

Tulsa Law Review

Volume 53 | Issue 2

Article 21

Winter 2018

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Recommended Citation

Eric J. Miller, *Breaking Windows as Corrective Justice: Impure Resistance in Urban Ghettos*, 53 *Tulsa L. Rev.* 313 (2018).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol53/iss2/21>

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BREAKING WINDOWS AS CORRECTIVE JUSTICE: IMPURE RESISTANCE IN URBAN GHETTOS

Eric J. Miller*

TOMMIE SHELBY, *DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM* (BELKNAP PRESS 2016). PP. 352. HARDCOVER \$29.95. PAPERBACK \$19.95.

INTRODUCTION

In 2014, in Ferguson, Missouri, police officer Darren Wilson shot and killed Michael Brown, an unarmed African American. There is a famous—or infamous—photograph from the protests that depicts Edward Crawford, a man in a stars-and-stripes t-shirt winding up to throw a tear gas canister, apparently at the police. On its face, this seems an unlawful act. But is it an unjustified one? Is Crawford engaged in a morally or politically justified act of resistance to the police (or the city or the state)? Is he a bystander, acting to protect his fellow residents from wrongful police intimidation? Or is he engaged in a morally and legally impermissible act of civil unrest?

At the very least, Crawford violates one social norm governing African American interactions with the police. In encountering the police, and so the state, members of the public are supposed to act in a deferential manner, even if the police act wrongfully in initiating the encounter (their motive is just to harass the civilian) or in the manner they conduct the encounter (they treat the civilian with contempt). Rather than acting on their moral duty to confront wrongdoing, the public is required to reassure the police, through their conduct and manner, that they recognize their subordinate status and the passivity it entails.¹

Nonetheless, the stakes in these encounters are not equally spread across the community. The background matters: the police think some communities are more accepting of their authority than others, and so are more willing to rely on the soft authority of the uniform and the badge, rather than the hard authority of the nightstick and the gun.² Socioeconomic elites are treated better than poor people of all races; African Americans, whatever their class, are treated worse. While poor Whites outside the dark ghetto are

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1. TOMMIE SHELBY, *DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM* 57–58, 218, 221 (2016).

2. See JOSEPH S. NYE, *THE POWERS TO LEAD* (2008), for a comparison of soft power and hard power as obverse tools for obtaining preferred outcomes.

likely to face police harassment,³ the police think they lack much soft authority in the ghetto and are more inclined to use the hard authority of physical force when confronted by dissent. Enforced passivity has a different cultural meaning for African Americans than it does for many Whites.⁴ In that case, justice or self-respect and authority conflict in ways that predictably lead to subordination and violence.

Such encounters violate corrective justice: harassment is a wrong against the civilian that stands uncorrected.⁵ Complaining, however, would have no effect on correcting the wrong and may even make it worse;⁶ there are strong consequentialist arguments that resisting the police is not worth the candle. Nonetheless, deference to unjust demands has an important moral cost. Civilians must participate in, rather than confront and resist, their victimhood. They forgo (perhaps by design) a vital aspect of dignity or self-respect: “recognizing oneself as a rational agent and a moral equal and valuing oneself accordingly.”⁷

Crawford’s action upends this narrative. In throwing the canister, he rejects the self-abnegating stance of deference to unjust authority. Even if his act does not make the situation more just, and even if his act is “impure” and can be understood in multiple, conflicting ways, his act of protest—and riots and civic disruption more generally—is a powerful expression of political resistance. Crawford asserts his moral agency in calling the police to account as a political equal by forcing an encounter on the police: the police cannot remain remote.⁸ Such confrontation may be the only way the police or the state are forced to address, confront or acknowledge socially marginalized individuals when other channels of communication are broken.

