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Representing Black Male Innocence

Joan W. Howarth*

I. INTRODUCTION

Over ten years ago I looked through a short stack of five or six case summaries, choosing which convicted death row prisoner I would represent on appeal before the California Supreme Court. I picked Barry Williams, a purported Blood leader convicted of killing two Crips in 1981 and 1982 in South Central Los Angeles.¹ Two criteria predominated; first, I wanted an obscure case.² The young Black men who were the victims of the crimes of which Barry Williams had been convicted were statistically paradigmatic crime victims in this country,³ but they are not whom most Americans imagine when

* Professor of Law, Golden Gate University. I thank David Baldus, Elizabeth Rapaport, Susan Rutberg, Mark Silverstein, and Barry Williams for careful reviews of a draft of this paper, and participants in this Symposium and in a faculty colloquium at the University of California, Davis, for helpful comments on the project. Greg Genske, Rachel Holtzberg, and Saor Stetler provided excellent research assistance.

1. The California Supreme Court appointed me to represent Barry Glenn Williams on Aug. 16, 1986. *People v. Barry Glenn Williams*, Crim. No. 25581, S004720 (the automatic appeal). *In re Williams*, S050166 (habeas corpus), is still pending before that court. The death judgment was affirmed on appeal in *People v. Williams*, 940 P.2d 710 (Cal. 1997).

2. As a staff attorney for the ACLU, I understood that the ACLU's potential as a magnet for hostile law and order attention would be an unfair burden to impose on any high-visibility defendant. Choosing the match was the privilege of the attorney, not the client.

3. Young Black males are especially at risk to be victims of violent crime:

In 1992 the violent victimization rate for African American males age sixteen to nineteen was double the rate for white males and three times the rate for white females. . . . One out of every fourteen African American males age twelve to fifteen was the victim of a violent crime in 1992; for those age sixteen to nineteen the rate was one out of six; for those age twenty to twenty-four the rate was one out of eight.

SAMUEL WALKER ET AL., *THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA* 33 (1996). Similarly, "Homicide is the leading cause of death for Black males age fifteen to twenty-four, who are six times more likely to be murdered than their white male peers." Jewelle Taylor Gibbs, *Anger in Young Black Males: Victims or Victimizers?* in *THE AMERICAN BLACK MALE: HIS PRESENT STATUS AND HIS FUTURE* 127, 128 (Richard G. Majors & Jacob U. Gordon eds., 1994) [hereinafter *AMERICAN BLACK MALE*]. "Black males also have the highest rates of homicide and the shortest overall life expectancy save one category of people—those 85 years or older." Richard G. Majors & Jacob U. Gordon, *Introduction: The Purpose of the Book*, in *AMERICAN BLACK MALE*, at x.

they think of crime victims. A Black on Black crime is relatively rare for death row, and this one was likely to continue to be as obscure as we wanted it to be.⁴

The second criterion was more important: I chose the case that (on the basis of the two page summary provided by trial counsel) appeared to have the weakest evidence. No physical evidence linked Barry Williams to either of the murders for which he had been convicted: no fingerprints, no blood tests. No weapons were ever recovered. Innocence never crossed my mind; harmless error did. Errors abound in complex capital trials, but the difficult task is to propel past the hurdle of harmless error by demonstrating prejudice. That lack of physical evidence could help push the inevitable error over into the prejudicial category. My confidence was buoyed by noticing that the California Supreme Court had judged the two cases to be “weak” in ruling on a pretrial motion that the trials had to be severed to prevent evidence of two weak cases from combining to cause guilty verdicts in both.⁵

Naturally, some problems stood out in the case summary. Chief amongst them was the jury deliberations: after a fairly lengthy trial, the jurors found Barry Williams guilty in an hour and forty-five minutes,⁶ and, after the penalty phase, deliberated less than one day before sentencing him to death.⁷ In spite of those signals, I chose Barry Williams’ case, and was appointed by the California Supreme Court a few weeks later.

Within a few days of my appointment, the L.A. Times ran a front-page feature story on the chief prosecution witness in the case; the Times story presented her heroic struggle against gang intimidation along with a description of her house being shot up to scare her into not testifying against my client.⁸ After that single flash, the case has dropped back into obscurity.

4. See WALKER ET AL., *supra* note 3, at 19 (describing history of Blacks not being arrested for crimes against other Blacks because the “dominant white power structure viewed this behavior as ‘appropriate’ for African Americans”).

5. Williams v. Super. Ct., 683 P.2d 699 (Cal. 1984). Tried separately, both murder charges resulted in convictions, however. The prosecution sought and obtained a death sentence in the second trial, the appeal of which I was considering.

6. Reporter’s Transcript at 8436, People v. Williams, 940 P.2d 710 (Cal. 1997) (S004720).

7. Clerk’s Transcript at 801, 839, Williams (S004720). Eligibility for death was based on the Special Circumstance of a prior murder conviction, the conviction from the first trial. *Id.* at 494-95; CAL. PENAL CODE § 190.2(a)(2) (1988).

8. William Nottingham, *Gang Terror; Fear Fails To Gag Witness to Murder*, L.A. TIMES, Aug. 28, 1986, at Pt. 1, p. 1. See also William Nottingham, *Woman’s Ordeal Inspires Yearly Honor; D.A.’s Create Award for Witnesses*, L.A. TIMES, Apr. 25, 1987, at Pt. 1, p. 29.

My other criterion, the lack of physical evidence, also has withstood the test of time. As a result of the extensive habeas investigation,⁹ we now believe that Barry Williams was wrongfully convicted of both crimes, including the prior conviction that is the basis of the special circumstance. We also believe that he did not commit the uncharged crime that was the centerpiece of the prosecution's case for death. This article records my efforts to understand how a prosecutor could charge and a jury convict and sentence to death this innocent man. My theme is: representing Black male innocence.

Our claim in the litigation and my premise here is that Barry Williams is factually and actually innocent, in that he did not commit the crimes for which he has been convicted,¹⁰ and that he is actually "innocent of death," in that no reasonable juror could find him eligible for death.¹¹ My claim is *not* that gang leaders are heroes, or that gang warfare is not a serious problem, or that members of gangs are not responsible in some serious and fundamental way for

9. Mark Silverstein, now Legal Director of the ACLU of Colorado, did most of the work for the state habeas petition.

10. Anyone conversant with the current state of capital litigation, especially in the context of federal habeas corpus relief, is understandably somewhat skeptical about this defense attorney's claims of innocence. As the capital regulations have become more complex, and as federal habeas relief has become less and less available, perhaps appropriately the capital determination has turned more and more to the question of actual innocence. The Supreme Court and Congress have shrunk the availability of federal habeas relief, but a "colorable showing of factual innocence" remains a potential antidote to procedural default. *McCleskey v. Zant*, 499 U.S. 467, 495 (1991) (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986)). See generally *Jordan Steiker, Innocence and Federal Habeas*, 41 UCLA L. REV. 303 (1993); Bruce Ledewitz, *Habeas Corpus As a Safety Valve for Innocence*, 18 N.Y.U. REV. L. & SOC. CHANGE 415 (1990-91). Actual innocence claims are routinely made and routinely dismissed: "[I]n virtually every case, the allegation of actual innocence has been summarily rejected." Steiker, *supra*, at 377 (citing six circuit cases). The new federal habeas legislation passed early in 1997 will simply increase the importance of claims of actual innocence to preserve federal habeas relief.

11. "Innocent of death" is complicated, because the decision whether to sentence a defendant to death is made on the basis of factors beyond those related to the conviction. See generally Joan Howarth, *Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors*, 1994 WIS. L. REV. 1345, 1363-1381 (analyzing discretionary nature of capital decision). See, e.g., *Smith v. Murray*, 477 U.S. 527, 537 (1986) (stating that "the concept of 'actual,' as distinct from 'legal,' innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense"). To show actual innocence to avoid the death penalty, the defendant must establish "by clear and convincing evidence that . . . no reasonable juror would have found [him] eligible for the death penalty under [state] law." *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992). In *Herrera v. Collins*, 113 U.S. 853 (1993), the Court provided a cramped understanding of the role of innocence, assuming for the sake of argument but refusing to rule that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief." *Id.* at 869. Herrera lost because he had not met the "extraordinarily high" showing required to make the claim. *Id.*

the violence and destruction that has become the defining part of their culture.¹² Barry Williams' convictions and death sentence are supposed to rest not on a societal judgment about gang behavior, but rather on a judgment about certain facts about a single person being true beyond a reasonable doubt, and that truth justifying the strongest punishment. As to those convictions, and that death judgment, Barry Williams is innocent.¹³ This article is presented not to make the case for innocence, but to attempt something more complicated: to reveal and explain the very ordinary way that honest, careful people interpreted competing narratives presented to them, using the powerful constructed identity of a Black gang leader to take them past reasonable doubt.¹⁴

This article has two principle parts. Drawing on cultural studies, the first develops the social construction of Black male gang member, especially as that identity is understood within white imaginations. The powerful and frightening idea of a Black man who is a gang member, even gang leader, captured the imagination and moral passion of the decisionmakers in this case,

12. "Contrary to popular mythology, most Black males are not killed by police or white vigilantes, but by other Black males using handguns." Gibbs, *supra* note 3, at 128 (footnote omitted). Cornel West has provided strong criticism: "Driving that rage is a culture of hedonistic self-indulgence and narcissistic self-regard. This culture of consumption yields cold-hearted and meanspirited attitudes and actions that turn poor urban neighborhoods into military combat zones and existential wastelands." Cornel West, *Learning To Talk of Race*, in *READING RODNEY KING/ READING URBAN UPRISING* 255, 258 (Robert Gooding-Williams ed., 1993) [hereinafter *READING RODNEY KING*].

13. Sheri Lynn Johnson includes within the meaning of innocent "all defendants who are wrongfully convicted" including "the totally blameless convicted defendants, the criminally culpable defendant guilty of a lesser offense than the offense of which he is convicted, and the factually guilty but legally not guilty convicted defendant." Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1616 (1985) (footnote omitted).

14. The narrative choices reflect and create power; that is, the interpretation of Barry Williams as a guilty murderer deserving of death reflects certain ideas about Black men, especially about Black gang members, but it also reinforces those same ideas. Kimberlé Crenshaw and Gary Peller make a similar point:

In our view, law, in general, and the courtroom, in particular, are arenas where narratives are contested, and the power of interpretation exercised. . . . [T]he story lines developed in law "mediate" power in the sense that they both "translate" power as nonpower (the beating of King becomes the "reasonable exercise of force necessary to restrain a prisoner"); and they also *constitute* power, in the sense that the narrative lines shape what and how events are perceived in the first place.

Kimberlé Crenshaw & Gary Peller, *Reel Time/Real Justice*, in *READING RODNEY KING*, *supra* note 12, at 56, 59-60.

recasting and reframing the evidence in furtherance of this idea.¹⁵ In fundamental ways, this idea or imposed identity is fundamentally inconsistent with any American concept of innocence.

The second part uses Barry Williams' case to investigate some of the ways in which current criminal laws and procedures enable, reinforce, and police the inconsistency between being innocent and being a Black male gang member, or just Black male. Using specific examples from this case, I discuss the relentless distancing of the neighborhood by the prosecution, seating a jury for whom innocence was raced, the climate of fear engendered in the courtroom, the use of gang evidence, and other prosecutorial tools. The law, in this case, reinforced the frightening construction of Black gang leader, obscuring—that is, changing—the evidence of the trial. As mediated through this trial, the power of the idea of a Black male gang leader was so strong that it transformed a weak case into a dead-bang winner for the prosecution.

In discussing the Rodney King verdict, Judith Butler has pointed out that the jurors who acquitted the police saw in Rodney King's beaten body a threat *to* the law: "For if the jurors came to see in Rodney King's body a danger *to* the law, then this 'seeing' requires to be read as that which was culled, cultivated, regulated—indeed, policed—in the course of the trial."¹⁶ My goal is to understand and explain how Barry Williams was "read" as guilty and deserving of death in a trial with very impeachable witnesses and a noticeable lack of hard evidence as to the charged crime.¹⁷ My conclusion is that the powerful socially constructed identity of Black male gang leader is strong enough to reduce actual innocence into something like a mere technicality.

15. In this task, I am following the direction of Robert Gooding-Williams:

[O]ver and beyond contesting [false characterizations of black bodies], a critique of racial ideology should also explore the ways in which explanations and other representations of black bodies function as forms of sociopolitical imagination.... The point of such an investigation would not be to demystify black bodies ..., but to demythify them

Robert Gooding-Williams, *Look, a Negro!*, in *READING RODNEY KING*, *supra* note 12, at 157, 158.

16. Judith Butler, *Endangered/Endangering: Schematic Racism and White Paranoia*, in *READING RODNEY KING*, *supra* note 12, at 16.

17. As Butler described what the jury saw in Rodney King's body, "This is a seeing which is a reading, that is, a *contestable* construal, but one which nevertheless passes itself off as 'seeing,' a reading which became for that white community, and for countless others, the same as seeing." *Id.* at 16.

