, University of Pittsburgh School of Law. A.B. Harvard University, 1982; J.D. University of California at Berkeley, 1986. This article is dedicated to the memory of my father, Fred Armour, Sr. (Armour v. Salisbury, 492 F.2d 1032 (6th Cir. 1974)), who found the key to his own jailhouse door in the law books of the prison library; he showed us that the law can be the solution as well as the problem. I owe special thanks to Jules Lobel, Welsh White, Rhonda Wasserman, Anne Schiff, and Ruth Colker. Thanks also to Ronald Brand, John Burkoff, Pat Chew, Harry Flechtner, Robert Harper, Bernard Hibbitts, Sandra Jordan, Margaret Mahoney, and Richard Seeburger for helpful comments, and to Chris White, Joyce Durden, and Martine Beauman for their research assistance. This project was supported by an Alumni Summer Research Stipend from the University of Pittsburgh School of Law.

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action to be processed, the woman suddenly notices a figure moving directly toward the lobby from across the street. Focusing her full attention on the approaching figure, she notes that the person is a young man (at most twenty-something); that he is wearing a trench coat with an upturned collar and a tarpaulin hat pulled down even with his eyes (perhaps in deference to the pouring rain); and that he is black.

The trench coat-clad young man glances down the deserted street as he reaches the lobby and then enters, pushing his right shoulder against one of the swinging glass doors. As he pushes the door open, he unbuttons the collar of his trench coat with his right hand and reaches into the coat in the direction of his left armpit. With his eyes focused on the space beneath his coat into which he is reaching, he takes hold of something and begins to withdraw it.

Panic-stricken at the image before her and conscious of the rhythmic clicking of the automatic teller counting out ten fresh clean twenty-dollar bills, the woman pulls a pistol from her purse and levels it at the entering figure. As the young man looks up from his coat, he sees the pistol trained on him and reflexively thrusts his right hand—which now contains a billfold retrieved from his inside breast pocket—out in front of him while shouting at the woman not to shoot. Perceiving what she takes for a handgun thrust in her direction, together with the man's unintelligible loud shouts, the woman shoots and kills the black man.

In claiming self-defense, the woman may argue that the black victim's race is relevant to the reasonableness of her belief that she was about to be attacked. Her claim might be based on any of three distinct arguments. First, she could claim that it was reasonable to consider the victim's race in assessing the danger he posed because most people would do so. She might introduce studies or anecdotes demonstrating the frequency with which Americans make assumptions about an individual's character on the basis of race, and argue that she should not be punished for basing her response on the widely held belief that blacks are more prone than whites to be criminals. Second, she could claim that, independent of typical American beliefs, her consideration of the victim's race was reasonable because blacks commit a disproportionate number of violent crimes and therefore pose a greater statistical threat. In framing this argument, she would show that quantifiable statistical discrepancies exist between the crime rates of blacks and nonblacks, and she would assert that she knew of, and reasonably relied on, these statistical probabilities when deciding to shoot.

Finally, if the woman had previously been violently assaulted by a black individual, she might claim that her overreaction to the victim's race was reasonable in light of her earlier traumatic experience. One recent case accorded legal weight to such "negrophobia" by holding that an ordinary person assaulted by an anonymous black individual might develop a pathological fear of *all* blacks sufficient to justify an award of disability benefits.[1] Invoking the

1. Jandrucko v. Colorcraft/Fuqua Corp., No. 163-20-6245 (Fla. Dep't of Lab. & Empl. Sec. Apr. 26, 1990).

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same psychological proposition, our defendant might claim that her negrophobia is relevant to the reasonableness of her reactions to the supposed assailant.

Because the concept of reasonableness is central to self-defense doctrine, each of these race-based claims might result in a determination that the defendant should be excused for her shooting of the black customer. Indeed, it has been well-documented that defendants in self-defense cases exploit the racial prejudices of jurors in asserting the reasonableness of their fear of supposed assailants who are black.[2] The meaning of race does not necessarily "speak for itself" in these cases; defense attorneys construe race in subtle and not-so-subtle ways with the goal of exonerating their clients. The salience and significance of the victim's race will turn on the arguments that lawyers employ and that courts countenance. Accordingly, the core issue of this article is whether courts should countenance race-based claims of reasonableness in self-defense cases.

To appreciate the growing acceptance of race-based evidence and arguments in self-defense cases, one need go no further than the celebrated New York subway vigilante case of *People v. Goetz*.[3] In this case, the defendant, Bernhard Goetz, successfully claimed that his shooting of four black teenagers after one of them requested five dollars was justified as an act of self-defense. Professor Fletcher, a legal theorist who witnessed the entire trial, identified numerous unmistakable instances of the defense "indirectly and covertly" "play[ing] on the racial factor."[4] One such trial tactic involved recreating the shooting of the teenagers, for which the defense called in four "props" to act as the four black victims:

> The nominal purpose of the demonstration was to show the way in which each bullet entered the body of each victim. The defense's real purpose, however, was to re-create for the jury, as dramatically as possible, the scene that Goetz encountered when four young black passengers began to surround him. For that reason [Goetz's attorney] asked the Guardian Angels to send him four young black men to act as the props in the demonstration. In came the four

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2. *See, e.g.*, George P. Fletcher, A Crime of Self-Defense: Bernhard Goetz and the Law on Trial 206-08 (1988) (describing trial tactics used by the defense to emphasize the racial identity of the four black alleged assailants shot by New York subway vigilante Bernhard Goetz); Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 Tul. L. Rev. 1739 (1993) (exploring how the use of racial images influences criminal trials, and proposing legislation modeled after rape shield laws to curb the manipulation of racial fears and stereotypes in the courtroom).

3. 68 N.Y.2d 96, 497 N.E.2d 41, 506 N.Y.S.2d 18 (1986).

4. Fletcher, *supra* note 2, at 206. Courts should treat such covert appeals to factfinders' racial beliefs with *at least* as much circumspection and solicitude for the truth-seeking process as explicit race-based evidence of reasonableness, since they are at least as threatening to the rationality and fairness of the factfinding process. As Fletcher notes:

> In the end, Slotnick's [Goetz's lawyer's] covert appeal to racial fear may have had more impact on the jury precisely because it remained hidden behind innuendo and suggestion. It spoke to that side of the jurors' personality that they could not confront directly. Paradoxically, Slotnick may have gained more from not [explicitly playing on the racial factor] than from bringing the racial issue out into the open. Openly talking about racial fear in the courtroom might have helped the jury to deal more rationally with their own racial biases.

Id. at 208. Although explicitly addressing the racial issue might have the salutary effect on the factfinding process that Fletcher suggests, since racism is essentially irrational and deep-seated, it might just as well have the opposite effect of exacerbating racist fears.

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> young black Guardian Angels, fit and muscular, dressed in T-shirts, to play the parts of the four victims in a courtroom minidrama.[5]

Although the witness who was surrounded by these young black men was not authorized to testify about the "typical" person's fear of being accosted by four such individuals, the defense "designed the dramatic scene so that the implicit message of menace and fear would be so strong that testimony would not be needed."[6] The defense also played on the racial factor by "relentlessly" characterizing the victims as "'savages,'" "'vultures,'" "'the predators' on society," and "the 'gang of four.'"[7] As Fletcher insightfully notes:

> These verbal attacks signaled a perception of the four youths as representing something more than four individuals committing an act of aggression against a defendant. That "something more" requires extrapolation from their characteristics to the class of individuals for which they stand. There is no doubt that one of the characteristics that figures in[to] this implicit extrapolation is their blackness.[8]

Exploitation of racial fears is also evident in the trial of the four white Los Angeles police officers who beat Rodney King. Although this was not strictly a self-defense case, the controversy it generated at least partly concerned the white policemen's highly distorted perception of the threat posed by an unarmed black man, a perception which the Simi Valley jury considered "reasonable" during the state court trial. Professor Vogelman describes the defense's use of racial stereotypes in the Rodney King case as an appeal to the "Big Black Man" syndrome. (Significantly, "big black males" also figure centrally in the legally recognized negrophobia that I analyze in Part IV.) In Vogelman's words:

5. *Id.* at 207.

6. *Id.* at 130.

7. *Id.* at 206 (quoting defense attorney Barry Slotnick).

8. *Id.* Although Fletcher asserts that neither a judge nor juror should be permitted to take race into account in deciding the reasonableness of a defendant's response, he paradoxically maintains that individuals will inevitably, and not irrationally, consider race in assessing whether someone is dangerous:

> Given the tragic disproportion of crimes committed by black youth, ordinary sensible people cannot avoid considering race, along with youth, gender, dress, and apparent educational level, in making a judgment about whether a group of youths on the subway bespeaks danger . . . . This is, of course, a form of racial stereotyping . . . . We might all be fairer to each other if there were no such cues based on generalized experience, but how much can we expect of the ordinary person when he picks his seat on the subway?

Id. at 203-04. Predictably, Fletcher's failure to more fully explore and reconcile these judgments invites criticisms like the following from Professor Kenneth Simons:

> Why is it "rational" for someone in the shoes of Bernhard Goetz to consider the attackers' racial identities? Because, in our soeiety, the defender sometimes has factually valid grounds for especially fearing an interracial crime? Or because, to put it bluntly, he cannot be expected to do better than the average white racist? Moreover, while I agree that legal recognition of racial stereotypes in self-defense law is dangerous, Fletcher fails to consider whether fairness to the defendant requires such recognition.

Kenneth W. Simons, *Self-Defense, Mens Rea, and Bernhard Goetz*, 89 COLUM. L. REV. 1179, 1189 (1989). My analysis is aimed at addressing questions like those posed by Simons by recasting them in terms of heuristic devices such as the "Reasonable Racist" and "Intelligent Bayesian," and then arguing why fairness to the defendant does not require legal recognition of racial stereotypes in self-defense law.

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> Rodney King was portrayed as the prototypical "Big Black Man." He was portrayed as larger than life, with superhuman strength. It was in this context that jurors, while watching the video of King being brutally beaten, described him as being "in control." He had to be stopped. After all, as the map introduced by the defense so clearly indicated, his "destination" was Simi Valley.[9]

Indeed, one of the defendants, Stacey C. Koon, testified that King was "a monster-like figure akin to a Tasmanian devil."[10] In his closing argument, the attorney for defendant Laurence M. Powell stressed that the officers' blows were controlled efforts to subdue King, a black man who was stopped for speeding, who tried to evade the police, and who only reluctantly complied with their commands.[11]

Thus, the concrete reality of racially charged self-defense arguments is readily apparent, and the legal propriety of such strategies must be evaluated. I contend that even though a supposed assailant's race may be formally relevant under self-defense doctrine, courts must refuse to allow race-based claims of reasonableness—whether explicit or covert—to figure in self-defense cases. In Part I, I briefly describe the formal structure of self-defense doctrine, which emphasizes the "reasonableness" of the defendant's perception of the threat posed by his "assailant." In Part II, I evaluate the claim that it is reasonable to consider the race of a putative assailant because most people would do so. As part of this discussion, I lay the groundwork for later arguments by clarifying the nature of the moral norm implicit in the reasonable person standard. In Part III, I consider the argument for basing the validity of race-conscious risk assessment on statistical generalizations and demonstrate that these generalizations invariably subvert the rationality of the factfinding process.

Part IV introduces arguably the most formidable race-based self-defense claim of all: that based on an alleged post-traumatic stress disorder stemming from an earlier incident involving blacks. My analysis of this claim focuses on the disjunction between instrumental and noninstrumental views of criminal liability in the difficult case of the certifiable negrophobe.[12] Challenging the noninstrumentalist, narrowly motive-focused conception of criminal liability which informs much contemporary self-defense jurisprudence,[13] I argue that

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9. Lawrence Vogelman, *The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom,* 20 FORDHAM URB. L.J. 571, 574 (1993).

10. *Latest Defense Witness in Rodney King Trial Backfires,* L.A. SENTINEL, Apr. 1, 1993, at A4. Another officer, under cross-examination by the defense, described King's beating as "a scene from a monster movie." *Beating: 'Scene from Monster Movie,'* ATLANTA J. & CONST., Mar. 11, 1992, at A3.

11. Seth Mydans, *Defense Lawyer at Beating Trial Asserts Driver Prompted Violence,* N.Y. TIMES, Apr. 22, 1992, at A16.

12. Essentially, noninstrumentalist conceptions of legal liability focus on the past actions of specific parties, while instrumentalist ones focus on the future welfare of society in general. *See* text accompanying notes 84-87 *infra* for further discussion of these models and the consequences of choosing one or the other.