Tommie Shelby’s remarkable book, *Dark Ghettos: Injustice, Dissent, and Reform*, deepens and broadens these important questions. Contrasting our usual civic norms, which assume a background of a basically just society, with those of an unjust one, Shelby asks: what are our civic obligations to each other? Our basic duty of justice—whether bystander, perpetrator, or victim—requires us to call out and correct injustices. Shelby believes that our civic claims on others have a different source than the duty of natural justice and instead depend upon marshaling reciprocal obligations grounded in fairness and respect. If we tolerate conditions that are so unfair and so categorically undermine the self-respect of readily identifiable groups of people, then do we even have standing to call protesters like Crawford to account, or to condemn his actions as morally or politically wrongful? Shelby’s striking conclusion is that some societies place people in conditions so unjust that they are not, in fairness, answerable to the rest of us for acts of resistance to their social,

3. See, e.g., P.A.J. WADDINGTON, *POLICING CITIZENS: POLICE, POWER AND THE STATE* 42 (1999) (arguing that the police impose “[p]revailing social values . . . by routine harassment and intimidation”).

4. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317, 356 (1987) (suggesting that certain types of treatment “conveys a symbolic message to which the culture attaches racial significance”).

5. SHELBY, *supra* note 1, at 12–13, 25.

6. *Id.* at 263.

7. *Id.* at 98.

8. *Id.* at 258. See also Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 *OHIO ST. J. CRIM. L.* 133, 169 (2011) (describing the “array of relatively cheap informal means: protests, vigils, strikes, ad hoc rallies, and unexpected visits to legislators’ offices” available to the public to protest police activity).

legal, and political circumstances.

In this short review, I shall briefly consider Shelby's identification of some core features constitutive of a ghetto, and then the distinctive justice-based approach he takes to evaluating the continued existence of ghettos, before concluding with some remarks on the nature and success of his moral and political project.

RACIAL GHETTOS

Ghettos—metropolitan neighborhoods that significantly undermine the conditions in which individuals can flourish as equal members of the political community—should not exist. They should never have existed and must be eradicated as soon as possible.⁹ Shelby targets “dark ghettos”: places in which African Americans are both *segregated* on the basis of race and *clustered* in communities of “*concentrated disadvantage*.”¹⁰ These segregated and disadvantaged communities are ones whose populations, instead of flourishing, are congenitally depressed along multiple indices of well-being. Clustered disadvantage in ghettos imperils the residents' health, safety, education, and employment prospects, and more generally undermines their liberty and freedom of association, social equality, and economic fairness.¹¹

If racial ghettos ought not exist, as a normative matter, then we ought not be satisfied with technocratic and consequentialist solutions to the “problem” of the ghetto that stop short of ending it. Tolerating ghettos requires either ignoring the question of their continued existence or justifying it. The former approach, which Shelby calls the “medical model,” is narrowly targeted towards technocratic values such as efficiency in identifying and delivering services designed to ameliorate the social, economic, and cultural conditions of ghetto residents.¹² But the medical model, by ignoring the question of the continued existence of the ghetto, does not challenge the underlying structure of the society that produced the ghetto, but perpetuates it. Just as bad, the medical model (like the Ferguson police officer) treats ghetto residents as passive recipients of aid, rather than active participants in the polity and the project of resisting injustice. Both failures tend to encourage depictions of ghetto residents as pathological to the extent that they fail to live up to dominant social norms.¹³

The underlying problem, then, is how a liberal polity, one that adheres to concepts of both basic justice and a system of fair cooperation among its members, can contain ghettos. In failing to eradicate ghettos, American society is, Shelby implies, a society that tolerates injustice and unfair exploitation of some of its members. Those outside the ghetto participate in injustice to the extent that they do not promote a corrective-justice response: eradicating these racially segregated ghettos. Needless to say, that conclusion is likely to prove uncomfortable, especially as it leads through a series of further arguments to the conclusion that on occasion we do not have standing, in justice, to condemn the protests of people like Edward Crawford.

9. SHELBY, *supra* note 1, at 275.

10. *Id.* at 40.

11. *Id.* at 40–41, 67.

12. *Id.* at 2.

13. *Id.* at 14.