II. CONSTRUCTED BLOOD

A. *The Black Man*

This case is mainly about Black men, as victims, suspects, witnesses, and perpetrators;¹⁸ I understand it as a contest between differing narratives¹⁹ about Black manhood.²⁰ This identity is not established in nature by skin color or biology. Michael Rustin has said that race is “both an empty category and one of the most destructive and powerful forms of social categorization.”²¹ In my view as well, race and gender are social constructions, not biological variables. Racial identity is “an unsettled space,” an ongoing process that is fragmented and unstable.²² Identity can be a fiction, or a metaphor.²³ Race is a form of seeing, or recognizing. It is a form of knowledge, but often knowledge in service of subordination.

18. By focusing on Black men, I risk reinforcing and reinscribing the Black male criminal image that I am describing and decrying. I also risk suggesting that Black men are the most desperate or most in danger of our criminal justice system, although the greatest increase of any demographic group pouring into the criminal justice system is being experienced by African American women, whose rate of criminal justice supervision rose by 78% from 1989 to 1994. MARC MAUER & TRACY HULING, *THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* 1 (1995).

19. Cf. Kimberlé Crenshaw, *Whose Story Is It, Anyway? Feminist and Antiracist Appropriations of Anita Hill*, in TONI MORRISON, *RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY* 402-03 (1992) [hereinafter *RACE-ING JUSTICE*]: “[A]t least one important way social power is mediated in American society is through the contestation between the many narrative structures through which reality might be perceived and talked about.” *Id.* at 403. According to Crenshaw, “the central disadvantage that Hill faced was the lack of available and widely comprehended narratives to communicate the reality of her experience as a black woman to the world.” *Id.* at 404.

20. Rich anthologies of writings by Black men on Black male identity include DON BELTON, *SPEAK MY NAME: BLACK MEN ON MASCULINITY AND THE AMERICAN DREAM* (1995); BROTHERMAN: *THE ODYSSEY OF BLACK MEN IN AMERICA—AN ANTHOLOGY* (Herb Boyd & Robert L. Allen eds., 1995); *SOULFIRES: YOUNG BLACK MEN ON LOVE AND VIOLENCE* (Daniel J. Wideman & Rohan B. Preston eds., 1996).

21. Toni Morrison, *Introduction: Friday on the Potomac*, in *RACE-ING JUSTICE*, *supra* note 19, at ix (quoting Michael Rustin).

22. STUART HALL, *ETHNICITY: IDENTITY AND DIFFERENCE*, *RADICAL AMERICA* 23 n.4 (1989).

23. See, e.g., Regina Austin, *The Black Community, Its Lawbreakers, and a Politics of Identification*, in *AFTER IDENTITY: A READER IN LAW AND CULTURE* 143 (1995).

Race as a form of seeing, or recognizing, is evidenced by the way that Black men are seen as criminals. Ordinary Black men frighten white men, women and children.²⁴ To many non-Blacks, crime means Black;²⁵ Black male means criminal.²⁶ Charles Stuart and Susan Smith knew that; both found temporary success in deflecting blame from themselves by inventing a fictional Black male culprit.²⁷ Most of the public easily believed these claims of Black perpetrators, recognizing truth where none existed. Clyde Franklin reminds us:

24. This point has been made most eloquently by Frantz Fanon in *BLACK SKIN; WHITE MASKS* 111-12 (Charles Lam Markmann trans., 1967) (including "Mama, see the Negro! I'm frightened! Frightened!"). See also Butler, *supra* note 16, at 18 (quoting and discussing this passage, describing Fanon as "offer[ing] a description of how the black male body is constituted through fear"); Gooding-Williams, *supra* note 15, at 164-65 (quoting Fanon and asserting that "the image of the Negro the boy posits is an interpreted image, that is, a racial representation that was constituted by assigning a particular function (e.g., the function or role of causing fear in white people) to Negroes when they appeared in the legends and the stories we have inherited from the past"); Erika L. Johnson, *A Menace to Society: The Use of Criminal Profiles and Its Effects on Black Males*, 38 *HOW. L.J.* 629, 629 (1995) (stating that "black men embody society's greatest fears and suspicions about crime"); Patricia J. Williams, *Meditations on Masculinity*, in *CONSTRUCTING MASCULINITY* 238-39 (Maurice Berger et al. eds., 1995) (describing her two-year-old son being called "scary").

25. "Replete with images of dark-skinned predators, crime has become a metaphor for race, hammered home nightly on TV news and exploitative crime shows." JEROME G. MILLER, *SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM* 149 (1996).

26. See, e.g., Crenshaw & Peller, *supra* note 14, at 77 ("Rhetorically, in the American Empire, the stigmata of poverty, the 'deviancy' of crime—and much of the political responsibilities of critical dissent—have been transferred to Blacks and other 'natives.'"); Williams, *supra* note 24, at 242 ("[A]ny black criminal becomes all black men, and the fear of all black men becomes the rallying point for controlling all black people."). Frantz Fanon described this:

In Europe, the black man is the symbol of Evil. . . . The torturer is the black man, Satan is black, one talks of shadows. . . . In Europe, whether concretely or symbolically, the black man stands for the bad side of the character. . . . Blackness, darkness, shadow, shades, night, the labyrinths of the earth, abysmal depths, blacken someone's reputation; and, on the other side, the bright look of innocence, the white dove of peace, magical, heavenly light.

FANON, *supra* note 24, at 188-90, quoted in IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 173-74 (1996). But see Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 *VA. L. REV.* 503, 531 (1994) (stating that white crime is "more serious, more common, and more hurtful").

27. As Erika Johnson reminds us, Susan Smith knew that the "suspect had to be a black man. Better still, a black man in a knit cap, a bit of hip-hop wardrobe that can be as menacing in some minds as a buccaneer's eye patch." Johnson, *supra* note 24, at 631. See also Eric Harrison, *S. Carolina Case of Deceptions Also a Case of Perceptions: Crime: A Mother's Tale of a Carjacker Is Now Seen As Another Example of Vilifying Black Men*, *L.A. TIMES*, Nov. 8, 1994, at A27.

[T]he Black man presently being recognized by mainstream society is not the Black man who invented the cotton gin; he is not the Black man who pioneered the development of blood transfusions; he is not the Black man who performed miracles with the peanut; he is not the Black man who fought tirelessly for civil rights and women's rights in the 1800s; and he is not the Black man who in the late 1960s led Black people on a journey to the "promised land." Instead, the Black man recognized by mainstream society today is fearsome, threatening, unemployed, irresponsible, potentially dangerous, and generally socially pathological.²⁸

The ubiquity and depth of the false conflation between Black identity and danger has several explanations. Frantz Fanon and others have written persuasively about the way that white cultures use Blacks to symbolize the evil part of themselves, which can then be disowned, and placed onto a distant figure.²⁹ Toni Morrison makes similar points about American literature, in which she analyzes the way that canonical American writers, white writers, use Black characters as foils for (white) American strength.³⁰ Similarly, Vera Paster writes:

The African-American male youth . . . is a special object of projection for a white-male-dominated society that focuses on his blackness and his maleness as representations of its disowned self. Irresponsibility, lack of intelligence, unbridled sexuality, dangerous aggression, and other stereotypes thus attributed engender anxiety which the dominant society seeks to bind by its elaborate system of isolation, control,

28. Clyde W. Franklin, II, *Men's Studies, the Men's Movement, and the Study of Black Masculinities: Further Demystification of Masculinities in America*, in *AMERICAN BLACK MALE*, *supra* note 3, at 3, 11. Former Secretary of Health and Human Services, Louis Sullivan, was quoted in *Time*: "When you look at a long list of social pathologies, you find Black men Number 1." *Id.* at 16.

29. Jerome Miller makes the same point about criminals: "This is what the criminal represents in [our] society—a reminder that all is not right. He must therefore be quickly invalidated and driven from view lest we become aware that we all have a share in the deviance." MILLER, *supra* note 25, at 161-62.

30. TONI MORRISON, *PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION* (1992).

humiliation, and punishment of the rejected-self representation, Black males. Hence the gauntlet.³¹

Beyond this psychology of thrusting evil onto a Black figure, we also live in a time in which the symbol of a frightening Black male is being used effectively to warn (especially non-Black) Americans away from “soft” social policies. As James B. Stewart has written, “The image of the Black male as predator is used by neoconservatives to illustrate what they interpret as the result of a social experiment gone awry. Black males are portrayed as the equivalent of Frankenstein’s monsters created by permissive social policies.”³² Stuart Alan Clarke has written that “Social Representations—narratives, symbols, images—that privilege race as a sign of social disorder and civic decay can be thought of as part of a socially constructed ‘fear of a black planet’ that has traditionally functioned to blunt progressive political possibilities.”³³

Kobena Mercer develops these ideas:

While the private lives of black men in the public eye—Rodney King, Magic Johnson, Clarence Thomas, Mike Tyson—have been exposed to glaring media visibility, it is the “invisible men” of the late-capitalist underclass who have become the bearers—the signifiers—of the hopelessness and despair of our so-called postmodern condition. Overrepresented in statistics of homicide and suicide, misrepresented in the media as the personification of drugs, disease and crime, such invisible men, like their all-too-visible counterparts, suggest that black masculinity is not merely a social identity in crisis. It is also a key site of ideological representation upon which the nation’s crisis comes to be dramatized, demonised and dealt with—enter

31. Vera S. Paster, *The Psychosocial Development and Coping of Black Male Adolescents: Clinical Implications*, in *AMERICAN BLACK MALE*, *supra* note 3, at 215-16.

32. James B. Stewart, *Neoconservative Attacks on Black Families and the Black Male: An Analysis and Critique*, in *AMERICAN BLACK MALE*, *supra* note 3, at 40. “President Bush’s ‘Willie Horton ad campaign in 1988 was successful because it was created after a decade of Black male bashing by the mass media.’” Franklin, II, *supra* note 28, at 17 (quoting Ishmael Reed).

33. Stuart Alan Clarke, *Fear of a Black Planet: Race, Identity Politics, and Common Sense*, *SOCIALIST REV.*, 37, 38 (1991).

Willie Horton as apogee of the most *un*American Otherness imaginable.³⁴

Whether grounded in psychological needs, ideological battles, or something else entirely, the deeply imbedded idea of a frightening Black man has some influence on every person in America, including every person in the criminal justice system. Each stage of our criminal justice process reflects and reinforces the "knowledge" that Black male means criminal.³⁵ On the street, Black men carry with them the greatest risk of being shot and killed by the police.³⁶ Just as the image of a Black man as a criminal permeates the use of profiles for searches at the early stage in criminal processing³⁷ and the decision whether to detain a suspect,³⁸ the same powerful idea of Black men as criminals

34. KOBENA MERCER, *WELCOME TO THE JUNGLE: NEW POSITIONS IN BLACK CULTURAL STUDIES* 159-60 (1994).

35. Haney Lopez writes, "The fact of high incarceration rates for Blacks partially stems from, and subsequently is used to confirm, the mythology of Black criminality and, by implication, White innocence. . . . Law makes these notions self-fulfilling prophecies that further entrench racial differences." LOPEZ, *supra* note 26, at 141. According to Robert Gooding-Williams, the "racial representations present in *Ghost*, *Casablanca*, and the works of fiction Toni Morrison discusses are but a small sample of the great storehouse of interpreted images of black people that American jurors, lawyers, and media pundits have available to them as elements of the culture they have in common. That particular jurors, lawyers, and media pundits should have made use of some of these images in the contexts of the Simi Valley trial and the television coverage of the L.A. uprising simply marks them as Americans." Gooding-Williams, *supra* note 15, at 163. See LOPEZ, *supra* note 26, at 115 ("[T]he ultimate question [is] not whether legal practices construct race but what role such construction plays in the attainment or frustration of social justice.").

36. "[Blacks] are shot and killed three times as often as whites by police in the big cities, down from a ratio of seven to one in the early 1970s." WALKER ET AL., *supra* note 3, at 85. The persistence of this disparity suggests that "police officers' definitions of dangerousness, and thus their willingness to use deadly force, depend to some degree on the race of the suspect." *Id.* at 232.

37. See, e.g., Johnson, *supra* note 24; Elizabeth A. Gaynes, *The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause*, 20 *FORDHAM URB. L.J.* 621, 624 n.18 (1993) (describing television crew that sent out two groups of young men on successive evenings, using identical routes and vehicles, in which Black group was stopped twice and white group never, although white group were passed by police sixteen times); Margaret M. Russell, *Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice*, 43 *HASTINGS L.J.* 749 (1992) (applying critical race analysis to the proliferation of appearance-based gang-profiles).

38. See, e.g., Sheri L. Johnson, *Race and the Decision To Detain a Suspect*, 93 *YALE L.J.* 214 (1983) (stating that police admit race is an important factor in determining whether to detain a suspect).

permeates verdicts and judgments of guilt.³⁹ We know that jurors see guilt or innocence differently depending on the race of the defendant.⁴⁰ Judges judge in part using race.⁴¹ Racialized knowledge explains why special programs have been sponsored by the NAACP, Black lawyers, police, and educators to train Black high school students what to do when they are stopped by the police.⁴²

Racialized knowledge controls how every player within the criminal courts understands truth in this world. This explains how the videotape of Rodney King being beaten was interpreted by the Simi Valley jury. As Robert Gooding-Williams confesses:

Having seen the videotape of King being beaten, we allowed ourselves to indulge the (in some cases closeted) positivist fantasy—think of it as the “Dragnet” fantasy—that the facts (“Please, just the facts, Ma’am”) were enough. . . . Yet the attorneys who defended King’s assailants knew better. They knew better, because they knew what Fanon knew and went to such great lengths to explain: namely, that in modern

39. Studies reveal that “African American defendants are more likely than whites to be sentenced to prison; those who are sentenced to prison receive longer terms than whites.” WALKER ET AL., *supra* note 3, at 152. “Among offenders convicted of felonies in California in 1980, 44 percent of the African Americans, 37 percent of the Hispanics, and 33 percent of the whites were sentenced to prison.” *Id.* at 152 (citation omitted). “[A] number of studies have found that African Americans are sentenced more harshly than whites.” *Id.* at 154 (citation omitted).