13. *See, e.g.,* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW § 10.5 (1978) [hereinafter FLETCHER, RETHINKING]; Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation,* 14 LOY. L.A. L. REV. 435 (1981); George P. Fletcher, *The Individualization of Excusing Conditions,* 47 S. CAL. L. REV. 1269 (1974) [hereinafter Fletcher, *Excusing Conditions*]; Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill,* 36 AM. U. L. REV. 11 (1986).

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the purely noninstrumental perspective inadequately considers the critical values at stake in this context.

Finally, in Part V, I develop the contours of a constitutionally based rationale for excluding race-based evidence and legal arguments of the type elucidated earlier in the article. Specifically, I demonstrate that by countenancing the arguments and evidence proposcd by the Reasonable Racist, the Intelligent Bayesian, and the Involuntary Negrophobe, courts implicitly apply an impermissible racial category that gives effect to private prejudices in violation of the Equal Protection Clause. In constructing this argument, I explore the nature of unconscious biases, which pose a dilemma for those seeking to apply an instrumentalist view of the law without unnecessarily trammeling traditional concepts of personal liability. Ultimately, I conclude that equal protection doctrine requires an instrumentalist reading, and that such a reading mandates that the race-based evidence and legal arguments of the Reasonable Racist, the Intelligent Bayesian, and the Involuntary Negrophobe be rejected.

Over the course of the article, I visit and revisit the case of the battered woman, for her situation challenges those seeking principled reasons for allowing her self-defense claim while rejecting the race-based self-defense claims our hypothetical bank patron might advance. Like the Intelligent Bayesian, the battered woman's claim may rely, in part, on statistical generalizations. And like the Involuntary Negrophobe, her claim may be based on a trauma-induced misreading of the threat posed by her abuser. I demonstrate that the rationales for distinguishing between these cases lies in an instrumentalist reading of the law.

I. The Formal Structure of Self-Defense Doctrine

Self-defense is generally defined as the use of a reasonable amount of force against another when the defender reasonably believes that she is in immediate danger of unlawful bodily harm from the other, and that the use of such force is necessary to protect against this danger.[14] The defender must have *honestly* and *reasonably* believed that the feared attack was *imminent*, and that her response to it was both *necessary* and *proportional*.[15] In order to be exonerated, then, our hypothetical bank patron must convince the factfinders that she honestly and reasonably believed that she had to act when she did to avoid being killed or seriously injured, and that nothing less than deadly force would have saved her.[16]

Reasonableness is the linchpin of a valid self-defense claim in two respects. First, even if the elements of imminence, necessity, and proportionality are not objectively present, a defendant's self-defense claim is valid as long as the defendant has a reasonable, subjective belief that they are present.[17] For exam-

14. Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 5.7 (2d ed. 1986).

15. *Id.*

16. In New York, for example, attempted robbery is considered a sufficiently threatening crime to warrant a response with deadly force. Fletcher, *supra* note 2, at 25.

17. LaFave & Scott, *supra* note 14, § 5.7(c).

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ple, even though the bank patron in our hypothetical was not actually being attacked by the black victim, she has a valid claim if her mistaken belief that she was under attack was reasonable. Second, from a factfinder's perspective, the reasonableness of a belief is a rough index of its honesty; that is, the more reasonable the belief seems to a jury, the more likely a jury is to be convinced that the defendant honestly held the belief herself. Thus, the reasonableness requirement plays a pivotal role in shaping a defendant's strategy in presenting her self-defense claim.

II. The Reasonable Racist

The Reasonable Racist asserts that, even if his belief that blacks are "prone to violence" stems from pure prejudice, he should be excused for considering the victim's race before using force because most similarly situated Americans would have done so as well. For inasmuch as the criminal justice system operates on the assumption that "blame is reserved for the (statistically) deviant,"[18] an individual racist in a racist society cannot be condemned for an expression of human frailty as ubiquitous as racism.

With regard to his claim that average Americans share his fear of black violence, the Reasonable Racist can point to evidence such as a 1990 University of Chicago study which found that over 56 percent of Americans consciously believe that blacks tend to be "violence prone."[19] Moreover, numerous recent news stories chronicle the widespread exclusion of blacks from shops and taxicabs by anxious storekeepers and cabdrivers, many of whom openly admit to making race-based assessments of the danger posed by prospective patrons.[20] Few would want to agree with the Reasonable Racist's assertion that every white person in America harbors racial animus as he does; nonetheless, it is unrealistic to dispute the depressing conclusion that, for many Americans, crime has a black face.

The flaw in the Reasonable Racist's self-defense claim lies in his primary assumption that the sole objective of criminal law is to punish those who devi-

18. Mark Kelman, *Reasonable Evidence of Reasonableness,* 17 Critical Inquiry 798, 801 (1991).

19. Tom W. Smith, Ethnic Images 9,16 (Dec. 1990) (General Social Survey Topical Report No. 19, on file with the *Stanford Law Review*).

20. *E.g.,* Keith Harriston, *3 Cab Firms to Monitor for Bias: Suit over Shunning of Blacks Settled,* Wash. Post, Nov. 3, 1990, at B1; *The Jeweler's Dilemma,* New Republic, Nov. 10, 1986, at 18; Clarence Page, *Black Youths: Buzz In or Buzz Off?,* Chi. Trib., Nov. 2, 1986, § 5, at 3; Sam Roberts, *Hailing a Taxi Is Even Harder if You're Black,* N.Y. Times, Dec. 10, 1987, at B1; *Fear of Blacks, Fear of Crime,* N.Y. Times, Dec. 28, 1986, at 10 (editorial arguing that whites who discriminate against all blacks based on the crimes of a few should imagine themselves in the shoes of those unfairly discriminated against).

Professor Patricia Williams gives a chilling personal account of being barred from a glitzy Manhattan boutique which used a buzzer system as a screening device, ostensibly to reduce the incidence of robbery. It was midafternoon just two weeks before Christmas, and several white patrons were shopping inside the store. When Professor Williams pressed her "round brown face to the window . . . seeking admittance," the clerk within "mouthed 'We're closed,'" and refused to let her in. Patricia J. Williams, The Alchemy of Race and Rights 44-45 (1991). Ironically, the boutique in question was Benneton's, a retailer "whose colorfully punnish ad campaigu is premised on wrapping every one of the world's peoples in its cottons and woolens." *Id.* at 45.

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ate from statistically defined norms. For even if the "typical" American believes that blacks' "propensity" toward violence justifies a quicker and more forceful response when a suspected assailant is black, this fact is legally significant only if the law defines *reasonable* beliefs as *typical* beliefs. The reasonableness inquiry, however, extends beyond typicality to consider the social interests implicated in a given situation. Hence not all "typical" beliefs are per se reasonable.

The notion that typical beliefs are reasonable finds expression in certain familiar personifications of the reasonableness requirement, such as "the ordinary prudent man," "the average man," "the man in the street,"[21] and "the man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves."[22] Operationally, the jurors—themselves typical people holding typical beliefs—ordinarily judge the reasonableness of the defendant's beliefs by projecting themselves into the defendant's situation and asking whether they would have shared his beliefs under the circumstances. If the answer is yes, the Reasonable Racist maintains, the defendant should be exculpated because the behavior of an average person is not morally blameworthy.

Typical beliefs may be considered reasonable for two very different reasons. First, they are presumed to be accurate.[23] Most of our claims to knowledge about the world rest on typical beliefs; we assume that the propositions about the world that "everyone knows" (propositions often equated with "common sense") are true unless we have reason to doubt them. Accordingly, typical beliefs about the propensity of blacks towards violence are reasonable insofar as we have no reason to doubt them. In Part III, I take up the claim by some commentators, and even civil rights leaders, that heightened fear of black violence is factually justified.

Second, typical beliefs may be considered reasonable on the supposition that they are not blameworthy, however inaccurate or even irrational they may be.[24] This is the claim of reasonableness invoked by both the Reasonable Racist and, as I discuss in Part IV, the Involuntary Negrophobe. According to this claim, even admittedly wrong judgments about a fact or situation should be excused so long as most people would have reached the same wrong conclusions under similar circumstances. This argument rests on the premise that "blame is reserved for the (statistically deviant); we are blamed only for those actions and errors in judgment that others would have avoided."[25] Under a noninstrumental theory of criminal liability, it is unjust to punish someone like

21. *See, e.g.*, 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 16.2 (1956).

22. This formulation is quoted in an English case, Hall v. Brooklands Auto Racing Club, [1933] 1 K.B. 205, 224, and attributed to an unnamed American author. *See also* GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 23 (1985).

23. Kelman, *supra* note 18, at 800.

24. *Id.* at 801.

25. *Id.*

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the Reasonable Racist since his typical beliefs are by definition not morally blameworthy.[26]

The Reasonable Racist's claim that "blame is reserved for the (statistically) deviant," however, rests on a superficial understanding of the moral norm implicit in the reasonable person test. Professor Fletcher points out that the actual moral norm implicit in the reasonable man test is that blame is reserved for persons who fail to overcome character flaws that they can fairly be expected to surmount for the sake of important social interests.[27]

Two hypothetical cases of alleged duress help to illustrate this point. In the first case, "someone kills another to avoid a slap in the face"; in the second, "a government employee discloses official secrets to avoid having his car stolen."[28] Unless the defendants suffer from some pathological phobia of facial touches or stolen property, most people would characterize the first defendant's unwillingness to suffer a slap in the face to save a human life as cowardice, and the other defendant's refusal to part with a personal chattel for the sake of national security as selfishness. Most people would not excuse either defendant since "we can fairly expect of a man that he conquer his cowardice in the interest of saving human lives, or of a government official that he overcome his selfishness when governmental secrets are at stake."[29]

The Model Penal Code and common law courts would dictate this result by considering the traits of the fictitious reasonable person or person of reasonable firmness. The Model Penal Code provides an affirmative defense of duress for a defendant who commits what would otherwise be a crime if the threat that compels him to commit it is such that a person of "reasonable firmness" in his situation would have been unable to resist it.[30] If a person of "reasonable firmness" would be cowardly or selfish in the hypothetical scenarios, then the threatened slap and the threatened dispossession furnish each of the actors with an adequate defense. Common law courts, however, would never endow these fictitious exemplars with such attributes under these circumstances, "[b]ecause these are traits that men can be fairly expected to surmount to save the life of another or to protect other vital interests."[31]

This analysis exposes the fallacy of equating reasonableness with typicality. With respect to race, prevailing beliefs and attitudes may fall short of what we can fairly expect of people from the standpoint of what Professor Eisenberg

26. *See, e.g.*, George P. Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401, 417-18 (1971) (arguing that the determination of whether a defendant deserves to be excused mirrors the inquiry into whether the accused is morally culpable for violating the law).

27. Fletcher, *Excusing Conditions*, *supra* note 13, at 1291. According to Fletcher, "the standard of the reasonable person provides a substitute for inquiries about the actor's character and culpability." *Id.* at 1290. Thus, a legal system such as that in Germany which directly assesses the character and culpability of defendants has no use for a fictitious reasonable person. *Id.* In contrast, a system such as ours which rarely evaluates the character and culpability of defendants explicitly does so indirectly via the reasonable person. *Id.* The courts define the reasonable person as one who possesses those traits and attributes that an ordinary person would possess in the particular situation being evaluated.

28. *Id.*

29. *Id.* at 1291.

30. *See* LAFAVE & SCOTT, *supra* note 14, at 375; MODEL PENAL CODE § 2.09(1) (1962).

31. *See* Fletcher, *Excusing Conditions*, *supra* note 13, at 1291.

refers to as "social morality."[32] If we accept that racial discrimination violates contemporary social morality, then an actor's failure to overcome his racism for the sake of another's health, safety, and personal dignity is blameworthy and thus unreasonable, independent of whether or not it is "typical." Although in most cases the beliefs and reactions of typical people reflect what may fairly be expected of a particular actor, this rule of thumb should not be transformed into or confused with a normative or legal principle. Nevertheless, this is precisely the error the "Reasonable Racist" makes in claiming that the moral norm implicit in the objective test of reasonableness extends no further than the proposition that "blame is reserved for the (statistically) deviant."[33]

III. The Intelligent Bayesian

> There is nothing more painful to me at this stage in my life than to walk down the street and hear footsteps and start thinking about robbery—then look around and see somebody white and feel relieved.
>
> The Rev. Jesse Jackson, in a speech in Chicago decrying black-on-black crime[34]

A second argument which a defendant may advance to justify acting on race-based assumptions is that, given statistics demonstrating blacks' disproportionate involvement in crime, it is reasonable to perceive a greater threat from a black person than a white person. Walter Williams, a conservative black economist, refers to such an individual an "Intelligent Bayesian," named for Sir Thomas Bayes, the father of statistics.[35] On its surface, the claim of the Intelligent Bayesian appears relatively free of the troubling implications of the Reasonable Racist's defense. While the Reasonable Racist explicitly admits his prejudice and bases his claim for exoneration on the prevalence of racial animus, the Intelligent Bayesian invokes the "objectivity" of numbers.[36] The Bayesian's claim is simple: "As much as I regret it, I must act differently towards blacks because it is logical to do so." The Bayesian relies on numbers that reflect not the prevalence of racist attitudes among whites, but the statistical disproportionality with which blacks commit crimes.