ASYMMETRIC POLITICAL OBLIGATIONS

Shelby's argument depends upon the distinction between our civic and natural obligations. Civic obligations derive from reciprocity; natural obligations do not. They derive from the bundles of rights that define our basic or non-social moral standing. Natural obligations, including many of the obligations of justice, thus stand apart from and beyond our civic obligations, though natural obligations may be enforced by our civic institutions.

Shelby's claim is that the normative illegitimacy of the ghetto—the fact that, in justice, they ought not exist—relieves ghetto residents of their civic obligations, though not their natural justice based ones. So certain types of non-violent criminal activity, such as protesting, resisting arrest, but also recreational drug use or shoplifting, may be permissible to remedy society's failure to provide jobs and services (such as transportation, healthcare, meaningful educational opportunities, and so on necessary for employment opportunities). Other criminal acts, such as violent assaults, may be prohibited because they violate natural justice, even if they do not breach civic duties. A weaker version of Shelby's argument is that those who tolerate the existence of these ghettos, through their malign neglect of these social institutions,¹⁴ have an under-acknowledged moral hand in perpetrating injustice and are estopped from using arguments based on civic duties to critique law-breaking activities of ghetto residents. These two arguments are not mutually inconsistent: some forms of resistance may be fully permitted, because civic norms do not apply, where others may be impermissible but not punishable, because those who would cast penal judgment lack civic standing to do so.

Civic obligations are social and reciprocal. Shelby reaches this conclusion by starting with the claim that society is a system of social cooperation over time. Social cooperation entails that each member of a given society makes demands of the others to participate in that society's shared public goals. Every society provides a set of political institutions that oversee this system of cooperation, and which promulgate and enforce various rules and principles that underpin association of its members. Under this system of cooperation, we can make demands on others, and they can make demands on us.¹⁵

That system is more or less fair based on the distribution of rights and duties among the members of that society. The system is fairer when everyone does their part and when everyone has a chance to participate in guiding those institutions that set the terms of cooperation. It is less fair when some shirk their duties or reap benefits that are disproportionate in comparison to their contribution, or when some are (consistently) excluded from participating in setting the terms of cooperation. One way in which society is less fair is when it precludes people from participating on the basis of race, gender, class, and so on.¹⁶

The system of reciprocity, however, entails an asymmetry when individuals fail to uphold their side of the social compact. People who do not work, who have families in circumstances that require others to participate in supporting the children, and who commit

14. See, e.g., MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* (1996).

15. SHELBY, *supra* note 1, at 213.

16. *Id.* at 35.

crimes are shirking their fair share and unfairly benefiting off of the rest of society.¹⁷ As a result, we have no obligation to support them and often an obligation to condemn or punish shirkers. One justification advanced for tolerating the ghetto is that those who reside within are people who fail to assimilate to the core cultural, moral, and political norms or “bourgeois values” of American society and who unjustly burden the rest of us with their bad behavior.¹⁸ Unless they uphold their end of the bargain, this argument claims, these shirkers have no moral standing to demand that we ameliorate their disadvantaged condition.

The core claim of *Dark Ghettos* is that the usual asymmetry does not apply and is in fact reversed. The existence of ghettos does not reveal the moral failure or political impotence of ghetto residents. Instead, Shelby advances the striking argument that American society is so unjust and oppressive of those at the bottom that the usual bonds of reciprocity fall away and the asymmetry flips. The marginalized and victimized are justifiably antagonistic to those unfair rules, laws, and social norms that marginalize and victimize them. In an unjust system, however, the failure to comply with formal and informal social norms is not necessarily a form of shirking, but often a form of resistance—even if poorly and “impurely” expressed—to an unfair social order and its goals and rules.¹⁹