40. In 1985, Sheri Lynn Johnson reported, “Nine very recent experiments find that the race of the defendant significantly and directly affects the determination of guilt. White subjects in all of these studies were more likely to find a minority-race defendant guilty than they were to find an identically situated white defendant guilty.” Johnson, *supra* note 13, at 1625. In one of these studies discussed by Johnson, the “only jury unable to reach a verdict was racially balanced (50% black and 50% white) and assigned to view the black defendant. By the second ballot, all white jurors in this jury voted guilty and all black jurors voted not guilty. . . . [O]nly one jury ultimately reached a unanimous verdict of guilty; this was an all-white jury viewing the black defendant.” *Id.* at 1628.

41. One study “found that African American judges were more likely than white judges to send white defendants to prison. Further analysis led the researchers to conclude that this difference reflected the fact that African American judges incarcerated African American and white offenders at about the same rate, while white judges sentenced African Americans [sic] offenders to prison at a higher rate than white offenders. In [the city studied], in other words, African American judges imposed more equitable sentences than white judges.” WALKER ET AL., *supra* note 3, at 169.

42. MILLER, *supra* note 25, at 100-01.

Eurocentric societies no black bodies can be kept safe from the assault of negrophobic images and representations.⁴³

B. The Bloods and the Crips

Undoubtedly because they epitomize the dangerous Black man, Bloods and Crips have made their way into our national consciousness.⁴⁴ President Clinton addressed Bloods and Crips from the East Room:

The message today to the Bloods, the Crips, to every criminal gang preying on the innocent is clear: We mean to put you out of business, to break the backs of your organization, to stop you from terrorizing our neighborhoods and our children, to put you away for a very long time. We have just begun the job, and we do not intend to stop until we have finished. (Applause.)⁴⁵

Although there are more Latino gang members in Los Angeles than Black, L.A. is now the nation's gang capital in large part because of the visibility of

43. Gooding-Williams, *supra* note 15, at 165 (footnote omitted). "[T]he lawyers' retake of the received image of a wide and chaos-bearing black man allegorically asserted that blackness constitutes the very antithesis of [an essentially white-American] social order." *Id.* at 167 (arguing that black bodies and the mutilation of black bodies is at the center of American social reality, not its antithesis). For a criticism of the use by criminal defense attorneys of a "deviance narrative [that] constructs racial identity in terms of bestiality or pathology," see Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301, 1304 (1995).

44. "[T]he two most notorious gang names in the United States are the Crips and the Bloods (aka Pirus)." C. Ronald Huff, *Gangs in the United States*, in THE GANG INTERVENTION HANDBOOK 3, 11 (Arnold P. Goldstein & C. Ronald Huff eds., 1993). For autobiographical narratives of Crips and Bloods warfare, see YUSUF JAH & SISTER SHAH'KEYAH, UPRISING: CRIPS AND BLOODS TELL THE STORY OF AMERICA'S YOUTH IN THE CROSSFIRE (1995); SANYKA SHAKUR, AKA MONSTER KODY SCOTT, MONSTER: THE AUTOBIOGRAPHY OF AN L.A. GANG MEMBER (1993); *Forum: When You're a Crip (Or a Blood)*, HARPER'S MAG., Mar. 1989, at 51 (Leon Bing interviewing Li'l Monster, Rat-Neck, Tee Rodgers, and B-Dog). See also LEON BING, DO OR DIE (1991) (describing author's experiences with Los Angeles gang members); JOHN HAGEDORN & PERRY MACON, PEOPLE AND FOLKS: GANGS, CRIME AND THE UNDERCLASS IN A RUSTBELT CITY (1988) (comparing lives of gang members in Milwaukee and Los Angeles). For a positive description of urban neighborhood strength, see PETER MEDOFF & HOLLY SKLAR, STREETS OF HOPE: THE FALL AND RISE OF AN URBAN NEIGHBORHOOD (1994) (describing successful organizing in Boston neighborhood).

45. Remarks by the President at Announcement of Juvenile Violence Act, May 13, 1996, available in 1996 WL 254535. Note that President Clinton dichotomizes Bloods and Crips against "the innocent" and assumes that Bloods and Crips are somebody different from "our children."

the Bloods and the Crips: "Law enforcement agencies currently estimate more than 100,000 Crips and Bloods in greater Los Angeles alone and count as gang related more than 500 homicides annually."⁴⁶ "The competition between the Bloods and the Crips has assumed almost legendary status."⁴⁷ One nationally syndicated comic strip featured a young middle class boy writing home from camp, reporting that the Camp Director prohibited the campers from changing their cabin names from Vikings and Buccaneers to Crips and Bloods.⁴⁸

But Bloods and Crips are not merely legends in their own time; they are young men constructing the violent identity that defines them. Clyde Franklin points out that all "Black masculinities, in particular, are constructed under the cloud of oppression."⁴⁹ Kobena Mercer has written that "black masculinity is a highly contradictory formation of identity, as it is a *subordinated* masculinity."⁵⁰ The identity of a Black gang member is an

46. Huff, *supra* note 44, at 7 (citation omitted). "Los Angeles has been recording an average of 500 to 700 gang-related homicides per year." *Id.* at 13.

47. IRVING SPERGL, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, GANG SUPPRESSION AND INTERVENTION: AN ASSESSMENT 33 (1993). Reporters report on "gang-related crime" as if it were true, in part to generate interest without having to specify more information about the specifics of the crime. MARTIN SANCHEZ JANKOWSKI, ISLANDS IN THE STREET: GANGS AND AMERICAN URBAN SOCIETY 286-87 (1991).

48. Hilary B. Price, *Rhymes with Orange*, SAN FRANCISCO CHRON., July 17, 1996, at E8 ("Dear Mom, Each cabin has a different name. Our's is the Vikings. The next older boys are the Buccaneers. We voted to change our names to the Crips and the Bloods, but the Camp Director said 'no,'" over pictures of two campers firing water balloons at the Camp Director's cabin).

49. Clyde W. Franklin, II, *Ain't I a Man? The Efficacy of Black Masculinities for Men's Studies in the 1990s*, in AMERICAN BLACK MALE, *supra* note 3, at 271, 278.

50. MERCER, *supra* note 34, at 143. See generally *id.* at 142-43. Mercer explains:

Patriarchal culture constantly redefines and adjusts the balance of male power and privilege, and the prevailing system of gender roles, through a variety of material, economic, social and political structures such as class, the division of labor and the work/home nexus at the point of consumption. Race and ethnicity mediates this process at all levels, so it is not as if we could strip away the "negative images" of black masculinity created by Western patriarchy and discover some "natural" black male identity which is essentially good, pure and wholesome. The point is that black male gender identities have been historically and culturally constructed through complex dialectics of power and subordination.

Id. at 136-37. Mercer's description of the image of the Black male youth in England is applicable to Los Angeles:

[H]e becomes the objectified form of inarticulate fears at the back of the minds

especially contradictory construction. Sociologist Jewelle Taylor Gibbs explains that gangs function as “a social structure that permits, reinforces, and legitimizes the channeling of their anger and hostility at the dominant society. Thus, gangs provide a vehicle for group anger focused on illegitimate activities, thus symbolizing rejection and defiance of mainstream society.”⁵¹ She warns that “[o]nly by understanding the depth of these frustrations and the intensity of this anger can one begin to comprehend the escalating violence and self-destructive behavior of these young Black males. . . . Thus, these victims of poverty and discrimination are gradually transformed into the victimizers of the vulnerable and disadvantaged, the mirror image of their own despair and alienation.”⁵² Similarly, Jerome Miller explains random acts of violence as “a destructive way of avoiding further victimization.”⁵³ Kobena Mercer explains: “Such intracommunal violence can be seen as an almost pathological misdirection of rage—the experience of oppression is turned inward, and colonial violence is reinscribed upon the self.”⁵⁴

Richard Majors and others have developed a gender analysis of gang behavior:

of “ordinary British people” that are made visible in the popular tabloid headlines. But this regime of representation is reproduced and maintained in hegemony because black men have had to resort to “toughness” as a defensive response to the prior aggression and violence that characterizes the way black communities are policed (by white male police officers). This cycle between reality and representation makes the ideological fictions of racism empirically “true”—or rather, there is a struggle over the definition, understanding and construction of meanings around black masculinity within the dominant regime of truth.

Id. at 137-38.

51. Gibbs, *supra* note 3, at 137.

52. *Id.* at 142.

53. MILLER, *supra* note 25, at 47.

54. MERCER, *supra* note 34, at 145 (discussing Fanon and Staples). In some ways, the black gang members are similar to the Black gay men described by Mercer:

[S]ome black gay men appear to accept and even play up to the assumptions and expectations which govern the circulation of stereotypes. Some of the myths about black sexuality are maintained not by the unwanted imposition of force “from above,” but by the very people who are in a sense dominated by them.

Id. at 136.

Black gang members manifest masculinity and toughness physically through murder, violence, crime, and assault. Masculinity and toughness are expressed in the symbolic behaviors of gang members as well. To counter their invisibility as Black men, gang members use symbolic behavior as a way to make themselves “visible” to society. In addition to gaining visibility for the gang member, symbolic behaviors also express anger, defiance, pride, protest power, solidarity, and entertainment.⁵⁵

Majors continues:

The Black gang member epitomizes the frustrated Black male in this country. . . . [B]ecause of group emasculation, many Black males become obsessed with masculinity as demonstrated by their involvement in self-destructive and risk-taking behaviors (e.g., emphasis on violence, aggression, promiscuity, fighting, toughness, drinking) as a way to enhance self-esteem, power, control, and social competence. Hence, Black gang members’ obsession with masculinity is, in a sense, exaggerated traditional masculinity.⁵⁶

Jankowski makes a similar argument, challenging the distance that many Americans would place between their own values and the lives and choices of gang members:

The United States, which often prides itself as the bastion of individualism, has produced a pure form of its own individualism: a person of staunch self-reliance and self-confidence whose directed goals match those of the greater

55. Richard Majors et al., *Cool Pose: A Symbolic Mechanism for Masculine Role Enactment and Coping by Black Males*, in *AMERICAN BLACK MALE*, *supra* note 3, at 245, 253-54.

Black gang members have their own rules and culture and are obsessed with the symbols that identify and promote their masculine-oriented culture. The ways that gang members symbolically convey masculinity include provocative walking styles, handshakes, hairstyles, stances, use of various colors, clothes (e.g., baseball caps, jackets, warm-up suits), bandannas, hairnets, “battle scars” (from turf wars with other gang members), jewelry (e.g., gold chains, earrings), hand signals, language, nicknames.

Id. at 254.

56. *Id.* at 254-55.

society and whose toughness and defiant stance challenge all who would threaten him. Ironically, in the defiant individualist gang member, American society has found it difficult to control its own creation.⁵⁷

Many criminologists and sociologists argue that gang violence will not be reduced until gang members' human motivations are acknowledged. Richard Majors explains:

Gang membership provides a way to organize one's world, direct anger, create stimulation, and entertain. Also, gang membership provides the gang member with a sense of family and belonging, affiliation, respect, status, and empowerment—all things his own society has not provided him. For a gang member, belonging to a gang may be a way of saying, "I may not be able to depend on you, society, but I can depend on this bunch of guys."⁵⁸

But that kind of description of the human being behind the symbol is more and more rare. The Black men in gangs are more and more understood to be irredeemable and evil, super-predators fit only to be hunted down and locked up, or perhaps killed. Social services are less relevant as the Black gang member is portrayed less as a human being and more as a "new breed" of amoral animal.⁵⁹ Jerome Miller points out that "Politicians and human-service professionals alike periodically call the public's attention to this ostensibly more unfeeling, cold, and dangerous young offender who now stalks our streets."⁶⁰ According to Miller, "a better analytical model [than new breed] might be found by looking at the social antecedents that led an infantry company of remarkably ordinary American troops to rape, torture, and mutilate

57. JANKOWSKI, *supra* note 47, at 313.

58. Majors et al., *supra* note 55, at 255.

59. MILLER, *supra* note 25, at 38. See also JANKOWSKI *supra* note 47, at 257 ("T.O. was a forty-year-old member of the LAPD: 'I have a lot of resentment toward the communities that I work. The gangs are like animals and nobody in the community knows anything.'").

60. MILLER, *supra* note 25, at 37-38. Miller continues, "One could make the argument with equal force that the more obvious example of a 'new breed' can be found among the psychiatrists, psychologists, social workers, and counselors who work directly for, or on, the periphery of the criminal justice system." *Id.* at 38.