32. Melvin A. Eisenberg, The Nature of the Common Law 15 (1988). Eisenberg defines social morality as the "moral standards that claim to be rooted in aspirations for the community as a whole, and that, on the basis of an appropriate methodology, can fairly be said to have substantial support in the community, can be derived from norms that have such support, or appear as if they would have such support." *Id.* Some recent work in psychology suggests that the conflict between social morality and prevailing stereotypes about blacks gives rise to what is known as "unconscious" or "aversive" racism. *See* notes 136-145 *infra* and accompanying text.

33. *See* Harper & James, *supra* note 21, § 16.2 (explaining that the reasonableness standard "represents the general level of moral judgment of the community, what it feels ought ordinarily to be done, and not necessarily what is ordinarily done, although in practice the two would very often come to the same thing").

34. *Perspectives,* Newsweek, Dec. 13, 1993, at 17.

35. Walter E. Williams, *The Intelligent Bayesian, in The Jeweler's Dilemma, supra* note 20, at 18.

36. Professor Walter Williams, for instance, contends that fairness to race-sensitive shopkeepers and cabdrivers who nevertheless exclude blacks requires us to recognize and accept the need to "play the odds" in a world of imperfect information. *Id.*

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Although they constitute roughly 12 percent of the population, blacks are arrested for 62 percent of armed robberies.[37] Professor Kelman notes that "the *rate* of robbery arrests among blacks is roughly twelve times the rate of non-blacks (that is, it would be twelve times more probable that a particular black person is a robber than a nonblack, if one had to make a purely race-based estimate)."[38] Even assuming considerable bias in police arrests, he continues, "it is nonetheless implausible that actual rates of robbery by race are even close."[39] In addition to race, the Bayesian may consider other personal characteristics of a supposed assailant—such as youth, gender, dress, posture, body movement, and apparent educational level—before deciding how to respond.[40] Having assessed these "objective" indices of criminality, the Bayesian argues that his conduct was reasonable (and thus not morally blameworthy) because it was "rational."

A threshold problem with the Intelligent Bayesian's claim is the practical impossibility of determining whether a particular defendant is an "Intelligent Bayesian" or a "Reasonable Racist." For countless Americans, fears of black violence stem from the complex interaction of cultural stereotypes, racial antagonisms, unremitting representations of black violence in the mass media, and other elements. The tendency of individuals to credit only those statistics and images which confirm their preexisting biases exacerbates these irrational influences.[41] Thus, even if race does in some measure increase the probability that an "ambiguous" person is an assailant, defendants and factfinders will inevitably exaggerate the *weight* properly accorded to this fact. Although, as Fletcher points out, "it is difficult to expect the ordinary person in our time not to perceive race as one—just one—of the factors defining the 'kind' of person who poses a danger,"[42] the typical person tends to perceive race as the *overriding* factor when the supposed assailant is black. Yet employing race as the dominant index of dangerousness cannot be statistically justified; blacks arrested for violent crimes comprised less than 1 percent of the black population in 1991, and less than 1.7 percent of the black male population,[43] making the odds that any particular black person will commit a violent crime very long indeed.

For white Bayesians, cultural differences increase the danger of overestimating the threat posed by a supposed black assailant. Nonverbal cues such as

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37. Kelman, *supra* note 18, at 814 n.20.

38. *Id.*

39. *Id.*

40. *See* FLETCHER, *supra* note 2, at 203-04.

41. For example, the same Chicago study which found that most Americans believe that blacks are "prone to violence" also found that most of those same Americans believe that blacks are (among other things) unpatriotic. Smith, *supra* note 19, at 9. But since the willingness to risk ones' life for his or her country is a universally recognized hallmark of patriotism, and since blacks have been disproportionately represented in the all-volunteer armies deployed in the Persian Gulf War and other recent American military actions, the widely held belief that blacks are unpatriotic seems plainly irrational and racist. I further discuss the phenomenon of selective assimilation of facts at note 145 *infra* and accompanying text.

42. FLETCHER, *supra* note 2, at 206.

43. ELLIS COSE, THE RAGE OF A PRIVILEGED CLASS 94 (1993).

eye contact and body communication, for instance, vary significantly among subcultures, and thus may be of limited predictive value in intercultural situations.[44] If the female bank patron in our opening hypothetical were white (I intentionally left the defendant's racial identity undefined), her misinterpretation of the black victim's eye and body movements as furtive and threatening may have resulted from cultural differences in nonverbal cues, illogically distorting her perception of danger.

Even if we accept the Bayesian's claim that his greater fear of blacks results wholly from his unbiased analysis of crime statistics, biases in the criminal justice system undermine the reliability of the statistics themselves. A *Harvard Law Review* survey of race and the criminal process, for example, found that "[a]n examination of empirical studies suggests . . . that racial discrimination by police officers in choosing whom to arrest most likely causes arrest statistics to exaggerate what differences might exist in crime patterns between blacks and whites, thus making any reliance on arrest patterns misplaced."[45] Consequently, although the rate of robbery arrests among blacks is roughly twelve times that of nonblacks, it does not necessarily follow that a particular black person is twelve times more likely to be a robber than a nonblack.[46]

Although biases in the criminal justice system exaggerate the differences in rates of violent crime by race, it may, tragically, still be true that blacks commit a disproportionate number of crimes. Given that the blight of institutional racism continues to disproportionately limit the life chances of African-Americans, and that desperate circumstances increase the likelihood that individuals caught in this web may turn to desperate undertakings, such a disparity, if it exists, should sadden but not surprise us. As Professor Calabresi points out:

> [O]ne need not be a racist to admit the possibility that the stereotypes may have some truth to them. I don't believe in race, but if people are treated badly in a racist society on account of an irrelevant characteristic such as color or language, it should not be surprising if they react to that treatment in their everyday behavior.[47]

To the extent that socioeconomic status explains the overinvolvement of blacks in robbery and assault (assuming that there is, in fact, such overinvolvement), race serves merely as a proxy for socioeconomic status. But if race is a proxy for socioeconomic factors, then race loses its predictive value when one controls for those factors. Thus, if an individual is walking through an impoverished, "crime-prone neighborhood," as Reverend Jackson may have had in mind, and if he has already weighed the character of the neighborhood in judging the dangerousness of his situation, then it is illogical for him to consider the

44. Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 238 (1983) (citing studies in MICHAEL ARGYLE, BODILY COMMUNICATION 73-105 (1975); EDWARD TWITCHELL HALL, THE HIDDEN DIMENSION (1966); EDWARD TWITCHELL HALL, THE SILENT LANGUAGE (1959); Paul Ekman, *Universal and Cultural Differences in Facial Expressions of Emotion*, *in* NEBRASKA SYMPOSIUM ON MOTIVATION (1971)).

45. *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1473, 1508 (1988) (footnotes omitted).

46. *See* Kelman, *supra* note 18, at 814 n.20.

47. CALABRESI, *supra* note 22, at 28.

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racial identity of the person whose suspicious footsteps he hears. For he has already taken into account the socioeconomic factors for which race is a proxy, and considering the racial identity of the ambiguous person under such circumstances constitutes what Professor Johnson aptly refers to as "double-counting."[48]

Since our hypothetical takes place in a predominantly white upper-middle-class neighborhood, it does not seem to implicate the double-counting problem. Further, for purposes of this analysis, I shall assume, perhaps counterfactually, that the rate of robberies is "significantly" higher for blacks than for nonblacks. I shall also assume for the sake of argument that the defendant's greater fear of blacks results entirely from his analysis of crime statistics. I turn now to a consideration of the potential negative effects of introducing race-based statistical claims in self-defense cases. For the reasons detailed below, I believe that the admission of such seemingly "objective" evidence raises particularly serious concerns in these cases.

A. *Statistical Generalizations About Race and the Subversion of Rationality*

The most readily apparent objection to the reasonableness claim of the Intelligent Bayesian challenges the statistical *method* he employs to assess the victim's dangerousness. Neither private nor judicial judgments about a particular member of a class, the argument goes, should rest on evidence about the class to which he or she belongs. Despite the attractiveness of this principle, and occasional suggestions by courts and commentators that statistical inferences be eschewed in favor of particularized proof and individualized judgment,[49] private and judicial decisionmakers routinely rely on statistical evidence to judge past facts and predict future behavior.[50] One context in

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48. Johnson, *supra* note 44, at 238.

49. *See, e.g.*, United States v. Rangel-Gonzales, 617 F.2d 529, 532 (9th Cir. 1980) (noting that the fact that very few aliens consult with the Consulate when advised of right to do so "would not appear to have any bearing on what this particular individual would have done"); Smith v. Rapid Transit, Inc., 317 Mass. 469, 58 N.E.2d 754 (1945) (holding that plaintiff's demonstration that the defendant company operated most of the buses on the route where she was injured was insufficient to present a triable issue of fact).

50. Law schools, for example, select applicants with high undergraduate grades and test scores on the theory that such applicants tend to earn higher first-term or first-year average grades than other applicants. *See* Barbara D. Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408, 1422 n.40 (1979). Lenders use statistics concerning age, marital status, location of residence, income, and assets to predict whether a borrower will repay a loan. *Id.* at 1422. Parole commissions may also use statistical techniques to predict parole success, considering factors such as number of prior convictions, type of crime, employment history, and family ties. *Id.* at 1421-22.

In the adjudicatory context, courts consider nonindividualized statistical probabilities when deciding whether to allow tort plaintiffs to get to the jury on the basis of primarily epidemiological proof of causation, *see, e.g.*, DeLuca v. Merrell Dow Pharmaceuticals, Inc., 911 F.2d 941 (3d Cir. 1990) (admitting epidemiological studies as circumstantial evidence that use of Bendectin during pregnancy caused plaintiff's birth defects), and they are increasingly willing to accept mathematical probabilities as proof of cause-in-fact in medical malpractice cases, *see, e.g.*, Herskovits v. Group Health Coop., 99 Wash. 2d 609, 664 P.2d 474 (1983) (finding that testimony that defendant's failure to diagnose plaintiff's cancer reduced plaintiff's chance of survival for five years from 39% to 25% created jury question on proximate causation).

which the use of statistical generalizations has been especially important (and controversial) is in the construction of self-defense claims for battered women who kill their abusers. I examine this context in more detail below.

To accept the usefulness of statistical generalization as a general matter, however, is not to agree that such generalizations are appropriate in all contexts. For the use of statistical generalizations entails significant social costs, notwithstanding obvious benefits to defendants. Such generalizations may subvert the criminal justice system's promise that each individual defendant will be tried according to the specific facts of his case. Ultimately, the courts' reliance on statistical generalizations may provide an official imprimatur on stereotypes about the class in question. In the case of the Intelligent Bayesian, countenancing race-based statistics might further entrench stereotypes about blacks as criminals in the public's collective consciousness.

The use of race-based generalizations in the self-defense context has an especially grievous effect: It subverts the rationality of the justice system and encourages an inequitable weighing of the costs and benefits of acting on such generalizations. In fact, race-based statistical evidence may be so effective at tapping into pervasive and deeply ingrained racial prejudices as to render such evidence more prejudicial than probative, justifying its exclusion under federal and state evidence codes.[51]

To understand how the use of race-based statistical generalizations undermines the rationality of the justice system, it is essential to understand the nature of the determination juries make in self-defense cases. In judging the reasonableness of the defendant's use of deadly defensive force, the factfinders do not merely make an empirical judgment (on either statistical or particular grounds) about the magnitude of risk either actually or apparently posed by a supposed assailant. They must also decide whether the defendant should have waited for the "ambiguous" or "suspicious" victim to clarify his violent intentions before resorting to deadly force. Predictions—about the world generally and about human behavior in particular—always involve some risk of error. The more information we possess about a given situation, the smaller the risk of error in our judgments about it.

Taking the time to gather information, however, is not without its own social costs. And nowhere are information costs higher than in the self-defense context, where the only way to gather more information is to wait for the "suspicious" person to manifest his violent intentions before responding with force. Hence the *cost of waiting* is increased risk for the person who wants to defend herself successfully. If that person considers blacks to pose a "significantly" greater threat of assault than whites, she will not wait as long for an "ambiguous" black person to clarify his violent intentions as for a white person.

On the other hand, the *costs of not waiting* as long for blacks with unclear intentions as for similarly situated nonblacks go well beyond the physical inju-

51. *See* FED. R. EVID. 403. Rule 403 reads, in relevant part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."

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ries suffered by the immediate black victims of putative self-defense. Not waiting as long for blacks to clarify their intentions destroys what Professor Patricia Williams refers to as "the fullness of [African-Americans'] public, participatory selves."[52] That is, hastier use of force against blacks forces blacks who do not want to be mistaken for assailants to avoid ostensibly public places (such as "white" neighborhoods, automatic tellers, and even Manhattan boutiques) and core community activities (such as shopping, jogging, sightseeing, or just "hanging out"). Moreover, race-based predictions of an individual's behavior insufficiently recognize individual autonomy by reducing people to predictable objects rather than treating them as autonomous entities.[53]

Ultimately, race-based evidence of reasonableness impairs the capacity of jurors to rationally and fairly strike a balance between the costs of waiting (increased risk for the person who perceives imminent attack) and the costs of not waiting (injury or death to the immediate victim, exclusion of blacks from core community activities, and, ultimately, reduction of individuals to predictable objects). In fact, such evidence may be so effective at tapping the racism—conscious or unconscious[54]—which has been proven to infect jury deliberations, that it should arguably be excluded under the "more prejudicial than probative" standard of most states' evidence codes, of which the provisions in section 403 of the Federal Rules of Evidence are illustrative.[55] A large and compelling body of social science research—including case studies, studies of conviction rates, death penalty statistics, laboratory findings in mock jury studies, and general research on racial prejudice—establishes that racial bias affects jury deliberations.[56] These studies indicate two distinct kinds of jury bias operating in criminal cases: own-race favoritism and other-race antagonism.[57] Both kinds of bias subvert the rationality of the factfinding process in self-defense cases.

Own-race favoritism induces some white factfinders to overvalue the interests of the white defendant and the group to which he belongs,[58] while other-race antagonism causes some to undervalue the interests of the black victim and

52. WILLIAMS, *supra* note 20, at 46.

53. Underwood, *supra* note 50, at 1414. Of course, as Professor Underwood notes, all predictions of human behavior pose some threat to the value of respect for individual autonomy. *Id.* But autonomy is especially threatened when the forecast that a person will *choose* to act violently is based on a factor—such as race—over which that person has no control. *Id.* at 1415-16, 1434-36.

54. Twentieth century theories of unconscious motivation, particularly those of Freud and cognitive psychology, provide compelling explanations for the derogatory views about blacks prevalent among white Americans. *See* notes 136-145 *infra* and accompanying text.

55. For the relevant text of Rule 403, see note 51 *supra.*

56. *See generally* Sheri Lynn Johnson, *Black Innocence and the White Jury,* 83 MICH. L. REV. 1611, 1616-49 (1985); *see also* Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges,* 76 CORNELL L. REV. 1, 110-15 (1990).

57. Johnson, *supra* note 56, at 1617.

58. *Id.* at 1619-22, 1625-34 (revealing through social science research a historical tendency among whites to be more lenient with white defendants than with black ones).

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the group to which he belongs.[59] In self-defense cases, this means that prejudice may cause juries (often all white)[60] to miscalculate the costs of not waiting as long for blacks to reveal their intentions as for nonblacks, since an individual and a group with which they do not identify will bear those costs, while "one of their own" would bear the cost of waiting for a suspected assailant to exhibit his violent intentions. If juries were roughly half black and half white, the biases of white and black factfinders (both own-race and other-race) would tend to offset each other, minimizing the influence of racial bias on the factfinding process.[61] But blacks often have no voice in jury deliberations, and therefore evidence that emphasizes race unfairly increases the likelihood that the interests of black victims of putative self-defense will not be vindicated.

Thus, even assuming that race-based statistical evidence is probative of the magnitude of risk posed by an unknown black person, it threatens to undermine the rational determination of how long the defendant should have waited for the stranger to clarify his intentions before resorting to deadly force. In the words of the Federal Rules of Evidence, its "probative value [may be] substantially outweighed by the danger of unfair prejudice."[62] And surely a paragon of rational thinking like the Intelligent Bayesian would not press for the admission of evidence that subverts the rationality of the factfinding process.

B. *Distinguishing the Battered Woman and the Intelligent Bayesian*

Battered women who kill their abusers in nonconfrontational situations may develop self-defense claims structurally analogous to those of the Intelligent Bayesian. While the Intelligent Bayesian defends his actions using statistical generalizations about blacks' propensity toward violence, the battered woman defendant may rely on statistical generalizations about batterers' propensity to seriously injure or kill the victims of their abuse. It would appear, then, that the proposed application of the evidence codes' "more prejudicial than probative"

59. *Id.* at 1620, 1634-35. *Contra* Jeffrey E. Pfeifer, *Reviewing the Empirical Evidence on Jury Racism: Findings of Discrimination or Discriminatory Findings?*, 69 NEB. L. REV. 230 (1990) (questioning recent research showing racial bias in mock juries).

60. Many American juries are all white or nearly all white both because of the racial composition of our population and because, for various reasons, the juror selection process results in underrepresentation of minorities. J. VAN DYKE, JURY SELECTION PROCEDURES 28-32, app. G (1977); Hayward R. Alker, Carl Hosticka & Michael Mitchell, *Jury Selection as a Biased Social Process*, 11 LAW & SOC'Y REV. 9, 33 (1976).

61. *Cf.* People v. Wheeler, 22 Cal. 3d 258, 267, 583 P.2d 748, 755, 148 Cal. Rptr. 890, 896 (1978) (explaining how culturally diverse juries achieve impartiality because members' biases "cancel each other out").

62. FED. R. EVID. 403. A restriction on the use of race-based statistics that might prejudice the jury in a self-defense case would be much like the federal Rape Shield Law, FED. R. EVID. 412, which prohibits the introduction of evidence of a victim's sexual history in a rape case. *See* Johnson, *supra* note 2. While prior sexual conduct is at least marginally probative of a victim's consent—just as racial crime statistics may be probative of a defendant's state of mind—Congress decided in the Rape Shield Law that the slight disadvantage to the defendant of prohibiting the evidence was outweighed by intrinsic justice concerns (minimizing distorted outcomes), as well as by extrinsic social policies (protecting the privacy interests of victims and encouraging reporting). FED. R. EVID. 412 advisory committee's note. The intrinsic justice protections and extrinsic social policies which would be advanced by restricting the use of race-based statistical evidence in self-defense cases are as important as those advanced by the restrictions of the Rape Shield Law.

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standard to bar the statistical generalizations of the Intelligent Bayesian would also prevent those of the battered woman. An analysis of the battered woman's self-defense claim, however, reveals that her use of generalizations is distinct from that of the Intelligent Bayesian, and may actually enhance the rationality of the factfinding process.

Statistical evidence showing the percentage of women killed by their abusers, the failure of protective orders, or the pattern of escalating violence in abusive relationships, may be particularly useful to bolster battered women's self-defense claims when they kill during a lull in the violence, kill when the abuser was asleep, or hire someone else to kill him.[63] In such a case of "nonconfrontational" homicide, the battered defendant must convince the factfinder that, at the time she killed her partner, she reasonably believed that she needed to act imminently and with deadly force to protect herself from serious injury or death.[64] In doing so, she may argue, just as the Intelligent Bayesian does, that her actions were reasonable in part because they were based on convincing factual generalizations. As Professor Kelman points out, the battered woman in such a case "almost surely subjectively relies in part on statistical generalizations (the police don't take domestic violence seriously, protective court orders don't work, men who hit make up and then hit harder)."[65] Even if the defendant herself does not personally rely on such generalizations, Kelman continues, her lawyer,

> [in] attempting to persuade the jury that they too would have been scared in her situation, will *surely* make use of general evidence and will believe that statistical information about the ineffectiveness of police intervention in domestic violence cases or general information about the escalation of violence in the "battering cycle" is germane.[66]

The battered woman's case is arguably distinguishable from the Intelligent Bayesian's case in the nature of the evidence it employs. The battered woman may support her claim with her *personal* observations of the decedent over time, including her intimate knowledge of his habits, the severity of his brutality, and the predictability of his assaults. Our hypothetical bank patron, as an Intelligent Bayesian, also justifies her fear with particularized proof: the am-

63. Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals,* 140 U. PA. L. REV. 379, 397 (1991). Professor Maguigan notes that in a significant percentage of cases—about 20%—the defendant kills her abusive spouse in a "nonconfrontational" situation, i.e., a situation in which the decedent did not pose an imminent threat of death or serious bodily injury to the defendant. *Id.*

64. *See* text accompanying note 15 *supra.* In some cases, especially those involving battered women who killed their batterers in nonconfrontational situations, courts have noted that the requirement that the feared attack be imminent does not make exceptions for the situation in which the defender is being de facto held captive. In one battered woman case, the dissent pointed out that the majority's strict reading of the immediate danger requirement would preclude finding imminence in "a hostage situation where the armed guard inadvertently drops off to sleep and the hostage grabs his gun and shoots him." State v. Stewart, 763 P.2d 572, 584 (Kan. 1988) (Prager, C.J., dissenting). Accordingly, courts should frame the imminence issue in terms of whether the defender needed to act imminently to prevent any serious harm, even that which would not have occurred until much later. *See* Kelman, *supra* note 18, at 801 n.3.

65. Kelman, *supra* note 18, at 813.

66. *Id.* at 814.

biguous trench coat and tarpaulin hat, the equally ambiguous glance down the deserted street, his "suspicious" movements as he entered the lobby, and his sudden movements and shouts just before the shooting. Nonetheless, predictions based on a personal and intimate history with someone (like the batterer) are arguably more reliable than those based on instant impressions of a stranger (like the supposed black assailant).[67]

Perhaps the most decisive difference between the statistical generalizations offered by the battered woman and the "Intelligent Bayesian" lies in the impact of their respective proofs on the rationality of the factfinding process. The race-based generalizations of the "Intelligent Bayesian," as I have discussed, subvert the rationality of the factfinding process by tapping irrational and often unconscious sentiments about blacks. In contrast, the statistical evidence presented by the battered woman does not so clearly play on the prejudices that factfinders carry with them into the jury box. Her statistical evidence is aimed at disabusing the factfinders of their prejudices against defendants like herself so that they can more rationally and fairly judge her claim. As Elizabeth Schneider explains:

> A battered woman who kills her batterer has to overcome special myths and misconceptions about battered women. . . .
>
> . . . Expert testimony can give the judge and jury information concerning the common experiences and characteristics of battered women in order to refute widely held myths and misconceptions concerning battered women that would interfere with judge or juror ability to evaluate the woman's action fairly. . . . Introduction of expert testimony is important because a battered woman who explains a homicide as a reasonable and necessary response to abuse in the home, threatens deeply held stereotypes of appropriately submissive female conduct and of patriarchal authority.[68]

Thus, the battered woman's evidence may actually enhance the factfinding process by challenging widespread myths and misperceptions about the plight of battered women. Accordingly, denying the Bayesian's use of these generalizations need not require that we also deny them to the battered woman, for the purposes served and the ends achieved in each case are distinguishable.

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67. In questioning this sort of argument, Professor Kelman notes that implicit in its reasoning is a theory that the sole reasonable basis for prediction is something like inertia.

> We can, in this view, be confident only that people will do what they have done before. I doubt this epistemological supposition is sound: I suspect, for instance, that I would do much better predicting that a stranger is about to have an affair with someone, on the basis of observed flirting, than I could predict whether my wife were, on the basis of habit. . . . [W]e must recognize that many battered women kill in situations where they claim to know that their spouse is about to do something different, something *more* violent than he has ever done to her before.

Id.

68. Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195, 201-02 (1986) (footnotes omitted); *see also* People v. Torres, 128 Misc. 2d 129, 134, 488 N.Y.S.2d 358, 362 (Sup. Ct. 1985) ("[S]pecialized knowledge would properly assist the jury in understanding the unique pressures which are part and parcel of the life of a battered woman, and, in this manner, enable the jury to disregard their prior conclusions as being common myths rather than informed knowledge.").

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IV. The Involuntary Negrophobe

> Among the many violent reactions I had in the weeks following the rape, including despair, helplessness, a sense that my life was over, was a visceral, desperate fear of all strange black and brown men. Walking alone in Mount Pleasant, an inner-city Washington, D.C., neighborhood, I had a panic attack as it seemed that each of the dozens of Central American men streaming toward and past me on the sidewalk was about to pull a knife and stab me.[69]

This frank and chilling description by Professor Micaela di Leonardo of her reaction to being raped by a black male suggests the profoundly personal level on which the link between race and violence may be forged. In contrast to both the "Reasonable Racist" (whose fear of blacks stems from and is reinforced by the mass media and traditional racial myths) and the "Intelligent Bayesian" (whose racial fears rest on crime statistics), Professor di Leonardo's fear emerged after a violent personal assault. To what extent, then, should such "involuntary negrophobia" be relevant to claims of self-defense?