Vietnamese women and children at My Lai while some resisted doing so.”⁶¹ Gang researcher Jankowski argues that “gangs are a commodity” and that the “demonic” depiction is a distorted myth.⁶² He argues that “gangs ultimately are depicted as not only physically threatening average, law-abiding citizens, but also as undermining the morals and values of the society as a whole. They are carriers of moral disease within the social body.”⁶³ The dominant response to gang violence has been demonization and incarceration of the “new breed.”

C. EVERY BLACK MAN A BLOOD OR CRIP

So every Black man is seen as a criminal; and Black criminals in a group or gang are seen as a new breed of inhuman beasts. And, more and more, the distinction between ordinary Black man and Black gang member is disappearing. The metaphorical link between a Black male and a gang member is being concretized daily through massive police data banks constructed over the last decade.⁶⁴ These data banks can contain gossip and rumors.⁶⁵ Jerome

61. *Id.* at 47. Miller continues, “The distortion of power relationships, the defining of the ‘enemy’ as beneath contempt, the chronically threatening and paranoid world in which one lives, the inuring to violence and wearing down of sensitivity to others, and the impotence of one’s condition—all these bespeak a social context that most survive but to which some succumb.” *Id.*

62. JANKOWSKI, *supra* note 47, at 309.

63. *Id.* at 284, 308.

64. According to Mike Davis:

[O]ne of the main functions of the “antigang” dragnets such as the LAPD’s Operation Hammer has been to create a rap sheet on virtually every young Black male in the city Thanks to massive street sweeps, the gang roster maintained by the LAPD and sheriffs has grown from 14,000 to 150,000 files over the last five years. This accumulation has allowed the district attorney, Ira Reiner, to make the hyperbolic claim that 47 percent of all young Black males in L.A. County are active gang members. Needless to say, these files are not only employed in identifying suspects, but have also become a virtual blacklist. Under California’s recent “Street Terrorism Enforcement and Prevention Act” (STEP), for instance, membership in a gang presumably as proven by inclusion in one of these data bases, can become a separate felony charge.

Mike Davis, *Uprising and Repression in L.A.*, in READING RODNEY KING, *supra* note 12, at 142, 148.

65. “[G]ossip about gang affiliation which had been kept previously in the police officer’s head or in personal files[] has been incorporated indiscriminately into a computer data base.” SPERGEL, *supra* note 47, at 104 (citation omitted). “In another campaign, Los Angeles police made random street stops of young people believed to be gang members, and photographed them for police files. . . . In many instances, they were not even gang members.” Susan L. Burrell, *Gang Evidence: Issues for Criminal*

Miller reports on a list of "suspected gang members" that had been compiled by the Denver Police Department and was revealed in 1993: "Although blacks represented only 5% of Denver's population, they accounted for 57% (3,691) of those on the list."⁶⁶ "Significantly, the 3,691 blacks on the list of gang 'suspects' meant that *over two-thirds of all the black youths and young men between ages 12 and 24 living in Denver had been profiled as 'suspect.'*"⁶⁷ Similarly, in 1992 the Los Angeles County District Attorney's Office estimated that nearly half of all Black men ages 21-24 living in Los Angeles County were gang members.⁶⁸ The metaphorical link between Black men and crime is set in concrete, in jails and prisons, run by what Jerome Miller calls "a bureaucracy unparalleled in American history, having as its central task the apprehension, labeling, sorting, and managing of the absolute majority of young African-American males."⁶⁹ Police instinct and intuition, often racialized knowledge, is becoming blunt and crude data called up on countless computer screens, carrying ever-increasing weight as it is copied and transmitted. So the line between the average Black man and the amoral, demonic gang member—the new breed—disappears.

III. CONSTRUCTED BLOOD OVERTAKING INNOCENCE IN THIS CASE

A. *The Prosecution's Cases*

Barry Williams' case was and is obscure, engulfed by a tragic and huge urban civil war.⁷⁰ Although the idea of the Bloods and the Crips is

Defense, 30 SANTA CLARA L. REV. 739, 742 (1990).

66. MILLER, *supra* note 25, at 109.

67. *Id.* at 109.

68. *Id.* at 91.

69. *Id.* at 162.

70. Jerry G. Watts observes:

Black urban communities are engulfed in an everyday violence unheard of in the history of humankind except during periods of extended warfare. For instance, in Washington, D.C., and neighboring Prince Georges County, Maryland, which has a sizable poor black population, 3,000 murders have been officially recorded in the last five years. The murderers and murder victims were overwhelmingly young blacks, particularly young black men. To fathom the murder of approximately 3,000 young people within a five-year span, one might want to

ubiquitous, the actual men are anonymous and out of sight.⁷¹ Barry Williams was convicted of two separate murders, the June 16, 1981 slaying of Donald Billingsley in Green Meadow Park, and the March 25, 1982 killing of Jerome Dunn by a shooter riding in a stolen van.⁷² Barry Williams' eligibility for the death penalty was based on having been convicted of two murders.⁷³ Both killings were prosecuted as casualties in the wars of South Central Los Angeles between the Bloods and the Crips.

The first victim, Donald Billingsley, had been one of about ten young people hanging out near a stage at the recreation center of Green Meadow Park in South Central Los Angeles about 9:30 on the summer night of June 16, 1981. Several young people rushed from some bushes toward the stage, shooting at the young people on it, using an automatic .45 caliber hand gun and at least two different shotguns, killing Billingsley and wounding two others.⁷⁴ Several of the people who had been shot at identified Barry Williams as one of the gunmen. A neighbor identified Barry Williams as having run from the

imagine the death toll as the equivalent of two Washington, D.C., high schools disappearing from the face of the earth.

Jerry G. Watts, *Reflections on the Rodney King Verdict and the Paradoxes of the Black Response*, in *READING RODNEY KING*, *supra* note 12, at 236-37.

71. In this sense, criminal justice records are not unlike literary texts: "[Uncle Tom's Cabin and The Confessions of Nat Turner] share at least one thing in common: the Black man at the center of each of these novels is hardly visible at all, in Ellison's sense of the term, because the Black man's individual humanity has been for the most part veiled by an abstracted identity projected onto him by the white author's notions of what a Black man represents, or ought to represent." William L. Andrews, *The Black Male in American Literature*, in *AMERICAN BLACK MALE*, *supra* note 3, at 59, 61.

72. Initially an Information was filed on May 20, 1982, charging Barry Williams with the murder of Donald Billingsley. That Information was dismissed for insufficient evidence on July 22, 1982. *People v. Williams*, 940 P.2d 710 (Cal. 1997) (S004720). The same day, the State filed an expanded Information in Los Angeles Superior Court, re-charging Barry Williams with the murder of Donald Billingsley, with two counts of attempted murder of others in the Park, and adding the murder of Jerome Dunn. Subsequently the Information was amended to add a count of conspiracy to commit assault with a deadly weapon and murder (related to the Donald Billingsley death). Clerk's Transcript at 349, *Williams* (S004720). Following the decision of the California Supreme Court, the trial of the Billingsley counts was severed from the trial related to Jerome Dunn's death.

73. The early Information charged Barry Williams with the Special Circumstance of multiple murder (Cal. Penal Code § 190.2(a)(3) (1988)). Clerk's Transcript at 247-50, *Williams* (S004720). Following severance of the two cases, the Special Circumstance was re-charged as prior murder (Cal. Penal Code § 190.2(a)(2) (1988)). Clerk's Transcript at 494-95, *Williams* (S004720).

74. Reporter's Transcript at 8659-8710, *Williams* (S004720).

scene with some kind of gun.⁷⁵ In addition, a jailhouse informant, Arthur Cox, testified that he had been present at a meeting of the 89th Street Family Bloods, led by Barry Williams and his cousin Junior Bridges, at which they had discussed a plan to shoot at the Green Meadow Park Boys.⁷⁶ Arthur Cox testified that he also attended a gathering of the same people the morning after the shooting, at which Barry Williams claimed to have used a .357, and therefore not to have killed the “dude” who allegedly died from a shotgun.⁷⁷

After hearing evidence of this crime, the jury in the first trial convicted Barry Williams of first degree murder, two counts of attempted murder (based on others on the stage who were shot), one count of conspiracy to commit murder, and found true the allegation that he had personally used a firearm.⁷⁸ On those crimes, Barry Williams was sentenced to thirty-four years to life in state prison.⁷⁹ Other than investigating officers, all witnesses, victims, and suspects were African American residents of the neighborhood near the Green Meadow Park in South Central Los Angeles.

The same lawyers tried the second case a few months later before a different judge and a new jury. The victim here was another young Black man, Jerome Dunn, who had been shot by someone in a van. The prosecution presented evidence that “two Black motherfuckers”⁸⁰ with a gun had robbed a driver of his blue van around 6:00 p.m.⁸¹ About a half hour later, friends Jerome Dunn and Kenneth Hayes were riding their bicycles, Dunn well ahead of Hayes, when the stolen van stopped near Jerome Dunn. Dunn stopped and talked for several minutes with one or more of people inside the van. As Hayes got close, he heard chattering and laughter from the van and saw someone’s right hand—to the elbow—come out of the driver’s window and shoot Dunn four times.⁸² Hayes had told the police officer the evening of the crime that he

75. *Id.* at 8820-32.

76. *Id.* at 8766-71.

77. *Id.* at 8775. Arthur Cox claimed to have been an active participant in the meeting and the gathering, but not to have participated in the shooting.

78. Clerk’s Transcript at 469, Green Meadow Park case, *Williams* (S004720).

79. *Id.* at 500.

80. Reporter’s Transcript at 6903, *Williams* (S004720).

81. *Id.* at 6874-6903.

82. *Id.* at 7465-68.

believed the passenger did the shooting;⁸³ at the Preliminary Hearing he had testified that most likely it was the driver.⁸⁴ It was getting dark and drizzling.⁸⁵

Jerome Dunn died from five gunshot wounds, in the temple, neck, shoulder, chest, and back.⁸⁶

Although the prosecution presented evidence that Barry Williams was a member of the 89th Street Family Bloods, and that the location of the crime and the dress of the victim suggested that the perpetrators were members of the 89th Street Family Bloods, eyewitness Patricia Lewis presented the crucial testimony identifying Barry Williams as the driver of the van. Mrs. Lewis and a friend had been in a station wagon stopped at the intersection when the van drove by, stopped, backed up, and then proceeded toward Jerome Dunn, stopping next to him. Mrs. Lewis testified that she saw the driver as the headlights of the station wagon shined in the driver's window, and that she saw something "shining" in the driver's mouth. She testified that she had heard the driver say, "Let's go fuck him up."⁸⁷

From a distance of what she estimated to be forty-one feet, but which the prosecution conceded was actually 302 feet, Mrs. Lewis saw a hand come out of the driver's window holding a gun, although she could not tell if it was a handgun. She testified at trial that she thought that the arm holding the gun was that of the driver, although she had testified at the preliminary hearing that she could not tell whether it was the driver or the passenger.⁸⁸ She testified at trial that her memory was better at the preliminary hearing, but she had not testified accurately because she had been afraid. She subsequently identified Barry Williams as the driver of the van, an identification based in large part on the shining silver cap on his front tooth, which she claimed to have seen gleaming in the headlights. Although Mrs. Lewis testified that she had never before seen the driver's face (and that she had never made a mistake in identifying anyone), her husband testified that Barry Williams had been a

83. *Id.* at 8358. See also Petition for Habeas Corpus at 338, *In re Williams* (S050166) ("The statements of Kenneth Hayes, made to police officers on the night of the crime, state that the passenger was the shooter.").

84. *Id.* at 7535.

85. *Id.* at 7497.

86. Reporter's Transcript at 6916-19, 7556-63, *Williams* (S004720).

87. *Id.* at 7705, 7778.

88. *Id.* at 7712, 7802-03.

leader in his youth cadet program, and had been at the Lewis house (with Mrs. Lewis present) on an almost daily basis for several years. There also was a dispute about whether Patricia Lewis had seen Barry Williams' photograph in Mr. Lewis' photo album, kept by Mr. Lewis in the Lewis' living room, and shown to the police investigating Jerome Dunn's murder.⁸⁹

The case against Barry Williams also included testimony from two informants, John Gardner and Arthur Cox. Gardner testified that he had attended a meeting of 89th Street Family Bloods prior to the Dunn shooting in which Barry Williams and others had suggested combining forces with other Blood sets to protect the neighborhood against the Crips,⁹⁰ and that subsequently in conversation Barry Williams had claimed to have shot Jerome Dunn ("took fool out of the box, some fool, from A.G. Crips").⁹¹

89. *Id.* at 7776, 7793, 8078-80. The jurors were told about inconsistencies in Patricia Lewis' statements, and about Barry Williams' frequent presence at the Lewis home. They did not know, however, that in her early statements to the police, Mrs. Lewis had denied seeing anything unusual about the suspect's teeth, and that Mrs. Lewis had "learned" prior to her identification of Barry Williams that the shooting had been done by someone from Barry Williams' household. The Brady violation from the undisclosed police tape recording of Mrs. Lewis' interview is one of the issues raised in the habeas petition. See Petition for Habeas Corpus at 32-50, *In re Williams* (S050166). Additional habeas issues related to Mrs. Lewis' testimony include the prosecution's knowledge of and failure to disclose that Mrs. Lewis lied about the identification of the other person in the car with her to prevent anyone from interviewing her about what she had seen, and the failure of the prosecution to disclose to the defense Mrs. Lewis' history of mental illness, among other issues.