Suppose the patron who shot the young black man in our ATM hypothetical had been mugged by black teenagers nine months before the night of the shooting. Suppose further that after the mugging she developed what her psychiatrist diagnosed as a post-traumatic stress disorder, triggered by contact with blacks, which induced her to overestimate the black victim's threat on the night of the shooting. Under these circumstances, the defendant could claim that her admittedly paranoid fear of the young black victim was "reasonable" for someone mugged in the past by black assailants.

As open-ended and dangerous as this claim of reasonableness may seem, courts have already accepted its underlying doctrinal and psychological propositions. The doctrinal foundation of the negrophobe's claim is the widely accepted "subjective" test of reasonableness, which takes into account both the defendant's past experiences and the psychological effects of those experiences.[70] Under this standard of reasonableness, the factfinder compares the defendant's judgments not to those of a typical person drawn from the general population, but to those of a person *in the situation* of the defendant.[71] The defendant's "situation" for purposes of this standard includes not only the immediate circumstances of the fatal encounter, but also the psychological effects

69. Micaela di Leonardo, *White Lies Black Myths: Rape, Race, and the Black 'Underclass,'* Village Voice, Sept. 22, 1992, at 30. Professor di Leonardo points out that she is an academic specialist on race, class, and gender in America, and that before her rape, she had been a rape crisis counselor and had taught classes on rape at Yale. *Id.*

70. *See* Maguigan, *supra* note 63, at 409-12 (noting that most jurisdictions use a reasonableness standard that includes consideration of the defendant's individual circumstances and subjective point of view).

71.

> In objective jurisdictions, reasonableness is measured against the standard of a hypothetical generic reasonable person (or man). In other jurisdictions, there is a subjective portion of the reasonableness test, which places the hypothetical reasonable person in the situation of and having the information available to and the experience and perceptions of the defendant on trial. The majority standard is one that combines subjective and objective tests of reasonableness.

Id. at 409 n.105 (citations omitted).

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of experiences she has undergone prior to the fatal encounter.[72] Thus, as long as a "typical" person could develop the same misperceptions as did the defendant under exposure to the same external forces, the defendant's misperceptions will be found reasonable.[73]

The psychological premise underlying the negrophobe's claim is that a typical person assaulted by a black individual could conceivably develop a pathological phobia towards *all* blacks. Surprisingly, in a recent Florida case,[74] a judge awarded workers' compensation benefits to a negrophobic claimant on precisely this proposition. Even more surprisingly, every appellate court that has reviewed this controversial case has affirmed the benefits award.[75]

In the Florida case, Ruth Jandrucko, a fifty-nine-year-old white woman, filed a workers' compensation claim after she was mugged by a young black male while making a customer service visit for her employer.[76] As a result of the attack, she suffered a fractured vertebra in her back and developed what experts diagnosed as a post-traumatic stress disorder causing physical and psychological reactions to blacks.[77] Although her vertebral fracture eventually healed, her phobia toward blacks—particularly "big, black males"—per-

72. *See id.* at 410 n.108 (providing the jury instructions from People v. Goetz, 68 N.Y.2d 96, 497 N.E.2d 41, 506 N.Y.S.2d 18 (1986)).

73. Kelman, *supra* note 18, at 802.

74. Jandrucko v. Colorcraft/Fuqua Corp., No. 163-20-6245 (Fla. Dep't of Lab. & Empl. Sec. Apr. 26, 1990).

75. Judge John G. Tomlinson, Jr., ordered Fuqua Industries, the insurance carrier for Ms. Jandrucko's employer, to provide temporary total disability benefits to Ms. Jandrucko. Fuqua appealed the award to the Florida First District Court of Appeal, which affirmed Judge Tomlinson's decision per curiam without opinion. Colorcraft Corp. v. Jandrucko, 576 So. 2d 1320 (Fla. Dist. Ct. App. 1991). Fuqua thereafter unsuccessfully petitioned for a writ of certiorari from the United States Supreme Court. Fuqua Indus. v. Jandrucko, 111 S. Ct. 2893 (1991). While this petition was pending, Fuqua filed an original action under 42 U.S.C. § 1983 in the federal district court for the Southern District of Florida in an effort to enjoin the award of benefits. The Southern District denied Fuqua's request for preliminary relief, Fuqua Indus. v. Jandrucko, No. 91-842-CIV-KLR (S.D. Fla. 1991), and Fuqua appealed that decision. Prior to argument of that appeal the district court dismissed Fuqua's complaint. Fuqua Indus. v. Jandrucko, No. 91-842-CIV-KLR (S.D. Fla. 1991). Fuqua also appealed that dismissal. The United States Court of Appeals for the Eleventh Circuit consolidated the two appeals for oral argument. At this stage of the proceedings, the American Civil Liberties Union filed an amicus curiae brief in support of Fuqua's appeal, and the NAACP provided counsel for Fuqua. On December 28, 1992 the Eleventh Circuit dismissed Fuqua's appeal without opinion. Fuqua Indus. v. Tomlinson, 983 F.2d 236 (11th Cir. 1992).

On March 2, 1993 the Florida Senate unanimously passed a bill that excludes from the definition of "accident" "any disease that manifests itself in the fear or dislike of an individual due to race, color, religion, sex, national origin, age, handicap, or marital status." 1993 Fla. Sess. Law Serv. 2352 (West).

76. *Jandrucko*, No. 163-20-6245, at 3. Ms. Jandrucko "testified [that] she was either punched or kicked in the back and knocked to the ground by a black man who grabbed her purse and ran." Angela K. Calise, *WC Claim Cites Phobia of Black Men*, NAT'L UNDERWRITER, Sept. 9, 1991, at 3.

77. *Jandrucko*, No. 163-20-6245, at 4-5. One doctor testified that Ms. Jandrucko suffered from a post-traumatic stress disorder toward blacks, that she had an irrational fear of black men, and that she experienced insomnia and horrifying nightmares due to the trauma of the mugging. The doctor recommended that she confront the phobic stimulus via progressive desensitization, biofeedback, and, perhaps, medication. He also testified that he felt Ms. Jandrucko to be honest and not at all deceitful or malingering, and that she was not predisposed to be fearful of or prejudiced toward black persons. Another specialist testified that he had treated Ms. Jandrucko for what he diagnosed as a post-traumatic stress disorder. He also testified that even when Ms. Jandrucko rationally understood that she need not fear a particular situation, she still felt fear and demonstrated physiological sigus of fear. He also said that she had become "'hyper-vigilant'" and became startled with even a minor stimulus. *Id.*

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sisted.[78] Ms. Jandrucko claimed that her phobia rendered her incapable of working around African-Americans; hence, she argued, she could not find gainful employment.[79]

Accepting Ms. Jandrucko's argument, Florida compensation claims Judge John G. Tomlinson, Jr., awarded her total disability benefits for her phobia.[80] In reaching his decision, Judge Tomlinson found that before her assault Ms. Jandrucko exhibited no apparent "pre-existing racial prejudice or predisposition to psychiatric illness."[81] In other words, she was an ordinary person before the assault. As reported in the *Washington Post*, Judge Tomlinson commented that Ms. Jandrucko's pathological fear of blacks was not an exercise of "'private racial prejudice,'" but instead a mere "work-related phobia."[82] In Judge Tomlinson's view, "'[i]t is not relevant what the subject of her phobia is.'"[83]

A. *The Instrumentalist Response to the Involuntary Negrophobe*

Judge Tomlinson's statement illustrates one side of the ongoing debate between instrumentalist and noninstrumentalist theories of liability. The noninstrumentalist approach focuses exclusively on the personal culpability of the individual defendant, without regard for any social implications beyond the boundaries of the immediate case. According to Professor Fletcher, a leading proponent of the noninstrumental conception of legal liability:

> The distinctive characteristic of non-instrumentalist claims is that their validity does not depend on the consequences of the court's decision. Whether a court protects judicial integrity or achieves a fair result turns on an assessment of the facts of the dispute, not on a correct prediction of what may follow.[84]

In short, this approach focuses on specific parties and the past.

From the standpoint of personal culpability, the sine qua non of criminal liability for noninstrumentalists, Judge Tomlinson accurately concluded that the subject of a person's pathological phobia is not relevant. This view emphasizes the involuntary nature of a post-traumatic stress disorder: Insofar as a defendant can claim that "I couldn't help myself," she cannot be blamed for her reactions, regardless of the subject of her disorder.[85] Thus, under a purely noninstrumental regime, there is no reason to limit legal recognition of negro-

78. Testimony of Ruth Jandrucko at 26, *Jandrucko*, No. 163-20-6245 (Fla. Dep't Lab. & Employ. Sec. Apr. 4, 1986).

79. *Jandrucko*, No. 163-20-6245, at 6-7. A rehabilitation counselor testified that the relevant labor market offered no jobs in which Ms. Jandrucko would be guaranteed not to come into contact with African-Americans. *Id.*

80. *Id.* at 10.

81. *Id.* at 8. Ms. Jandrucko testified that she was raised in a deeply religious Mennonite family which forbade prejudice toward others and viewed hard work as inherently good. *Id.* at 6. Her supervisor stated that Ms. Jandrucko was well-liked by her colleagues, was not prejudiced against any ethnic groups, and was quite friendly with many of her black co-workers prior to her accident. *Id.* at 3.

82. William Booth, *Phobia About Blacks Brings Workers' Compensation Award*, WASH. POST, Aug. 13, 1992, at A3.

83. *Id.*

84. George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 539 n.4 (1972).

85. Fletcher, *Excusing Conditions*, *supra* note 13, at 1270, 1293-95.

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phobia to workers' compensation cases; once an involuntary condition is identified in any context, no just basis exists for imposing liability (including criminal liability) on an actor.[86]

The instrumentalist approach, in contrast, focuses on the broader implications of recognizing some legal claims and withholding legal recognition from others.[87] Instrumentalism, as I employ the term in this article, refers to legal decisionmaking that considers the social implications of legal rules and aims to affect future behavior. Essentially, instrumentalism is concerned with general social welfare and the future.

Legal recognition of the Involuntary Negrophobe's claims would subvert the general welfare by destroying the legitimacy of the courts. The paramount social function of the courts is the resolution of disputes. But the power of a third party to conclusively resolve disputes must rest on some basis, "such as his access to supernatural forces, his charismatic attributes, or his reputation as a Solomonic figure with a special ability to discern justice."[88] In a complex, impersonal, and officially secular society like ours, this basis is the courts' apparent objectivity, particularly their neutrality with respect to the parties before them.[89] The widespread sense of injustice that followed the acquittal of four police officers in the Rodney King beating case, triggering some of the worst rioting in American history, reveals a tangible price that society pays when courts lose their perceived objectivity, and thus their legitimacy, in the eyes of at least some in society. Significantly, the riots did not erupt when the images of King's beating initially saturated the airwaves, but only after the announcement of the verdicts. The black and Latino communities waited for the justice system to honor its promise of neutrality, and only took to the streets when that promise seemed so blatantly flouted.

The instrumentalist, then, is concerned about implications for the courts' perceived legitimacy were the courts to sanction the claim that race-based fear can be so involuntary as to provide a basis of exculpation. To accept such a claim, the courts would have to equate racism with recognized judgment-impairing conditions—such as insanity and youthfulness—which, when successfully invoked, justify a "not gnilty determination."[90] But although racism may be a condition that afflicts all Americans in contemporary society,[91] it is a condition that the courts themselves historically perpetuated through their en-

86. *Id.* at 1271. *See generally* FLETCHER, RETHINKING, *supra* note 13.

87. *See* Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use,* 66 CORNELL L. REV. 861 (1981).

88. EISENBERG, *supra* note 32, at 8-9.

89. *Id.*

90. *See, e.g.,* CAL. PENAL CODE § 26 (West 1988) (recognizing infancy and mental deficiency as culpability exceptions); TEX. PENAL CODE ANN. §§ 8.01-8.07 (West 1974 & Supp. 1994) (listing, inter alia, insanity and age as affecting criminal responsibility); *see also* Michael Andrew Tesner, *Racial Paranoia as a Defense to Crimes of Violence: An Emerging Theory of Defense or Insanity?,* 11 B.C. THIRD WORLD L.J. 307, 333 (1991) (advocating treating racial paranoia-induced delusional disorder as an insanity defense rather than a self-defense excuse).

91. *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism,* 39 STAN. L. REV. 317 (1987).

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forcement of runaway slave laws, Jim Crow laws, antimiscegenation laws, and the like. In the eyes of blacks, the courts' longstanding complicity in the perpetuation of racism would cast grave doubt on their neutrality in a decision to excuse a party for his antiblack attitudes.[92]

Treating "negrophobia" like insanity raises additional problems. Despite the general acknowledgment that genuine insanity may so severely impair an individual's sense of reality, of right, and of wrong as to nullify the possibility of culpability for that individual, there is a widespread perception that sane but guilty defendants exploit the insanity defense to escape long mandatory prison sentences or the death penalty.[93] Were people to develop the same skepticism with respect to defenses invoking negrophobia, the result might well be a total loss of faith in the criminal justice system's ability to adjudicate race-based claims fairly and effectively. Blacks, already concerned with a perceived dual standard operating in the court system,[94] would justifiably perceive the courts' crediting of such claims as the advent of a new legal loophole potentially enabling racists to express their venomous prejudices without consequence. Furthermore, to the extent that the legal system signals to either reasonable or "pathological" racists that they may act without fear of serious consequences, it may ultimately inhibit blacks' full participation in society.[95]

B. *Another Battered Woman Analogy*

Viewed solely from the noninstrumental conception of personal culpability, our negrophobic bank patron's self-defense claims are structurally parallel to those successfully made by battered women who kill their abusers in nonconfrontational situations.[96] In persuading the factfinder that she reasonably believed that she needed to act imminently, the battered woman defendant may concede (at least provisionally, for purposes of this particular claim of reasonableness)[97] that battered woman syndrome—a subcategory of post-traumatic

92. This is especially true with respect to homicide cases, in which the stakes are so high, and where the courts have traditionally devalued black victims. Booker T. Washington expressed what was undoubtedly widely shared outrage at the inequity of the racist criminal justice system: "[S]ince freedom there have been at least ten thousand colored men in the South, murdered by white men, and yet with perhaps a single exception, the record at no court shows that a single white man has ever been hanged for these murders." 3 THE BOOKER T. WASHINGTON PAPERS 29 (Louis R. Harlan ed., 1974).

93. Clarence E. Tygart, *Public Acceptance/Rejection of Insanity—Mental Illness Legal Defenses for Defendants in Criminal Homicide Cases,* 20 J. PSYCHIATRY & LAW 375, 383 (1992).

94. John Hagan & Celesta Albonetti, *Race, Class, and the Perception of Criminal Injustice in America,* 88 AM. J. SOC. 329 (1982) (presenting national survey data showing that blacks are considerably more likely than whites to perceive injustice in the judicial system).

95. *See* text accompanying note 52 *supra.*

96. *See* notes 63-64 *supra* and accompanying text.

97. A battered woman who kills in a nonconfrontational situation may make two quite distinct claims of reasonableness. The first claim—the one on which this discussion focuses—maintains that she should be *excused* for errors in judgment attributable to the psychological disorders induced by her plight. The second claim maintains that her conduct was rational, and hence *justified,* in view of the objective obstacles that she faced; that is, she was justified in killing her batterer in a nonconfrontational situation in the same way that a hostage would be justified in killing the armed guard who inadvertently drops off to sleep. *See* note 64 *supra.*

Professor Elizabeth Schneider points out that expert testimony on battered woman syndrome may address both of these claims. Expert testimony about "learned helplessness" and the psychological

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stress disorder[98]—caused her to overestimate the decedent's dangerousness and to underestimate her capacity to escape the battering relationship. She may nonetheless claim that she acted reasonably on the ground that a reasonable person *in her situation* would have perceived the threat in the same way.

Thus, both the battered woman and our hypothetical negrophobe rest their claims of self-defense on the same doctrinal and experiential propositions. Both attribute their post-traumatic stress disorders to their respective situations, and both present expert testimony establishing that an ordinary person could develop the same disorder if subjected to the same brutal external forces. To be sure, there are some factual differences between the two cases. Under scrutiny, however, these factual differences do not meaningfully distinguish the battered woman's claim from that of the negrophobe for the purpose of this discussion.[99]

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disorders induced by the abusive relationship taps an excuse theory of self-defense. In contrast, expert testimony about the objective obstacles to leaving—including "separation assault" (the often lethal escalation in violence that many women suffer when trying to leave a battering spouse) and the police's and courts' failure to protect women from ongoing abuse—suggests that the defendant's responses were rational and perhaps justified. *See* Schneider, *supra* note 68, at 202-03; *see also* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation,* 90 MICH. L. REV. 1, 80-82 (1991) (discussing how testimony on separation assault may sometimes support the excuse-based claim by explaining why the woman would stay in the battering relationship long enough to develop "learned helplessness"). Some feminists have cautiously criticized the learned helplessness element of battered woman syndrome for its tendency to promote stereotypes of women as passive, submissive, helpless, and irrational. *Id.* at 37-43; Schneider, *supra* note 68, at 207 & n.68; Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense,* 15 HARV. C.R.-C.L. L. REV. 623 (1980).

98. LEONORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 48-49 (1989). Several courts have explicitly recognized battered woman syndrome as a subcategory of post-traumatic stress disorder. *E.g.,* People v. Aris, 215 Cal. App. 3d 1178, 1194, 264 Cal. Rptr. 167, 177 (1989); State v. Hodges, 239 Kan. 63, 66, 716 P.2d 563, 566 (1986); Commonwealth v. Stonehouse, 521 Pa. 41, 62, 555 A.2d 772, 783 (1989).

99. For example, one might attempt to distinguish the battered woman's self-defense claim from our hypothetical negrophobe's on the ground that the ultimate victim of the battered woman's disorder—her abuser—was the very person responsible for her disorder's development, whereas the negrophobe's victims played no role whatsoever in the pathogenesis of his disorder. As the source of the violence that induced the disorder, the abusive spouse may deserve less legal protection than the innocent victim of the negrophobe. The vitality of so distinguishing between the two claims, however, turns on our willingness to shift from an excuse theory of self-defense to a less defensible punitive theory of self-defense. While the excuse theory focuses solely on the plight of the defendants and their lack of personal culpability in succumbing to "uncontrollable pathological factors," the punitive theory is a retributive approach to private punishment in which "[t]he individual acts in place of the state in inflicting on wrongdoers their just deserts." FLETCHER, *supra* note 2, at 27-28.

Fletcher identifies the most compelling reason for barring the punitive theory from the definition of crimes and defenses:

> The law wisely limits itself to the question whether a particular act constitutes a crime and merits punishment or whether, in the context of self-defense, a particular aggressive attack properly triggers a defensive response. The general character of suspects is important neither for human punishment nor for the assessment whether defensive force was permissible in a particular situation.

Id. at 28.

Nor can we distinguish the two cases on the ground that the battered woman experiences a cycle of repeated assaults, while our hypothetical negrophobe suffers a single violent incident. Both repeated episodes of violence and isolated traumatic incidents are equally capable of inducing a post-traumatic stress disorder. *See* Harold L. Hirsh, *Post-Traumatic Syndromes: Part II,* 31 TRAUMA 4, 7 (1989).

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Given the structural parallels between the two cases, it would appear that the self-defense jurisprudence utilized by some battered women may also be exploited to support the race-based self-defense claim asserted by our hypothetical negrophobe. One commentator aptly captures this point in her characterization of the Bernhard Goetz case[100] as a "hard case for feminists."[101] Goetz was acquitted based on a standard of reasonableness that made allowances for the fears and hypersensitivities of someone *in his situation.*[102] As Professor Maguigan notes, "[t]he *Goetz* standard . . . is consonant both with the standard of reasonableness currently employed in most jurisdictions and with the self-defense claims raised by most battered women defendants."[103]

The fact that the claims of the battered woman and the negrophobe intuitively strike many people as dramatically different, despite their formally identical doctrinal and experiential foundations, makes the claims of the battered woman an ideal foil for those of the negrophobe.[104] For the formal parallels between the two claims compel us to analyze what truly distinguishes them: the different kinds of evidence the two defendants use to support their respective claims of reasonableness.[105]

Unlike a battered woman defendant, our negrophobe adduces race-based evidence of reasonableness in support of his self-defense claim; namely, evidence of a post-traumatic stress disorder involving blacks. As discussed above, such evidence uniquely implicates compelling social policies which militate against its acceptance in the legal system. Herein lies the chief virtue of the comparison between the respective claims of the battered woman and the negrophobe: It forces us to shift our focus from issues of personal culpability (under the noninstrumental view, the negrophobe is no more personally culpable than the battered woman) to the social implications of giving the state's imprimatur to the negrophobe's evidence of reasonableness.

V. THE CONSTITUTIONAL ARGUMENT

In earlier parts of this article, I invoked moral norms, evidence law, and an instrumentalist conception of the law to argue against countenancing the race-based claims of the Reasonable Racist, the Intelligent Bayesian, and the Involuntary Negrophobe. In this Part, I develop a constitutional argument for rejecting the bank patron's claim in any of its manifestations. Specifically, I argue that were a court to exonerate a defendant by determining that his (conscious or unconscious) racism is "reasonable" under the circumstances, it would be employing a racial classification in violation of the Equal Protection

100. People v. Goetz, 68 N.Y.2d 96, 497 N.E.2d 41, 506 N.Y.S.2d 18 (1986). For a discussion of the facts and trial of *Goetz*, see text accompanying notes 3-8 *supra*.

101. Shirley Sagawa, Comment, *A Hard Case for Feminists:* People v. Goetz, 10 HARV. WOMEN'S L.J. 253 (1987).

102. *See* Maguigan, *supra* note 63, at 410 n.108.

103. *Id.* at 448.

104. *See* Kelman, *supra* note 18, at 799.

105. *See id.* (pointing out the importance of differentiating between the types of evidence of reasonableness that different defendants utilize, but not addressing the arguments against race-based evidence of reasonableness elaborated here).

Clause. I then move to a discussion of the nature of the private biases given effect by exonerating the Reasonable Racist, the Intelligent Bayesian, and the Involuntary Negrophobe.

A. *Equal Protection Under* Palmore v. Sidoti

Courts have long invoked the Equal Protection Clause of the Fourteenth Amendment, which prohibits the states from denying any person the equal protection of the laws,[106] to invalidate racially discriminatory laws and to prohibit racially discriminatory state action.[107] In the most straightforward case, when a state explicitly classifies a group of people by race, the classification is "suspect" and subject to "strict scrutiny" under the Equal Protection Clause.[108] Under strict scrutiny, a racial classification is constitutionally valid only if it is necessary to further a "compelling" state interest.[109]

Palmore v. Sidoti[110] is a leading case illustrating the application of strict scrutiny doctrine to evaluate a race-based equal protection claim. In *Palmore*, a Florida circuit court granted custody of a three-year-old girl to her mother upon her parents' divorce.[111] The following year, the father sought custody of the child by petitioning to modify the prior judgment on the basis of changed conditions, including the fact that his former wife was living with, and subsequently married, a black man, Clarence Palmore, Jr.[112] Even though the Florida court admittedly had no reason to doubt the mother's devotion to her daughter, the adequacy of housing facilities, or the respectability of her new spouse, it ordered custody of the child transferred to her father.[113] The primary rationale for the court's order was that the child would suffer social stigmatization if she remained in an interracial household with her mother.[114]

Applying strict scrutiny, the Supreme Court found that the Florida court's order to transfer custody violated the Equal Protection Clause. In reversing the judgment, the Supreme Court noted the persistence of racial prejudice in America, acknowledging the "risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if

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106. U.S. CONST. amend. XIV, § 1.

107. *E.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (invalidating a state prohibition of interracial marriage); Buchanan v. Warley, 245 U.S. 60 (1917) (striking down a Kentucky law forbidding blacks to purchase homes in white neighborhoods); Strauder v. West Virginia, 100 U.S. 303 (1880) (invalidating a state restriction on jury service by black citizens).

108. Korematsu v. United States, 323 U.S. 214 (1944); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, at 1465-74 (2d ed. 1988).

109. Dunn v. Blumenstein, 405 U.S. 330, 342 (1972); Shapiro v. Thompson, 394 U.S. 618, 634 (1968). Although the Supreme Court maintains that racial classifications are not per se invalid, racial classifications have so seldom snrvived judicial scrutiny that one leading commentator has referred to the strict scrutiny test as "'strict' in theory and fatal in fact." Gerald Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

110. 466 U.S. 429 (1984).

111. *Id.* at 430.

112. *Id.*

113. *Id.* at 430-31.

114. *Id.* at 431.

the child were living with parents of the same racial or ethnic origin."[115] Nevertheless, in a unanimous and strongly worded opinion, the Court held that "[t]he effects of racial prejudice, *however real*, cannot justify a racial classification removing an infant child from the custody of its natural mother."[116] While recognizing that "private biases may be outside the reach of the law," the Court stressed that "the law cannot, *directly or indirectly, give [these biases] effect*."[117] The Court's unusual interference with a state custody decision in *Palmore*,[118] including its determination that the state's parens patriae interest in the welfare of children was not compelling, reveal the strength of its resolve to prohibit the use of prejudicial racial classifications in formal legal proceedings.