90. Reporter's Transcript at 6964, *Williams* (S004720).

91. *Id.* at 6969-71, 7039. John Gardner has subsequently signed a declaration that he had never heard Barry Williams' claim to have shot anyone, and that he had attended plenty of gang meetings but never any where plans to kill people were discussed, but that he lied in order to avoid being prosecuted on a robbery charge. As part of his agreement for testifying he was housed in a hotel for a month with all of his food and lodging paid for (approximately \$3000 worth), his family was relocated to public housing, the state paid the movers' fee, and the D.A.'s investigator bought the family \$300-\$400 worth of groceries when they moved in. Petition for Habeas Corpus, Exhibit 158, *In re Williams* (S050166).

Jail house informant⁹² Arthur Cox testified that Barry Williams had told him in jail that Curtis Thomas, another 89th Street Family Blood, had “killed Bones”⁹³ and that Barry Williams claimed to have told Curtis to shoot.⁹⁴

In light of the inherent questions raised by the arrangements by which both Gardner and Cox testified, the crucial witness was Patricia Lewis. The inconsistencies in her own testimony were rendered insignificant, however, by the devastating and powerful testimony of her house having been shot when, as she testified, she was at home in her living room with her grandson in her arms.⁹⁵ She testified that forty-five to fifty shots entered the house, although no one was hurt.⁹⁶ Mark Williams, an 89th Street Family Blood member (no relation to Barry Williams), was subsequently prosecuted in juvenile court for this shooting.⁹⁷

The prosecution presented testimony from Kenneth Simmons, who testified that Mark Williams had told him that he had gone “to take care of some business for Barry, but it wasn’t done right or something like that.”⁹⁸ Simmons had been arrested with the shotgun alleged to have been used in the Lewis house shooting. Mrs. Patricia Lewis identified Mark Williams as the passenger in the blue van.⁹⁹ The jury determining Barry Williams’ guilt was instructed that evidence of Mrs. Lewis’ house having been shot up could be

92. Arthur Cox was identified as one of the “jailhouse snitches” implicated in the scandal provoked by Leslie White’s revelations that he was able to parlay false testimony of alleged confessions into leniency, money, conjugal visits, furloughs, and other favors from prosecutors. See transcript of “The Snitch,” *60 Minutes* (Feb. 26, 1989), quoted in Petition for Habeas Corpus, Exhibit 3, *In re Williams* (S050166); *D.A. Lists 130 Jail-House Informant Cases in Past 10 Years*, LOS ANGELES DAILY J., Jan. 3, 1989, at 11 (listing Barry Williams’ case).

93. Reporter’s Transcript at 7284-85, *Williams* (S004720).

94. *Id.* at 7300-01. Arthur Cox’ testimony was impeached in trial by his brother Ernest, who testified that Arthur had told him that he was studying Barry Williams’ transcripts so that he could make up something to use against Barry Williams to beat his own case.

95. *Id.* at 7731-33.

96. *Id.* at 7791.

97. *Id.* at 7631-33, 7649.

98. *Id.* at 7644.

99. Reporter’s Transcript at 7787, *Williams* (S004720) (describing Simmons’ prior inconsistent statements and prior testimony confessing to having shot up the Lewis house, which were disbelieved by the prosecution).

used as evidence of Barry Williams' consciousness of guilt of Jerome Dunn's murder.¹⁰⁰

No one but Barry Williams was ever prosecuted for either Jerome Dunn's or Donald Billingsley's death. Again, aside from the investigating officers and a defense dental expert (who testified about the number of metallic capped teeth on Black youths in Los Angeles), all witnesses, victims, and suspects were African American residents of the neighborhood in South Central Los Angeles.

After several weeks of testimony, the jury took less than two hours to find Barry Williams guilty of Jerome Dunn's murder. After a nine-day penalty trial, during which the jury heard testimony about the Green Meadow Park shootings and conviction, and other uncharged allegations of gang activity, the jury sentenced Barry Williams to death after just under a full day of deliberations.

B. The Context of the Trials

Barry Williams was tried at a time and place in which race was a dominant force in the thinking and understanding of the people involved in the case, the jurors, the lawyers, the witnesses, and the judge. The convictions of Barry Williams can only be understood in light of the powerful form of knowledge, way of knowing, that constitutes race in America today, or perhaps in Los Angeles in 1986. The prosecutor's technical case, the presentation of evidence to prove the crimes, floated on the air of a greater understanding that each of the players brought to the courtroom. The prosecutor presented facts about the deaths of Jerome Dunn and Billingsley, placing them always in the context of what the judge, lawyers and jurors knew, or thought they knew, about the world, including about the world of race, the world of Black men, and of Black male gang leaders. This racialized knowledge¹⁰¹ shapes how the story was understood, how Barry Williams was represented, not simply by his lawyers, but within the imagination of the decisionmakers.

100. The admission of the "bad acts" evidence is the subject of several issues on appeal. The prosecutor linked the shooting to Barry Williams by a maze of prior inconsistent statements and hearsay suitable for an ambitious Evidence exam.

101. "Contemporary racism is not simply a stupid hatred. It may be based upon the ignorance that breeds hatred, but it is every bit as dependent upon a form of knowledge. That knowledge, sometimes wittingly used, sometimes unwittingly, operates to reinforce the fear and hatred of others by providing rationales for hierarchizing differences." Thomas L. Dumm, *The New Enclosures: Racism in the Normalized Community*, in *READING RODNEY KING*, *supra* note 12, at 178, 180.

The crimes of which Barry Williams was convicted occurred in 1981 and 1982. The trials took place in 1985 and 1986. By that time, issues of Black gang violence had stormed into the consciousness of everyone in Los Angeles. Donald Billingsley was one of 292 victims of gang homicides in Los Angeles in 1981; Jerome Dunn was one of 205 in 1982. By 1986, when Barry Williams was convicted and sentenced to death, the number had risen to 328 gang homicides in Los Angeles.¹⁰² Gang warfare had begun to be heavily covered in the *Los Angeles Times*, as well as in regional newspapers. It was featured on the evening news.¹⁰³ White jurors knew more and more about black gang warfare, although they probably knew little about the economic reality of the young men implicated in the crimes.¹⁰⁴ As discussed above, in the words of Irving Spergel, the "gang was increasingly viewed as dangerous and evil, a collecting place for sociopaths who were beyond the reach of most community-based institutions to influence or rehabilitate."¹⁰⁵ Further, frustration about crime had crystallized into the campaign to unseat former Chief Justice Rose Bird and Associate Justices Joseph Grodin and Cruz Reynoso.¹⁰⁶ The film *Colors* was in production in Hollywood.¹⁰⁷

102. L.A. County Sheriff's Dep't, Sgt. Rick Davidson (phone conversation with Saor Stetler, Sept. 16, 1996): "[F]rom 1985 to 1988, the south-central area of Los Angeles, which is predominantly African-American, experienced rapid growth in gang activity" JANKOWSKI, *supra* note 47, at 205.

103. "Gang stories are one type of story that is valued because it gets people's attention and creates enough interest so that people will continue to watch the rest of the news. It is also true that gang-related violence is easier than some other stories that we are assigned to cover. The main reason is that we have an incident that's occurred, some violent act, and if the police report that it is 'gang-related' or some of the witnesses believe that it is 'gang-related,' then we report it as being 'gang-related' and a lot of our investigative job is over." JANKOWSKI, *supra* note 47, at 286-87 (quoting "D.X.," an L.A. television reporter).

104. "Between 1973 and 1986, the real earnings of Black males age 18-29 declined 31%, the percentage of young Black males in the full-time work force fell by 20%, and the number who [had] dropped out of the labor force doubled from 13% to 25%." Franklin, II, *supra* note 49, at 279.

105. SPERGEL, *supra* note 47, at 86.

106. Potential jurors were questioned about mailers against Rose Bird. See, e.g., Reporter's Transcript at 5298, 5521, 5750, 6021-22, 6109A-6112A, 6136, *People v. Williams*, 940 P.2d 710 (Cal. 1997) (S004720). One acknowledged having recently watched a commercial against the death penalty. *Id.* at 5298.

107. *Colors* starred Robert Duvall and Sean Penn as two LAPD officers working in the gang unit in the world of the Bloods and the Crips in Los Angeles. See generally Sheila Benson, *Complexity and Context Washed Out of "Colors,"* L.A. TIMES, Apr. 15, 1988, at Pt. 6, 1 ("With its knowing references to the Crips and the Bloods—rival L.A. gangs whose blue or red 'colors' identify them—its nighttime scenes of violent drive-bys and its daytime shorts of grade-schoolers dealing crack, *Colors*

Frederick Douglass charged in 1883 that "it is not so much the business of his enemies to prove [a Black man] guilty, as it is the business of himself to prove his innocence. The reasonable doubt which is usually interposed to save the life and liberty of a white man charged with crime, seldom has any force or effect when a colored man is accused of crime."¹⁰⁸ One hundred years later, white jurors saw threat and guilt in Rodney King's body lying on the ground under the police batons. If Rodney King's body, lying on the ground, contained menace and threat, what do white jurors see in a Black man identified as a gang leader, sitting at the defense table in a capital murder trial? Constitutional criminal procedure is careful to allow each criminal defendant to be tried wearing street clothes, rather than prejudicial jail jumpsuits, to maintain the presumption of innocence. Barry Williams' identity, his face and body clothed respectably, conveyed a meaning as deeply prejudicial as an orange jail jumpsuit, but much harder to remove.

C. The Erasure of Race

Barry Williams, both victims, and all the witnesses I have described are Black. The attorneys, court clerk, judge, and most of the police officers who testified were white, as were most of the jurors. The first irony in constructing a narrative of this case that features race and innocence, is that in the official story, this is not a case about either innocence or race. Not only by insisting on innocence, but also by insisting on a racialized account, I am challenging the State of California's position that "this is not a case about race."¹⁰⁹

may feel like a bloody slice of the 11 o'clock news."); David Ansen, *War on the Mean Streets*, NEWSWEEK, Apr. 18, 1988, at 73 ("Colors is the first movie to reflect the vicious escalation of gang violence in America."). The mood in Los Angeles did not reflect the actual numbers; Jerome Miller points out that in Los Angeles, "despite freeway shootings and gang warfare, there were 261 fewer murders in 1987 than in 1980, a drop of more than 20 percent." MILLER, *supra* note 25, at 30 (footnote omitted).

108. *Symposium on the Black Lawyer in America Today*, HARV. L. SCH. BULL. 6, 57 (Feb. 1971) (quoting Frederick Douglass).

109. The most deservedly notorious example of the disinclination of courts to recognize the impact of race in legal determinations undoubtedly is *McCleskey v. Kemp*, 481 U.S. 279 (1987), in which the five-person majority followed Justice Powell in expressing a startling lack of ambition to confront racism in the criminal justice system, in part because it promised to be too big a problem. For commentary on *McCleskey*, see Mumia Abu-Jamal, *Teetering on the Brink: Between Death and Life*, 100 YALE L.J. 993, 999-1001 (1991).

This removal and fictional erasure of race is what Kimberlé Crenshaw and Gary Peller have characterized as “the dominant form of contemporary race ideology”:

Through the typical process of “disaggregation,” a narrative is created within which racial power has been “mediated” out.... In both the Simi Valley police brutality trial and the Croson case [striking down Richmond’s contracting affirmative action program], a narrative mediates the presentation of the world by divorcing the effects of racial power—the number of Black contractors in Richmond, the curled body of Rodney King—from their social context and from their historic meaning.¹¹⁰

Similarly, although the players in the tragic deaths of Billingsley and Dunn were all Black, and the representatives of the State who identified a suspect, charged him, convicted him, and sentenced him to death were predominantly white, the 12,000 page transcript of this case contains only a handful of words related to race.¹¹¹ Anthony Alfieri describes as “race-talk” the “colorblind and the color-coded narratives” and describes “racialized stories” of courtrooms and law offices, by which he means “stories that appear facially neutral but inflict invidious injury.”¹¹² In this “disaggregation” or erasure of the racial identity and hierarchies in which this case arose and was prosecuted, this case is typical, and reflects perhaps the wishful ideology articulated for many by Justice Scalia in his concurrence in *Adarand Constructors, Inc. v. Peña*, in which he proclaims that in the government’s eyes, we are all one race, namely American.¹¹³ Barry Williams’ case is indeed a classic American story, particularly if we use that identifier in the same way that Sanyika Shakur (aka Monster Kody Scott) does in *Monster: The Autobiography of an L.A. Gang Member*, in which, telling the story of his life as a Crip in South Central Los

110. Crenshaw & Peller, *supra* note 14, at 63.

111. Cf. GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 206 (1988) (“Reading the record of the Goetz case, one hardly finds an explicit reference to the race of anyone.”).

112. Alfieri, *supra* note 43, at 1302 (footnote omitted).

113. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2119 (Scalia, J., concurring).

Angeles, he consistently, routinely, and automatically refers to white people as Americans.¹¹⁴

Rarely was race mentioned in this case, but the silence about race simply reinforced rather than dissipated the perception of everyone involved—most definitely including the Black prosecution witnesses and the Black defendant—that the courtroom proceedings were within the control of white people.

D. Jury Selection

1. These People Aren't Like You and Me

Beginning with jury selection, the prosecutor effectively reminded the decisionmakers, the jurors, of what a distant and frightening world they would be entering by warning each prospective juror that these people are different from you and me.¹¹⁵ The prosecutor told one juror that people from 88th and Avalon “may have different cultural ethics—different ethical and value structure than you have.”¹¹⁶ To another, the prosecutor said that “there may be witnesses that come up here and testify that may have completely different ethnic, social, cultural, moral backgrounds than you, people who you think are disreputable, immoral, valueless.”¹¹⁷ Especially to white and Asian-American potential jurors, the prosecutor explained that witnesses would come from a different ethnic, moral, and ethical background.¹¹⁸ After his standard speech about witnesses coming from very, very different lifestyles and morality, the prosecutor told one juror: “I would like to be able to call bankers, lawyers, doctors, accountants, insurance agents [as witnesses], but they are not here especially when a crime is committed especially out there in South Central Los

114. See, e.g., SHAKUR, *supra* note 44, at 139.

115. The education and selection of the jury is emphasized in at least one prosecutor's guide to gang prosecution, along with other techniques used in this case, including the use of investigating officers as gang experts, developing information from jailhouse informants, and the use of gang paraphernalia such as scrapbooks and photographs. Michael Genelin & Loren Naimen, *Prosecuting Gang Homicides*, PROSECUTOR'S NOTEBOOK, VOL. 10 (Cal. District Attorneys' Ass'n) 1988, at 3, 5-7.

116. Reporter's Transcript at 971, *People v. Williams*, 940 P.2d 710 (Cal. 1997) (S004720).

117. *Id.* at 3679.

118. *Id.* at 4154, 4334, 4505, 4655-56, 4794.

Angeles.”¹¹⁹ “They are going to be different ethnic, different ethical, different moral, different cultural, different societal values.”¹²⁰ The prosecutor told a juror from a middle class area, San Pedro: “In fact, coming from San Pedro and San Pedro High, I would say I know they are going to be from a different background than you. They may be persons that you consider to be morally bad, totally different lifestyle”¹²¹

Thus, from the beginning, the prosecutor searched for and reinforced whatever in the jurors’ identity separated them from the people of South Central, maintaining not just their separation, their sense of the Blacks from South Central as the other, but also reinforcing separation within a hierarchy.¹²² The othering in the courtroom simply reinforced the othering in the culture.

As Judith Butler described the first trial of the officers who beat Rodney King, “[T]he trial calls to be read not only as instruction in racist modes of seeing but as a repeated and ritualistic production of blackness (a further instance of what Ruth Gilmore, in describing the video beating, calls an act of ‘nation building’).”¹²³ The prosecutor’s repeated distancing of the people of the neighborhood constituted precisely that type of production of Blackness,

119. *Id.* at 4439.

120. *Id.* at 4857.

121. *Id.* at 5002, 5352, 5574, 5580. Similarly, Robert Gooding-Williams describes the Simi Valley trial of the officers who beat Rodney King:

By casting “the likes of Rodney King” as external threats to American society, the defense attorneys encouraged the citizens of a mostly white jury to disown their knowledge of a history of pain and injustice that has created American society and that remains essential to its identity. In effect, these lawyers promoted a form of bad faith that enabled the Simi Valley jurors to construct black Americans as “others,” and then to perpetuate the history of pain and injustice from which they had so conveniently separated themselves. We should criticize and attack the prejudices which fostered this bad faith, if only to make it more difficult in the future.

Gooding-Williams, *supra* note 15, at 169.

122. Ishmael Reed asks, “Why are Black faces and bodies used to illustrate most social pathologies—illegitimacy, crime, illiteracy, alcoholism, drug addiction, spousal abuse, prostitution, AIDS, family abandonment, and abuse of the elderly—when there are millions more whites involved in those activities than Blacks?” Franklin, II, *supra* note 28, at 17 (quoting Ishmael Reed).

123. Butler, *supra* note 16, at 16.

reminding the middle class, mainly non-Black jurors that these people are different from you and me.¹²⁴

2. *Policing the Jury*

The prosecutor in this case used peremptory challenges to remove six Black potential jurors from a jury panel of which the trial court judged the "great majority . . . [to be] Caucasian."¹²⁵ The prosecutor's removal of one of the Black potential jurors reveals the way that the state's reading of ordinary black man as gang member was useful to the state in keeping the jury predominantly white. At the time of the trial, potential juror Frederick Bussey was a married man who worked as a computer specialist for the State of California. He had attended college, and played on the football team until graduating from high school ten years prior to the trial.¹²⁶ He testified on voir dire that his only contact with gang members had been as a victim of armed robbery.¹²⁷

In responding to the defense claim under *Batson v. Kentucky*¹²⁸ that the prosecution had impermissibly used peremptory challenges for six potential Black jurors, the prosecutor was required to present race-neutral justifications for each challenge. The trial judge accepted as race-neutral the prosecutor's explanation that the removal of Frederick Bussey was based on Mr. Bussey's attendance at Morningside High School, which the prosecutor characterized as

124. According to Cornel West, "Both liberals and conservatives fail to see that the presence and predicaments of black people are neither additions to nor defections from American life, but rather *constitutive elements of that life*." West, *supra* note 12, at 256. Yet Monster Cody refers to all whites as "Americans." SHAKUR, *supra* note 44, at 139.

125. Reporter's Transcript at 6143A, 6149A, *Williams* (S004720). When required by the trial judge to provide "specific reasons" for the challenges, *id.* at 6147A, the prosecutor put forth what he believed, and the state argues today, are sufficiently race-neutral explanations that no error was established under either *Batson v. Kentucky*, 476 U.S. 79 (1986), or *People v. Wheeler*, 583 P.2d 748, 766 (Cal. 1978). The adequacy of the prosecutor's explanations as to two of the jurors is one of the thirty-seven defense arguments rejected by the California Supreme Court in the automatic appeal of the judgment against Barry Williams. It is also an issue included within the pending habeas petition.

126. Reporter's Transcript at 5680-5744, *Williams* (S004720).

127. *Id.* at 5711.

128. *Batson*, 476 U.S. at 79. The leading California case, *People v. Wheeler*, 583 P.2d 748 (Cal. 1978), is based on the Sixth Amendment and Article I, §16 of the California Constitution.

being in a Blood gang area.¹²⁹ On appeal, the Attorney General is exploiting the deep reservoir of white knowledge of Black men as criminals by claiming (without citation to the record or any other authority) that Bussey “had been a long time associate of Blood gang members.”¹³⁰ However, Mr. Bussey had stated unequivocally on voir dire that he did not associate with anyone in gangs at Morningside High School and that members of the Blood gang had never pressured him to join.¹³¹ Mr. Bussey stated that there were gang members at his high school, and that when he attended high school (in the early 1970s) the non-gang members would get together and get rid of them.¹³² In fact, the only contact that Mr. Bussey remembered was when some gang members stole his leather jacket from him at gunpoint.¹³³

The fact that Frederick Bussey attended the same high school as members of a Black gang tells something about his class, race, and geographic placement, but it is not evidence of bias that favors that gang. But the State of California saw him and still sees him as a Blood fellow traveler or wannabe. This is not only a mechanism to ensure that the defendant, Barry Williams, was seen through white eyes, was read through white consciousness, it was also a manifestation of the white eye gazing at a Black man, even a mild-mannered civil service worker, family man, and seeing/recognizing/imagining a gang member.¹³⁴

129. The prosecutor explained:

[H]e had a very low guilt rating because of his Blood association at Morningside High School. He went to Morningside High School and Morningside High School is a blood gang area, and that would lead me to believe he would—he would be more sympathetic toward blood gang members, and the defendant is a blood gang member.

Reporter’s Transcript at 6144A, *Williams* (S004720).

130. Respondent’s Brief at 87, *Williams* (S004720).

131. Reporter’s Transcript at 5716-17, *Williams* (S004720).

132. *Id.* at 5716-17.

133. *Id.* at 5710-11.

134. The other peremptory contested on appeal was the prosecution’s challenge to Black juror Mary A. Smith. The prosecutor was required to provide a “clear and reasonably specific” race-neutral explanation; his explanation regarding Mary A. Smith was that this “was a flat out mistake.” *Id.* at 6147A. On appeal, the State proffered two lines of defense: first, we all make mistakes; and second, this must have been a mistake because “juror Smith was a police officer and probably a juror a prosecutor [sic] would wish to keep on the jury.” Respondent’s Brief at 85-86, *Williams* (S004720). The law sensibly permits trial counsel to justify excusals with racially neutral reasons for wanting the person off

In defending the pattern of disproportionate challenges to Black potential jurors, the state makes the classic move of what Peller and Crenshaw call “disaggregation,” claiming that “race was simply not an issue in the case: appellant and all the percipient witnesses and the victims were black.”¹³⁵ Later the Attorney General returns to the same theme: “Appellant is black. The victims were black. Most of the witnesses were black. There was no logical reason for a prosecutor not to want blacks on the jury.”¹³⁶ Here the state is making the unseemly argument that a prosecutor’s effort to maintain a largely white jury would have no impact because the underlying events occurred entirely within a Black community. The state does not notice the whiteness of the police officers, who testified extensively as to the investigation of these crimes and as “gang experts.” The State does not notice the whiteness of the judge and the prosecutor, the representative of the People.

The prosecutor’s file suggests that race—specifically Blackness—was, of course, near the forefront of his mind. Indeed, the prosecutor represented the People from an unexamined position of whiteness.¹³⁷ With regard to prospective juror Vera Lipscomb, who was Black, the prosecutor underlined the name of her city of residence, Compton. In answer to the prosecution’s questions, Lipscomb testified on voir dire that her children were not members of any gang.¹³⁸ The prosecutor attached a note to her jury questionnaire: “Check the note on this one—can’t believe a 20s Black in Compton *wouldn’t* be a gang member.”¹³⁹ Prospective juror Ronald Barnes listed his race as Black on the juror questionnaire.¹⁴⁰ The prosecutor wrote that he believed the prospective juror was a “street ‘person’ dressed in a suit.”¹⁴¹ The prosecutor wrote “Run Him,” meaning do a computerized criminal history search.

the jury; the State here took the opposite tack, using reasons the People might have wanted this juror *on* the jury. *But see* *People v. Williams*, 940 P.2d 710, 734-35 (Cal. 1997) (finding no error).

135. Respondent’s Brief at 86, *Williams* (S004720).

136. *Id.* at 87.

137. For more on the privilege of whiteness, see STEPHANIE M. WILDMAN ET AL., *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996).

138. Reporter’s Transcript at 1601, *Williams* (S004720).

139. Petition for Habeas Corpus, Exhibit 276 at 1, *In re Williams* (S050166).

140. *Id.* at 7.

141. *Id.*

Prospective juror Edward L. King listed his race as Black.¹⁴² The prosecutor wrote “When In Doubt/ Blow Him Out.”¹⁴³ The prosecutor wrote “stupid” on the questionnaire of one prospective Black juror, Velma Matthews, whose questionnaire showed that she had graduated from Compton High, attended Compton College, and that she had been working for the same employer for thirteen years.¹⁴⁴ The prosecutor wrote that another prospective Black juror was “too young and stupid”¹⁴⁵ although the questionnaire also showed that the juror was working as an Accountant/Supervisor at UCLA and read two daily newspapers.¹⁴⁶ White potential jurors of the same age (early 20s) had no notation about their age, and two of them were in fact seated on the jury.¹⁴⁷ The prosecutor wrote the word “stupid” on the questionnaire of another Black prospective juror, who was a high school graduate, watched *60 Minutes*, and listed “reading” as one of the favorite activities for her spare time.¹⁴⁸ The prosecutor wrote “good Black juror” on the questionnaire of a Black juror who lived in Rolling Hills on the Palos Verdes Peninsula, a highly affluent neighborhood.¹⁴⁹ No jurors were identified as “good white jurors.” No white jurors were identified as “stupid.” The state’s official position of colorblindness is the false front or cover story¹⁵⁰ for racialized jury selection. Thus was the jury instructed, selected, and seated.

142. *Id.* at 8.

143. *Id.*

144. *Id.* at 9-10.

145. Petition for Habeas Corpus, Exhibit 276 at 11, *In re Williams* (S050166).

146. *Id.*

147. *Id.* at 14-15.

148. *Id.* at 16.

149. *Id.* at 17.

150. “Cover stories cover or mask what they make invisible with an alternative presence; a presence that redirects our attention, that covers or makes absent what has to remain unseen if the *seen* is to function as the scene for a different drama. One story provides a cover that allows another story (or stories) to slink out of sight.” Wahneema Lubiano, *Black Ladies, Welfare Queens, and State Minstrels: Ideological War by Narrative Means*, in *RACE-ING JUSTICE*, *supra* note 19, at 324.