The arguments advanced by the Reasonable Racist, the Intelligent Bayesian, and the Involuntary Negrophobe potentially implicate constitutional guarantees as explicated by *Palmore* and its progeny. Specifically, admission of race-based evidence and arguments in a legal proceeding may, under some circumstances, constitute the application of an impermissible racial categorization that gives effect to private prejudices. The constitutional argument has three components: (1) the existence of state action; (2) the existence of a race-based categorization; and (3) the existence of private biases that would be given effect were race-based evidence and legal arguments to be permitted.

B. *The State Action Requirement*

Constitutional protections such as those offered by the Equal Protection Clause cannot be triggered in the absence of state action. I maintain that the courts' decisions to countenance the race-based evidence and legal arguments offered by the Reasonable Racist, the Intelligent Bayesian, and the Involuntary Negrophobe constitute the necessary state action. In the landmark civil rights case *Shelley v. Kraemer*,[119] the Supreme Court held that judicial enforcement of racially restrictive covenants constitutes state action.[120] In so holding, the Court acknowledged that state action may be found through the operation of the courts.

According to Professor Tribe, "courts and commentators have characteristically viewed *Shelley* with suspicion."[121] According to its critics, the rule enunciated in *Shelley* is not a rule at all; rather, its effect may be to turn the state

115. *Id.* at 433.

116. *Id.* at 434 (emphasis added). This language militates against narrowly reading *Palmore* to hold merely that a court may not consider racial factors when the only evidence of harm is speculation over potential social stigma. It suggests that the Court would have rejected even actual injury to the child as sufficient justification for caving in to popular prejudices and awarding custody to the father.

117. *Id.* at 433 (emphasis added).

118. "The judgment of a state court determining or reviewing a child custody decision is not ordinarily a likely candidate for review by this Court." *Id.* at 431.

119. 334 U.S. 1 (1948).

120. *Id.* at 14 ("That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by the decisions of this Court.").

121. TRIBE, *supra* note 108, at 1711-12; *see, e.g.*, Bell v. Maryland, 378 U.S. 226, 329-32 (1964) (Black, J., dissenting); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29-31 (1959).

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action requirement into a "nearly empty or at least extraordinarily malleable formality."[122] Taken to its extreme, *Shelley* would permit judges to invalidate any type of *private* bias that depends on the courts for enforcement, thereby eviscerating the state action requirement in the discrimination context.

Significantly, the Court in *Palmore* had no difficulty finding state action, stating simply that "[t]he actions of the state courts and judicial officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment."[123] Why does the state action requirement seem so much more problematic in *Shelley* than in *Palmore*? The crucial distinction is that in *Palmore* the judge himself articulates and employs an explicit racial classification, while arguably in *Shelley* the judge "simply enforc[es] blindly the terms of a contract restricting the sale of land."[124] Hence *Shelley* generates controversy not because it overtaxes the state action requirement,[125] but because it seems to conflict with the principle that state action must intentionally discriminate in order to violate the Equal Protection Clause. Under the facts of *Shelley*, the court never has to articulate a racially biased view; it can claim to be enforcing the neutral rule that private intentions of contracting parties should be enforced, whatever those intentions may be. But in *Palmore*, the court itself develops and applies an explicit racial category, albeit to further the otherwise neutral policy of protecting the best interests of the child. This analysis is consistent with Professor Tribe's insight that state action is not a freestanding doctrine; rather, the nature of the underlying substantive right determines whether or not state action is present.[126] *Palmore* is less controversial than *Shelley* because in *Palmore* an officer of the court employs an explicit racial category, rendering the equal protection character of the underlying substantive right more readily apparent.

C. *The Race-Based Classification*

In order to credit the claims of the Reasonable Racist, the Intelligent Bayesian, and the Involuntary Negrophobe, judges and lawyers—"officers of the court"—must articulate and countenance explicit racial categories as in *Palmore*. A defense attorney who adverts to a victim's racial identity in proving his client's reasonableness articulates a racially biased rule: "The reasonable man has a greater fear of blacks than nonblacks." Judges who countenance race-based evidence of reasonableness implicitly recognize the same rule. Professor Johnson notes that "[w]ere judges to instruct jurors that some weight should be given to the defendant's race because black defendants are more likely to be guilty, there would be no question that a racial classification had been employed."[127] Likewise, a judge employs a racial classification when

122. TRIBE, *supra* note 108, at 1698.

123. *Palmore*, 466 U.S. at 432 n.1.

124. TRIBE, *supra* note 108, at 1714.

125. Any time the compulsory processes of the state are made available to a party through adjudication, state action is clearly present.

126. TRIBE, *supra* note 108, at 1698-1703, 1711-15.

127. Johnson, *supra* note 56, at 1684.

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instructing jurors to give some weight to a supposed assailant's race because ordinary people consider race when assessing the danger a person poses. Since both jury instructions and rules of evidence are procedural devices administered by judges, the same principles should apply to both.

To be sure, the respective defendants may have neutral reasons for wanting a court to employ explicit racial categories. The Involuntary Negrophobe, for example, may argue that the use of a racial classification serves the neutral noninstrumental principle that defendants should not be punished for involuntary reactions. In *Palmore*, however, the neutral policy of protecting the best interests of the child did not blind the Supreme Court to the fact that the lower court aimed to serve that policy through an impermissible racial classification.

D. *Giving Effect to Private Prejudice*

To advance an equal protection claim under *Palmore*, one must not only demonstrate the requisite state action and the existence of a racially restrictive category, but also that enforcement of the category would give effect to private prejudices. I now turn to a discussion of the nature of the private prejudices given effect under the Reasonable Racist, Intelligent Bayesian, and Involuntary Negrophobe paradigms.

1. *The Reasonable Racist.*

The Reasonable Racist presents the simplest case. In arguing that he should be exonerated on the ground that racist responses are typical—and thus reasonable—the Reasonable Racist openly admits his racial bias. Thus, to hear the Reasonable Racist's claim, the judge would have to admit evidence of an explicit racial classification, and in so doing would effectively employ a racial classification that gives effect to racial prejudice. Under *Palmore*, a judge who employs such a classification—even for a very good reason—infringes the Equal Protection Clause of the Fourteenth Amendment.

2. *The Intelligent Bayesian.*

Unlike the Reasonable Racist, the Intelligent Bayesian does not admit to personal bias. Since he claims that his racial fears rest on a valid factual basis, rather than on a racial basis, he may contend that a court that permits him to stress the racial factor in proving his reasonableness would not be employing an impermissible racial classification that "gives effect to private bias" in violation of *Palmore*.

We can reject this argument under either of two rationales. First, we can question the Bayesian's objectivity in selectively assimilating statistical information about blacks.[128] To the extent that the Bayesian aggressively assimilates negative statistical information about blacks, while remaining oblivious to contradictory or positive statistical information, he undermines his claim of ob-

128. *See* note 41 *supra* and accompanying text.

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jectivity. Countenancing the Bayesian's argument under these circumstances would give effect to private prejudice.[129]

Second, even conceding the possibility of a genuinely bias-free Bayesian, allowing him to emphasize the racial factor would give effect to racial bias in the jury box. Recall that there is compelling empirical evidence that racial prejudice routinely infects jury deliberations,[130] suggesting that the men and women charged with evaluating the reasonableness of the defendant's actions are anything but bias-free Bayesians. As a general matter, people tend to "seiz[e] upon positive myths about the groups to which they belong and negative myths about those to which they don't,"[131] causing them to misapprehend the disparate costs and benefits of their decisions for the respective groups. In the words of Professor Brest, through "racially selective sympathy and indifference," decisionmakers unconsciously fail "to extend to a minority the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one's own group."[132] Although the racial identity of the black victim will inevitably become clear during the course of the trial, overtly playing on this factor may exacerbate the prejudice that it taps in a white jury.

3. *The Involuntary Negrophobe.*

At first blush, the claim of the negrophobe may seem an easy case in view of *Palmore*, for a phobia about blacks may be a paradigmatic expression of private bias. The negrophobe, however, may convincingly disclaim having consciously harbored any racist sentiments before the assault that induced her disorder. In fact, the hallmark of the Involuntary Negrophobe's self-characterization is the absence of racial animus prior to the catalyzing incident. The judge presiding over the Ruth Jandrucko hearing, for example, ruled that Ms. Jandrucko showed no apparent racial prejudice before her assault and hence was not exercising a "private racial prejudice" in her pathological paranoia of blacks. The racial factor, contends the negrophobe, is merely coincidental. It is something her psyche randomly seized upon and involuntarily associates with the trauma of the earlier assault.

But the characterization of the negrophobe's pathological paranoia as a case of involuntary bias may be too glib. Recall the "visceral, desperate fear of all strange black and brown men" that Professor di Leonardo felt in the weeks following her rape by a black man.[133] These emotions apparently did not stem from any conscious racial animus: di Leonardo recounts that after her rape she "ended up, with no small sense of irony, lecturing cops, co-workers, relatives, and friends alike on the tiny percentage (perhaps one in nine) of all sexual

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129. The Bayesian might argue that the bias at work in assimilating statistical information is unconscious, and that he therefore should not be held accountable. But a constitutional violation may occur *whenever* the courts give effect to private prejudices, whether conscious or unconscious. *See* text accompanying notes 135-145 *infra*.

130. *See* note 56 *supra* and accompanying text.

131. JOHN HART ELY, DEMOCRACY AND DISTRUST 159 (1980).

132. Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7-8 (1976).

133. *See* text accompanying note 69 *supra*.

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assaults that fit the heavily symbolic strange-black-man-on-white-woman model."[134] Yet, in spite of her unflagging personal and professional commitment to the fight against racial prejudice, she developed an uncontrollable fear not, significantly, of all strange men, but of "all strange black and brown men."[135] Thus, at the same time that we accept the negrophobe's claim that she was not *consciously* racist before the catalyzing event, we may wonder whether *unconscious* racism fueled the peculiar phobia developed after the event.

The problem with the negrophobe's argument is its suggestion that "private bias" must manifest *self-conscious* racial prejudice to be unconstitutional. This approach rests on an impoverished understanding of the nature of the evil—invidious racial discrimination—that the Equal Protection Clause seeks to eradicate.

Beyond "conscious bias": the need for a new model. A key insight of modern psychological theory is that the determinants of human conduct are not always identified with consciousness.[136] Many influences condition and direct our reactions to the world even when we are not aware of them. Racism, in particular, operates largely in the realm of the unconscious.[137] Accordingly, to successfully eliminate governmental action that gives effect to racial prejudice, equal protection doctrine must accommodate the insights of modern psychology into unconscious racism.[138]

We need only consider how often we act on unconsidered assumptions about the world to understand the prevalence of unconscious motivation. A student who traverses a hallway between two classrooms while intently perusing the sports page of her hometown newspaper "assumes" that the floor will be there to receive each successive footfall. Her failure to forsake the box

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134. di Leonardo, *supra* note 69, at 30.

135. However, after moving to Northern California to stay with a friend weeks after the rape, di Leonardo "experienced . . . an uncomfortable but salutary shift: I was afraid of *all* the strange men I encountered[,] . . . nearly all [of whom] were white." *Id.*

136. In the words of Sigmund Freud:

> We have found—that is, we have been obliged to assume—that very powerful mental processes or ideas exist . . . which can produce all the effects in mental life that ordinary ideas do (including effects that can in their turn become conscious as ideas), though they themselves do not become conscious.

SIGMUND FREUD, *The Ego and the Id, in* 19 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 12, 14 (James Strachey ed., 1951).

137. A growing body of empirical research points to the rise of what Joel Kovel has referred to as the "aversive racist," in contrast to the "dominative racist" who openly embraces the notion of white superiority. JAMES M. JONES, PREJUDICE AND RACISM 121-24 (1972); JOEL KOVEL, WHITE RACISM: A PSYCHOHISTORY 54-55 (1970); Thomas F. Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964,* 37 RUTGERS L. REV. 673, 687-90 (1985). Professor Lawrence gives a succinct description of aversive racists:

> Aversive racists range from individuals who lapse into demonstrative racism when threatened—as when blacks get "too close"—to those who consider themselves liberals and, despite their sense of aversion to blacks (of which they are often unaware), do their best within the confines of the existing societal structure to ameliorate blacks' condition.

Lawrence, *supra* note 91, at 335; *see also* Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law,* 73 CORNELL L. REV. 1016, 1027-28 (1988) (discussing the growth of aversive racism and noting increasing academic attention to this trend).