E. Climate of Fear

Members of the jury (like the attorneys and court officers) traveled many miles from predominantly white suburbs to the courthouse in Compton. Compton is a largely black city in the midst of South Central Los Angeles. The Compton courthouse is a sort of fort, a multi-story outpost of bureaucracy and criminal justice processing looming up in the midst of flat, low, Black—and today, Latino—South Central. Many of the streets on the approach are lined with well-maintained homes, but they are modest, and white faces are rare. Participants in proceedings in the Compton Courthouse are routinely told not to wander far afield. The metal detectors are welcome. One juror described the courthouse as in a “terrible” neighborhood, where she always parked in a supermarket lot for safety.¹⁵¹

The jurors entered a frightening world every day of the trial, even without leaving the courthouse.¹⁵² Jurors in the case believed that two to five gang members attended the trial regularly and attempted to influence the trial on behalf of Barry Williams by intimidating witnesses and jurors.¹⁵³ Jurors also believed that gang members rode the elevators in the courthouse with the jurors in a purposeful attempt to intimidate them on behalf of Barry Williams.¹⁵⁴ Although the identity of the spectators is unknown, jurors found out later that an intimidating presence in the elevator was not, as they assumed during the trial, a gang associate of Barry Williams attempting to intimidate them on Williams’ behalf, but rather a plain clothes officer.¹⁵⁵

Fear generated by the setting was the backdrop for the fear expressed by participants in the trial. Evidence of a witness’ subjective fears about testifying is not necessarily relevant to the defendant’s guilt or innocence. While it may, in theory, help to explain the witness’ demeanor, the potential for unfair prejudice to the defendant is enormous.¹⁵⁶ Therefore, “threat evidence”

151. Petition for Habeas Corpus, Exhibit 221 at 2, *In re Williams* (S050166).

152. A crime scene visit was ruled out as too dangerous in the Dunn case. Jurors went in the Green Meadow Park trial, accompanied by extra security forces. *Id.* at 1.

153. Petition for Habeas Corpus at 394, Exhibit 249, *In re Williams* (S050166).

154. *Id.*

155. *Id.*

156. The search for truth about the charged crimes is easily compromised by evidence of uncharged crimes, such as threats implicit in a witness’ stated fear of a defendant. It is counterintuitive and difficult for jurors (or anyone else) to consider the fact that a witness has received threats, or is

must serve “an important purpose” before it will be admitted in federal courts.¹⁵⁷ Federal courts have found that even a modest, brief portion of testimony from a witness about his or her fear about testifying can deny the defendant a fair trial.¹⁵⁸

Barry Williams’ trials were awash in fear. In the Jerome Dunn case four prosecution witnesses were allowed to testify that they feared retaliation for their testimony.¹⁵⁹ John Gardner testified that he and his mother were relocated because of his testimony.¹⁶⁰ The police officer who arranged for Gardner’s testimony was allowed to testify that Gardner was concerned for his safety, and that Gardner was relocated because he “didn’t want to get killed” and he “was really concerned about the safety of his family.”¹⁶¹ Another police officer testified that he was concerned about repeated phone calls to Patricia Lewis, the main witness,¹⁶² and Patricia Lewis herself testified repeatedly about

afraid to testify, only when evaluating the witness’ credibility, while simultaneously ignoring the same fact on the question of the defendant’s guilt or innocence.

157. *United States v. Qamar*, 671 F.2d 732, 736 (2d Cir. 1982).

158. For example, in *Dudley v. Duckworth*, 854 F.2d 967 (7th Cir. 1988), the Seventh Circuit found that Dudley was deprived of a fair trial because a prosecution witness (a former codefendant testifying in return for a reduced sentence) was allowed to explain his nervousness on the stand by referring to threatening phone calls “he had received . . . the night before which were intended for him and his mother. He did not know who made the phone calls.” *Id.* at 969. The witness then testified that he was afraid that whoever had made the phone calls might threaten or harm his mother because of his (the witness’) testimony. *Id.* Despite the “impressive” evidence of Dudley’s guilt, the court found that the mere mention of the threatening phone calls required reversal. *Id.* at 972. The threats were highly prejudicial and not probative because they had not been linked sufficiently to the defendant yet “could only reflect adversely on [him].” *Id.* at 971-72.

Similarly, in *Clark v. Duckworth*, 906 F.2d 1174 (7th Cir. 1990), a prosecution witness “told the jury that he had received threats to prevent him from testifying.” *Id.* at 1176. “This testimony may have led the jury to believe that [the defendant], ultimately, was behind the threats, despite the fact that the government presented no evidence to support this implication.” *Id.* at 1177.

159. Reporter’s Transcript at 7046, 7180-81, 7671, 7810, *Williams* (S004720). This was permitted over the trial court’s initial ruling that such innuendo was too prejudicial, *id.* at 6567, but the climate of fear engulfing this case drew the judge into acquiescence.

160. *Id.* at 7046.

161. *Id.* at 7165, 7180-81.

162. *Id.* at 8107-08.

having received threatening phone calls.¹⁶³ Informant Kenneth Simmons was questioned about whether he was scared to be testifying.¹⁶⁴

In the Green Meadow Park case, jailhouse informant Arthur Cox was permitted to testify that the prosecution had housed him at “a secret location” because he was “[i]n danger of [losing his] life.”¹⁶⁵ The prosecution solicited Cox’s testimony that he was nervous because he was putting his life on the line by fulfilling his part of the deal to testify.¹⁶⁶ Kenneth Gardner testified that he did not identify Williams immediately after the crime because he was still living in the neighborhood and did not want to jeopardize his family, and that he was afraid of gang retaliation.¹⁶⁷ Lea Stoneham testified that she had not identified Williams earlier because she “like[d] living” and discussed at length her fears of retaliation.¹⁶⁸ Steve Wallace testified that he was afraid of Williams.¹⁶⁹ The prosecution emphasized that fear in closing argument: “[T]here is one common bond between everyone who testified on behalf of the prosecution: It’s the fear that permeates each and every witness. More than one witness expressed fear in this case. And Steve Wallace stated the basis for that fear . . . was the defendant, Big Time, Barry Williams.”¹⁷⁰

Surely, on this record, fear of Barry Williams, and horror at all these uncharged threats explain the jurors’ relatively speedy finding of guilt. But consider the logic of the evidence of fear and threats. Under the prosecution theory of the cases, any Blood was by definition willing to do anything for another Blood, including risking death and killing. Is that properly relevant to Barry Williams’ guilt or innocence as to the murders charged? Indeed, would friends and associates of an innocent defendant be less willing, even eager, to threaten witnesses than the friends and associates of a guilty one? Asked another way, would a witness whose testimony was known to be false be less likely to be threatened than a witness whose testimony was known to be true?

163. *Id.* at 7725, 7810.

164. *Id.* at 7674.

165. Reporter’s Transcript at 132-33, Green Meadow Park case, *Williams* (S004720).

166. *Id.* at 167-68.

167. *Id.* at 267, 277, 286, 294.

168. *Id.* at 624-27.

169. *Id.* at 1045.

170. *Id.* at 1181.

In fact, Steve Wallace's and the others' testimony was not wrapped in fear as much as in gang warfare. Prosecution witness Steve Wallace has now provided a signed declaration in which he acknowledges that his identifications of Barry Williams were lies and that he instructed the other witnesses (also Park Boy members or sympathizers) to falsely identify Barry Williams.¹⁷¹ Wallace and the others were not simply testifying about gangbanging; their testimony was itself gangbanging with perjury as the deadly weapon. Naturally inconsistencies are one of the dangers of concocting perjury; in this case, the inconsistencies of the rival gang witnesses, the jailhouse informants, and the witnesses from the neighborhood were all explained by repeated references to fear of Barry Williams. We believe that the prosecution coached the witnesses to explain all inconsistencies between trial testimony and pretrial statements by claiming fear of the defendant.¹⁷² The neighbor, Kenneth Gardner, has now signed a declaration recanting his testimony; he did not really see Barry Williams, but he had been assured by the police officer and the prosecutor that they had the right guy.¹⁷³ The inconsistencies were in fact caused by the neighbor changing his testimony to fit the D.A.'s theory, but the jurors were told that his changed stories, like all the others, were caused by fear of Big Time, Barry Williams.¹⁷⁴

171. The declaration states:

I did not see Barry at the park that night, but I told the police that I did. The Green Meadows Park Boys got together and decided that we would put the blame on Barry Williams. We wanted to do that because we regarded Barry as the leader of the 89 Family Bloods. We thought that we would use the police to get Barry off the streets. Then we would go after the rest of the 89 Family Bloods. The idea was to cut off the head and the body would die. We viewed Barry as the head. We wanted to get Barry off the streets. . . . Chauncey Walker and I both took an active role in deciding to put it on the 89 Family and Barry. Chauncey and I did not ask "What did you see." We told them that Barry did it. We'd say, "It was Barry." We would imply, "You are going to say this or else." We coached our stories on. We got them together. . . . Our objective was to defeat Barry and his friends by any means necessary. It was a straight-up frame-up.

Petition for Habeas Corpus, Exhibit 107 at 10-11, *In re Williams* (S050166).

172. Petition for Habeas Corpus at 549, *In re Williams* (S050166).

173. Petition for Habeas Corpus, Exhibit 154, *In re Williams* (S050166).

174. Petition for Habeas Corpus at 548-49, *In re Williams* (S050166).

By the end of the trial, jurors literally ran to their cars and drove home as quickly as possible.¹⁷⁵

F. Gang on Trial

In its pretrial severance decision in Barry Williams' case, the California Supreme Court recognized that "evidence of common gang membership . . . is arguably of limited probative value while creating a significant danger of unnecessary prejudice."¹⁷⁶ As the California Court of Appeals has recognized, "It is fair to say that when the word 'gang' is used in Los Angeles County, one does not have visions of the characters from the 'Our Little Gang' series."¹⁷⁷ However, in California and elsewhere, "nothing bars evidence of gang affiliation that is directly relevant to a material issue."¹⁷⁸ Naturally prosecutors recognize that "interlinking gang evidence with the crime is a force for conviction."¹⁷⁹ This case is an example of a prosecutor succeeding in bringing gang warfare into every aspect of the case. The prosecutor explained Jerome Dunn's death in misleading and inaccurate descriptions of gang warfare, and saturated the trial with references to gang nicknames and paraphernalia, extremely effectively.¹⁸⁰

The prosecution's theory about the murder of Jerome Dunn was (and is) that a Blood (Barry Williams) killed Jerome Dunn because Dunn was a

175. One of the jurors in the case described most of the jurors running to their cars after the trial ended to get home as quickly as possible because they were scared. Petition for Habeas Corpus, Exhibit 221, *In re Williams* (S050166).

176. *Williams v. Super. Ct.*, 683 P.2d 699, 705 (Cal. 1984).

177. *People v. Perez*, 114 Cal. App. 3d 470, 479 (1981) (reversing non-gang related conviction because of prejudicial impact of evidence of the defendant's gang affiliation).

178. *People v. Tuilaepa*, 842 P.2d 1142, 1152 (Cal. 1992); *People v. Olguin*, 31 Cal. App. 4th 1355, 1371 (1994) (upholding admission of extensive rap lyrics allegedly written by defendant, including "Well make you bleed will let you know that were from D.S.G Cause Ill be the vato you be having in our dreams . . . you wake up all shety and seaty and then you relize that Im worsor than Fredy . . .").

179. Genelin & Naimen, *supra* note 115, at 5-7.

180. See, e.g., Appellant's Opening Brief at 56-80, *Williams* (S004720). See also *People v. Champion*, 891 P.2d 93 (Cal. 1995) (finding that even if error, no prejudice resulted from the jury being told that the defendant's gang nicknames were "Evil" and "Treacherous"); *People v. Saucedo*, 33 Cal. App. 4th 1230, 1239 (1995) (upholding admission of evidence that defendant's gang name was "Capone").

Crip. Because there was no competent evidence that Dunn was a gang member, and no evidence that anyone in the van or Barry Williams knew Dunn, the key to the prosecutor's theory of relevance was to establish that Dunn was dressed like a Crip, which would suggest that the perpetrator believed Dunn was a Crip.¹⁸¹ Several problems emerge from this aspect of the case. First, the LAPD had lost Dunn's clothes.¹⁸² In the absence of the actual clothing, one of the investigating officers, Detective Jerry C. Johnson of the LAPD CRASH unit, testified that Dunn had been wearing a blue knit cap and a blue jacket, which Johnson testified was "typical dress" for a member of the Avalon Gardens Crips, and that Dunn "was not wearing any red colors that could lead to challenge."¹⁸³ None of this sounds especially controversial in light of what the world now knows about the color preferences of Bloods and Crips. But none of this was true the night of the shooting. At that time, gang members showed their affiliation with blue and red bandannas, but wore clothing of both colors.¹⁸⁴ And, indeed, Dunn was wearing a jacket that was blue on the outside with a visible red lining. But the prosecutor argued to the jury that Jerome Dunn was killed because he was wearing blue.¹⁸⁵ Beyond the confusion about the colors, the prosecution's theory that Dunn was killed by Bloods because he was dressed like a Crip disregards the reality that a high percentage of gang fighting involving Crips—thirty to fifty percent—was and is Crip-on-Crip violence.¹⁸⁶

Beyond using the gang evidence to explain the killing, the prosecutor used gang slang and nicknames over and over. For example, the prosecution asked one witness whether he knew Bongo, Cassanova, Duke and Sleepy,¹⁸⁷

181. Reporter's Transcript at 64-65, 71-72, *Williams* (S004720).

182. This is one of the examples showing that *People v. Simpson*, No. BA097211 (Super. Ct. of Los Angeles Cty. 1995), bore no resemblance to typical criminal trials. In spite of their relevance to a crucial aspect of the case, nobody paid much attention to the missing clothes in this trial.

183. Reporter's Transcript at 6924, *Williams* (S004720).

184. Petition for Habeas Corpus at 195, *In re Williams* (S050166). Indeed, arrest records reveal that at the time of this shooting, many young men identified by the police as Bloods wore blue—either pants, shirts, or even shoes—at the time of their arrests. *Id.* at 221-223.

185. Reporter's Transcript at 8266, 8293, *Williams* (S004720).

186. See SPERGEL, *supra* note 47, at 33 (citation omitted) ("Fights between CRIP gangs are reported to have accounted for one-third to one-half of all gang-versus-gang incidents in various Los Angeles jurisdictions.").

187. Reporter's Transcript at 7605-06, *Williams* (S004720).

although these people were not tied to anyone in the case, and then reminded the jurors of those names in closing argument.¹⁸⁸ Aside from the testimony of the investigating officers as gang experts about gang warfare, disputed turf, and colors, the prosecution at the penalty trial was allowed to introduce various gang memorabilia seized from Barry Williams' room, including a poster from his bedroom with gang names on it, a book (from 1977) with names in it, and a photo album with names.¹⁸⁹ The prosecutor described the items in his cross-examination of Barry Williams dozens of times, including such names as "Mr. Loco," "Baby Slaughter," and "Mr. Butcher" that were inscribed on the poster or in the notebook or photo album.¹⁹⁰

The most damaging nickname testimony of all was that related to Barry Williams himself; the prosecutor repeatedly elicited testimony that Barry Williams was known as "Big Time." According to the prosecutor, the nickname demonstrated that Barry Williams was "the leader" of the 89 Family.¹⁹¹ The prosecutor argued, without evidentiary foundation, that any use of a nickname demonstrated a pattern of criminal behavior, and he implied that the name Big Time suggested arrogance and flaunting of responsibility for criminal acts.¹⁹² The prosecutor emphasized this by repeating the nickname at least twenty-nine times during closing arguments in the two cases.¹⁹³

G. Animals and Snitches

The prosecutor also used animal epithets. Referring to the people in the van, the prosecutor argued, "They are a pack of laughing hyenas out to kill someone. It makes no difference who the Crip is. He's blue. Kill the blue."¹⁹⁴

188. *Id.* at 8386.

189. *Id.* at 9113-14, 9116.

190. *Id.* at 9149, 9151, 9154.

191. *Id.* at 6570.

192. *Id.* at 8290, 8299.

193. Reporter's Transcript at 1165 (three times), 1168 (eight times), 1170 (five times), 1172 (six times), 1175, 1181, 1211, Green Meadow Park case, *Williams* (S004720); Reporter's Transcript at 8287, 8289, 8290 (two times), *Williams* (S004720).

194. Reporter's Transcript at 8284, *Williams* (S004720). The prosecutor twice referred to the group in the van as "laughing hyenas." *Id.* at 8366. The California Supreme Court rejected the defense claim related to this argument. *People v. Williams*, 940 P.2d 710, 756 (Cal. 1997).

The animal image is also racialized, especially when applied to the group of gang members. In describing the Bernard Goetz trial, George Fletcher has pointed out that Bernard Goetz's attorney "played on the racial factor . . . relentlessly attacking the 'gang of four,' 'the predators' on society, calling them 'vultures' and 'savages.'"¹⁹⁵ The California Supreme Court has found "no impropriety" in a prosecutor's extended argument comparing a Black defendant's appearance in court as being like a Bengal tiger in captivity, in a zoo, compared to the dangerousness of the tiger in its natural habitat, or of the defendant in his natural habitat.¹⁹⁶ The court soundly rejected the defendant's argument regarding a racial message: "Defendant's complaint that the Bengal tiger argument was a thinly veiled racist allusion does not withstand scrutiny. Likening a vicious murderer to a wild animal does not invoke racial overtones. Indeed, the circumstances of the murder might have justified even more opprobrious epithets."¹⁹⁷ The court's minimizing of course ignores the role that animal epithets have in converting the accused into a convicted murderer.¹⁹⁸

195. See FLETCHER, *supra* note 111, at 206. In *Darden v. Wainwright*, 477 U.S. 168 (1986), the Supreme Court found the prosecutor's reference to the defendant as an "animal . . . [that] shouldn't be out of his cell unless he has a leash on him" to be improper but harmless. *Id.* at 180 n.11-12. See also *Miller v. State*, 177 S.E.2d 253 (Ga. 1970) (upholding death judgment for rape where prosecutor characterized the defendant as "a brute, beast, an animal, and a mad dog who did not deserve to live"); *Salvador v. United States*, 505 F.2d 1348, 1353 (8th Cir. 1974) (upholding conviction where prosecutor responded to defense argument that police arrested the defendants at random from a group of blacks in an apartment—"we are not here because some police officer reached into a tree full of blackbirds and pulled two of them out"—an argument characterized by the court as "unfortunate" but made by a prosecutor the court assures us "intended no appeal to racial prejudice"); *People v. Avena*, 916 P.2d 1000, 1028 (Cal. 1996) (noting that prosecutor referred to defendant as a killing machine, a tiger, and a cancer that must be removed).

196. *People v. Duncan*, 810 P.2d 131, 142 (Cal. 1991).

197. *Id.* (citing with approval other cases in which defendants were called a snake in the jungle, evil incarnate, or Adolf Hitler); *People v. Hawkins*, 897 F.2d 574, 598 (Cal. 1995) (finding no error in describing defendant as "coiled like a snake" and in claiming that sentencing him to life in prison [in lieu of death] would be like "putting a rabid dog in the pound"); *People v. Edelbacher*, 766 P.2d 1, 29-30 (Cal. 1989) (calling defendant "a snake in the jungle" was "vigorous but fair"); *People v. Thompson*, 753 P.2d 37, 74 (Cal. 1988) (Mosk, J., concurring and dissenting) (noting that prosecutor compared defendant unfavorably to "animals in the jungle"); *People v. Baker*, 207 Cal. App. 2d 717, 723 (1962) (finding that prosecutor's reference to defendants as "animals" who appeared differently in court than they did in the "jungle" was not misconduct). But see *People v. Talle*, 111 Cal. App. 2d 650, 676 (1952) (finding error in, among other comments, repeated characterization of the defendant as a "despicable beast").

198. Cf. FANON, *supra* note 24, at 113 ("My body was given back to me sprawled out, distorted, recolored, clad in mourning in that white winter day. The Negro is an animal, the Negro is bad, the Negro is mean, the Negro is ugly; look, a nigger. . .").

Unbeknownst to the jury, a main prosecution witness, Arthur Cox, was a repeated informant, often loaded on crack, who had been a suspect on numerous murders, including the Green Meadow Park shooting, and who was suspected in the death by fire of his two children, living with Cox and their mother in an unheated garage.¹⁹⁹ Mike Davis characterizes promised stepped-up LAPD and federal intelligence against the gangs as “not so much a matter of a romanticized policy of deep-cover infiltration of the gangs, as simply a ruthless escalation of police pressure on pathetic drug users who are friends or kin of gang members.”²⁰⁰ Jerome Miller condemns the practice even more strongly: “No single tactic of law enforcement has contributed more to violence in the inner city than the practice of seeing the streets with informers and offering deals to ‘snitches.’ It is no small matter. It is no coincidence that wanton violence exploded in some cities simultaneously with the massive use of informers in the inner cities.”²⁰¹ Jerome Miller charges that “relying on informers threatens and eventually cripples much more than criminal enterprise. It erodes whatever social bonds exist in families in the community, or on the streets—loyalties which, in past years, kept violence within bounds.”²⁰² In this case, for example, the defense presented testimony from Arthur Cox’ brother Ernest that Arthur had been studying Barry Williams’ case in order to save himself from prison time by coming up with something to say against Barry Williams.²⁰³ Jerome Miller gives us a powerful metaphor: “Our inner cities now resonate strongly with the destructive experiences of other societies warped by informers and snitches, the most obvious recent example being Stasi-ridden East Germany.”²⁰⁴ In addition to the social destruction wreaked by the widespread use of informants, the accuracy of trials conducted with informants also suffers, as dramatically evidenced by this case.

IV. CONCLUSION

199. Petition for Habeas Corpus at 100-08, *In re Williams* (S050166).

200. Davis, *supra* note 64, at 147.

201. MILLER, *supra* note 25, at 102. Miller reports that the federal government alone paid approximately half a billion dollars to informers from 1985 to 1993. *Id.*

202. *Id.* at 102.

203. Reporter’s Transcript at 8139-40, *Williams* (S004720).

204. MILLER, *supra* note 25, at 103 (footnote omitted).

This case is replete with perjury, cynical jailhouse snitches, questionable prosecution tactics, undisclosed evidence, and shaky witnesses. In many ways, the theme of mistaken identity is throughout. The crimes were real, as was the identification of gang warfare. But the suspects became somehow fungible; the group identity overwhelmed the individual on trial. Race mattered because the breakdown in justice was in the identification of this particular young Black man as the accused. The racialized image of Barry Williams as a Blood leader was sufficient justification for prosecutors to convince themselves that questionable tactics were being used in the service of justice, and to convince the jurors to quickly convict Barry Williams and sentence him to death.

Gangs are a social phenomenon, in which the individual's identity is linked (often brutally) to the group. At least in theory criminal trials focus on individual culpability. But in this case individual guilt or innocence became hazy and faded behind the wall of group identity and group guilt. For example, my revelation at the outset that witness Patricia Lewis' house was sprayed with bullets prior to Barry Williams' trial undoubtedly set up serious skepticism about my claims of innocence. Although Barry Williams was never charged with having done that, somebody did, logically someone associated with the 89th Street Family Bloods. The 89th Street Family Bloods are implicated by their association with Barry Williams, and he is implicated by his association with them.

Is it arrogant to insist upon innocence, when the chief prosecution witness had her house shot up apparently because of her testimony? Actual innocence is never a technicality, no matter what the identity of the person on trial. The crucial questions in the Barry Williams cases were who shot Jerome Dunn and who shot Donald Billingsley. The weak link in the evidence was that it was Barry Williams, not any other 89th Street Family Blood. Given that, how does any retaliation taken by the 89th Street Family Blood add to the reliability of the identification of the individual, Barry Williams? Would gang members who knew Mrs. Lewis' identification of Barry Williams to be false be any less likely to try to pressure her not to testify?

Artist Daniel Tisdale has created a piece entitled "America's Most Wanted," which consists of multiple enlargements of police mug shots of African Americans. Kobena Mercer explains that Tisdale's piece was created

in order to make the point that what the racial discourse of the stereotype represents is precisely an image of America's most *unwanted*. The effect is to overexpose the hidden fears that fuel the fantasmatic logic whereby the black male is desired

by the criminal justice system to the extent that he is undesired by the social system as a whole. . . . Because they could be pictures of any black man—indeed, of every black man in the abstract—they are, in fact, pictures of no black man in particular. Hence, they literally become documentary evidence of “invisible men” whose subjection to police brutality is routinely glossed on the grounds of “mistaken identity.”²⁰⁵

Barry Williams’ case presents a legal version of that artwork, a courtroom production and performance of a multiplicity of mistaken identities, a courtroom production of a multiplicity of mistaken Black male identities.

Another applicable metaphor, crossing over from art to law, is the frame. This article presents the framing of Barry Williams, in the sense that the limits of the racialized narratives, images, and constructed truths used by the state and easily available to the jurors, situated and framed Barry Williams as a Blood leader, a framing far away from the frame for the innocent. These are the prior frames that tell us what we can expect a Black man to do, what we can expect a Black male gang member to do.²⁰⁶ And, of course, these frames tell us what to do to him.

The current figures on Black men and arrests and incarcerations are remarkable and chilling.²⁰⁷ In light of Barry Williams’ case and the easy disappearance of actual innocence behind the terrifying and powerful identity of Black gang leader, prosecutors’ boasts that they are now achieving extremely high clearance rates in gang homicides—over 95% in Los Angeles²⁰⁸—are chilling as well.

205. MERCER, *supra* note 34, at 163-64.

206. “[T]here are no readings, be they close or superficial, in which the construal of the evidence at hand does not admit of some prior framing by the prejudices (pre-judgments) of the reader.” Gooding-Williams, *supra* note 15, at 167 (footnote omitted).

207. See, e.g., Melvin L. Oliver et al., *Anatomy of a Rebellion: A Political-Economic Analysis*, in READING RODNEY KING, *supra* note 12, at 117, 127 (“25% of prime-working-age young black males (ages 18-35) are either in prison, in jail, on probation, or otherwise connected to the criminal-justice system.”) (footnote omitted). “Half of the prisoners in the United States (50.2 percent by January 1993) are African American, despite the fact that blacks represent only 12 percent of the American population.” WALKER ET AL., *supra* note 3, at 1 (citation omitted). “Minorities are arrested, stopped and questioned, and shot and killed by the police out of all proportion to their representation in the population.” *Id.* at 85.

208. SPERGEL, *supra* note 47, at 101.