138. Johnson, *supra* note 137, at 1031-36; Lawrence, *supra* note 91, at 335.

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scores for an unobstructed view of the familiar floor beneath her is deeply rooted in this assumption, and the possibility that the floor might not be there "does not 'occur' to [her], that is, is not present in [her] conscious mental processes."[139] Fuller and Eisenberg describe assumptions of this kind as "tacit assumptions" or "psychological state[s]" that shape and direct an individual's act without being present in her conscious mental processes.[140]

Especially instructive insight regarding the operation of tacit assumptions comes from experiments roughly measuring the relative strength of an animal's "assumptions":

> If a rat is trained for months to run through a particular maze, the sudden interposition of a barrier in one of the channels will have a very disruptive effect on its behavior. For some time after encountering the barrier, it will be likely to engage in random and apparently pointless behavior, running in circles, scratching itself, etc. The degree to which the barrier operates disruptively reflects the strength of the "assumption" made by the rat that it would not be there. If the maze has been frequently changed, and the rat has only recently become accustomed to its present form, the introduction of a barrier will act less disruptively. In such a case, after a relatively short period of random behavior, the rat will begin to act purposively, will retrace its steps, seek other outlets, etc. In this situation the "assumption" that the channel would not be obstructed has not been deeply etched into the rat's nervous system; it behaves as if it "half-expected" some such impediment.[141]

In the terms of the maze analogy, racial stereotypes are channels laid out by our cultural belief system. We first traverse these culturally embedded channels in response to either explicit lessons or "tacit understandings."[142] When the stereotypes are tacitly transmitted, which is often the case, we traverse the channels largely unconsciously. Because stereotypes permeate our society, and because our culture often "rewards individuals for making hostile misjudgments that exaggerate the differences between themselves and members of [other] racial [groups],"[143] we travel these channels repeatedly. If an individual has never known a black professional or "is exposed to blacks only through a mass media where they are portrayed in the stereotyped roles of comedian,

139. LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 700 (5th ed. 1990).

140. *Id.*

141. *Id.*

142. "Tacit understandings" comprise culturally embedded ideals, beliefs, and attitudes about the world. According to theorists of cognitive psychology, many of an individual's beliefs and preferences develop through such understandings rather than explicit lessons. Because tacit understandings are not expressly stated, an individual learns and internalizes them without evaluating them at a conscious level. Although national news anchors like Dan Rather and Tom Brokaw do not announce that blacks are "prone to violence" on the nightly news, the relentless (and arguably selective) representation of black violence in the mass media tacitly transmits the same message. Even though most parents do not explicitly teach their children that blacks are dangerous, the way a child's mother (perhaps unwittingly) clutches her purse and quickens her step when blacks approach powerfully conveys the same lesson. *See* Lawrence, *supra* note 91, at 323, 336-39.

143. *Id.* at 338. Lawrence notes that "[i]f an individual is hostile toward a group of people, she has an emotional investment in preserving the differentiations between her own group and the 'others[,]'" making the "preservation of inaccurate judgments about the out-group . . . self-rewarding." *Id.* at 337.

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criminal, musician, or athlete,"[144] no unexpected barriers have materialized to force a detour in his development of negative attitudes towards blacks. Moreover, even if this individual encounters blacks who do not conform to the cultural stereotype, he will often reject or ignore such counterevidence rather than retrace his steps to explore other ways of thinking about blacks.[145] In time, these stereotypes become deeply etched in the individual's psyche, conditioning and directing his behavior without his awareness.

The relationship between unconscious racism and assault-induced negrophobia. Once we recognize that racially discriminatory behavior is directly and inevitably rooted in unconscious racism fostered by our society's tacit assumptions and biases, the rationale for denying the negrophobe's claim becomes clear. Regardless of how racially liberal Ms. Jandrucko, Professor di Leonardo, and our hypothetical negrophobe consciously believe themselves to have been before their respective assaults, they undoubtedly harbored some unconscious racism that developed into negrophobia after the assaults. Virtually every person in our society, especially if white, consciously or unconsciously compiles a mental library of black stereotypes over the course of her life. The belief that blacks are prone to commit violent assaults is among the most powerful and frightening myths in this library. Consequently, being assaulted by a black person cannot help but resonate with preexisting stereotypes in profound and unpredictable ways. The resonance may vary in intensity and duration, ranging from a mild and ephemeral hypersensitivity to a severe and lasting phobia. But whatever the magnitude of this resonance in any particular case, the possibility of any race-based reaction at all depends entirely on the preexistence of racism, conscious or unconscious.

An alternative explanation for the negrophobe's assault-induced fear of all blacks essentially asserts that the negrophobe "just happens" to strongly associate one of the assailant's prominent traits (skin color) with the attack. According to this argument, any one of the assailant's physical traits—his hair color, height, or facial hair, for instance—is equally likely to precipitate a phobic response in a victim. Thus, the negrophobe's response stems not from racial prejudice, but from an arbitrary linkage in her subconscious between the assault and the attacker's skin color.

Were race-based phobias the products of random and nondiscriminatory mental connections, we would expect a wide range of physical characteristics to trigger hypersensitivities or pathological fears in assault victims. Hypersensitivity to hair color, for instance, should be at least as common among assault victims as negrophobia. But the reason victims do not link their assailants' hair color to violence with anything resembling the patterned regularity with which

144. *Id.* at 343.

145. Once an individual unconsciously internalizes a tacitly transmitted cultural stereotype, she unconsciously interprets experiences to be consistent with the underlying stereotype, selectively assimilating facts that validate the stereotype while disregarding those that do not. As a result, she views her negative attitudes toward blacks as rational reflections of the observable world, rather than as culturally determined and constructed entities. *Id.* at 339; *see also* Mark Snyder, *On the Self-Perpetuating Nature of Social Stereotypes, in* COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR 183, 187-93 (David L. Hamilton ed., 1981).

they link race to violence is that in our culture hair color—but not race—is "an irrelevant category, an unimportant cultural fact."[146] As Professor Lawrence notes, "[f]ew of us can recall the color of our best friend's eyes, but when we pass a complete stranger on the street, we will remember his race."[147] Like hair and eye color, "race," observes Richard Wasserstrom, "would be largely if not exclusively a matter of superficial physiology" in a culture that did not attach the peculiar significance to race that ours does.[148] It is precisely because we do attach (irrationally and often unconsciously) such significance to race that negrophobic assault victims forge lasting psychological links between a single violent encounter and the race of their assailant.

Because much of the bias that drives race-based discrimination is unconscious, the Equal Protection Clause must reach such bias if it is to serve its protective function. Since assault-induced phobias of blacks may rest on conscious or unconscious racism, admitting evidence of such a phobia, even if the defendant claims it is involuntary, employs an explicit racial classification and gives effect to racial prejudice in violation of the Equal Protection Clause.

E. *An Instrumentalist Reading of the Equal Protection Clause*

The foregoing equal protection arguments, perhaps especially those of the negrophobe, undoubtedly strike noninstrumentalists as irrelevant in view of their conviction that punishing individuals for psychological conditions beyond their control—or knowledge—is unjust. Professor Fletcher argues that this conviction is based on three premises: "(1) punishing wrongful conduct is just only if punishment is measured by the desert of the offender, (2) the desert of an offender is gauged by his character—i.e., the kind of person he is, (3) and therefore, a judgment about character is essential to the just distribution of punishment."[149] In the self-defense context, where a defendant's mistaken or premature use of deadly force is attributable to a post-traumatic stress disorder, her act does not indicate what kind of person she is. Therefore, concludes the noninstrumentalist, it is unfair to punish the negrophobe in this situation.

This argument, however, ignores the historical application of the Equal Protection Clause along instrumentalist lines. One central and longstanding concern of the courts applying the Equal Protection Clause has been the elimination of racial stigmatization.[150] Professor Lawrence notes that "[t]he injury of stigmatization consists of forcing the injured individual to wear a badge or symbol that degrades him *in the eyes of society*."[151] Hence, insofar as

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146. Lawrence, *supra* note 91, at 330.

147. *Id.*

148. Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. Rev. 581, 585 (1977).

149. Fletcher, Rethinking, *supra* note 13, § 10.3.

150. Lawrence, *supra* note 91, at 349-55.

151. *Id.* at 351 (emphasis added). A lack of social respect denies blacks "access to societal opportunities" and limits their "participat[ion] in society's benefits and responsibilities." *Id.* Moreover, "separate incidents of racial stigmatization do not inflict isolated injuries but are part of a mutually reinforcing and pervasive pattern of stigmatizing actions that cumulate to compose an injurious whole that is greater than the sum of its parts." *Id.*; *see also* Brest, *supra* note 132, at 10-12; Richard Delgado,

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"stigmatizing actions injure by virtue of the meaning society gives them,"[152] courts must weigh the social implications of legal doctrines in judging whether they infringe on protections guaranteed by the Equal Protection Clause. The courts' application of equal protection doctrine to eradicate racially stigmatizing practices, therefore, necessarily involves an instrumentalist assessment of the social consequences of adopting certain legal rules.

In the case of the panic-stricken bank patron, granting legal recognition to her self-defense claim communicates the state's approval of racial bias regardless of what theory she pursues; it sends the message that "your dread of blacks is a valid excuse for taking the life of an innocent black person." In conveying such messages, the court reinforces derogatory cultural stereotypes and stigmatizes all Americans of African descent.

This discussion is not intended to deny that there are circumstances in which considerations of personal blame should figure centrally, even decisively, in assessing criminal liability. But in those cases where a defendant seeks to introduce exculpatory evidence that implicates and undermines critical social interests, especially those interests that courts recognize as the *raison d'etre* of specific constitutional provisions, courts must temper the noninstrumental approach to accommodate such interests.

The conflict between instrumental and noninstrumental conceptions of the law stems from the fact that "the law has two rather antithetical tasks with respect to human behavior: (1) that of adjusting its rules to the expectations and intentions [including tacit assumptions] of 'reasonable' persons, and (2) that of disciplining behavior and guiding it into proper channels."[153] To return to the maze analogy, the law cannot merely be concerned with accommodating a cultural belief system that induces individuals to repeatedly traverse stereotypical channels (and make some of us susceptible to pathological phobias). The law must also strive to lay out the channels of the maze, and to eliminate those pathways that foster the oppression of minorities. In other words, "[t]he law has always to weigh against the advantages of conforming to the laymen's assumptions, the advantages of reshaping and clarifying those assumptions."[154]

Under the noninstrumental model, the law must take the human animal as he is conditioned and simply ask whether society can fairly expect individuals to overcome their conditioning under the circumstances.[155] According to the instrumentalist view, the law should seek to alter the maze and retrain individuals by formulating rules that prevent the stigmatization of blacks, reflect the community's moral aspirations of racial equality, and help eradicate racial discrimination.

Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling, 17 HARV. C.R.-C.L. L. REV. 133, 146 (1982); Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 50-51 (1977).

152. Lawrence, *supra* note 91, at 352.

153. FULLER & EISENBERG, *supra* note 139, at 702.

154. *Id.*

155. *See* Fletcher, *Excusing Conditions*, *supra* note 13, at 1292-93.

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The dilemma posed by the Reasonable Racist, the Intelligent Bayesian, and the Involuntary Negrophobe stems directly from the fact that the law is rooted in both instrumentalist and noninstrumentalist conceptions of legal liability, and that the justice system seeks both to accommodate the behavior of ordinary persons and to encourage desirable behavior. The dilemma does not lend itself to facile solutions; we must submit ourselves to one or the other of its horns. In this case, the least destructive horn is the one that refuses to give the state's imprimatur to racial prejudice—whether conscious or unconscious, voluntary or involuntary.

CONCLUSION

Two years ago, I attended a meeting in Washington, D.C., for the American Association of Law Schools. After a series of meetings that ran into the evening, I tried to hail a cab to return to my hotel. Although several of my white colleagues were picked up immediately, I nearly got tennis elbow trying to flag down a taxi. I eventually had to prevail upon one of my white colleagues to hail a cab for me. It came as no surprise, therefore, when I later learned that a lawsuit had been filed against three D.C. cab companies for refusing to stop for blacks.

When I related my experience to colleagues and students, I found that many felt deep ambivalence about the issue: On the one hand, they understood my frustration, but, on the other, they (and I) also felt sympathy for the cabdrivers, many of whom live in constant fear of violence. In this article, I have set out three personifications of race-based claims of reasonableness—the "Reasonable Racist," the "Intelligent Bayesian," and the "Involuntary Negrophobe"—in order to investigate the distinct ways that race informs the reactions of ordinary people (especially but not exclusively white people) to blacks. Further, I have examined these constructs in the self-defense context, for it is here that these propositions take on a singular urgency. Although many of us may remain ambivalent about considering racial identity in assessing the threat that a person poses, my analysis concludes that courts must not permit racial fears to be emphasized or exploited in formal legal proceedings, no matter how formally relevant they may be.

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