The usual view is that urban ghettos are chaotic places in which moral and political values are unable to gain much traction. The technocratic response envisages what I have elsewhere called (following David Garland) “responsibilization”:²⁰ placing the onus on individuals to reform their character and conduct, rather than emphasizing the responsibility of the state for creating (through Jim Crow) and maintaining these segregated and disadvantaged communities.²¹ Once again, the attitude of those who advocate responsibilization is like that of the police officer. The state (and its well-off or “civilized” members) is thoroughly implicated in producing the conditions of injustice that render abject the circumstances of the ghetto resident. Nonetheless, the ghetto resident is supposed to comply with the values and ideologies that oppress her rather than challenge them (however piecemeal and inexpertly). As Shelby argues, this approach requires not only material injustice, but also the sort of self-abnegation destructive of self-respect.²²

Instead of regarding poor, urban, minority neighborhoods as disconnected from political mobilization and lacking political agents and agency, Shelby challenges us to regard these “dark ghettos” as hotbeds of political activity organized around resisting injustice. Given the limited social capital and ability to mobilize, these locations provide few options for political expression. Since these are limited and oppositional expressions of resistance, we should not expect them to fit dominant or mainstream standards for

17. *Id.* at 119.

18. Amy Wax & Larry Alexander, *Paying the Price for Breakdown of the Country's Bourgeois Culture*, PHIL. INQUIRER (Aug. 9, 2017), <http://www.philly.com/philly/opinion/commentary/paying-the-price-for-breakdown-of-the-countrys-bourgeois-culture-20170809.html>.

19. SHELBY, *supra* note 1, at 257–58.

20. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 124 (2001).

21. Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL'Y REV. 417, 425 (2009).

22. SHELBY, *supra* note 1, at 220.

political activity. In fact, that may be the point. Since mainstream society and its ideology of working, two-parent households provides mostly demeaning options to ghetto residents, it is not reasonable, Shelby thinks, to demand that ghetto residents abide by demands to work in the legal economy, or to respect the structure of family life promoted by the middle classes. To do so would be to forgo self-respect in the face of injustice. Given the prevailing conditions of American society, justice permits—and may even require—residents of African American urban ghettos to refuse the menial work available to them, to engage in loving and procreative relationships, and to disobey certain criminal laws.

Communities manifest social and political domination, not merely by perpetuating conditions of severe social deprivation, but also by limiting the acceptable ways in which socially deprived individuals can express their dissatisfaction with, or resistance to, their lot. We perpetuate a deeply unjust social order to the extent we characterize ghettos and their residents as deviant and treat their acts of resistance as incomprehensible or impermissible because they are not channeled through politically or culturally sanctioned institutions. These dominative attitudes of disregard or disrespect fail to acknowledge the ways in which official modes of protest often undermine the ghetto resident's ability to resist and instead reinscribe subordination and injustice as a condition of challenging it.²³

Acts of resistance can be big or small, clear or confused. For ghetto residents, the difficulties of organizing effective political resistance may be complex or insurmountable, and so their political speech may be “impure,” sending multiple mixed messages. That is the lesson of Edward Crawford's act of throwing a tear gas canister. Sometimes, broken windows reflect the unfairness of the state's toleration of deep injustice and social deprivation, not just the lawlessness of some urban community.²⁴ In the circumstances, throwing a gas cannister was the best Crawford could do to express his justified resentment of the police. Our goal should be to recognize these acts as public political expressions and judge them as such. Even in manifestly unjust societies, we are not bereft of standards to criticize such conduct: though we may lack civic reciprocity as a ground of criticism, basic justice remains.

CONCLUDING THOUGHTS

Shelby's book, as a whole, is a remarkable achievement. His is not an argument for lawlessness or indolence. It is a scathing critique of the status quo, a statement of the deep measure of injustice in American society, and a denial that we can responsibly make reciprocity-based demands upon our fellow citizens when we refuse to provide them the means to flourish.

23. For a recent exposé of the criminal justice system's participation in race and class-based subordination, see NICOLE GONZALEZ VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT* (2016) (describing the ways in which prosecutors, judges, defenders, and other officers of the court perpetuate systemic racism in the Chicago, Illinois court system).

24. Compare George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, *ATLANTIC MONTHLY*, Mar. 1982, at 29, 29–38 (arguing that tolerating urban blight and low-level disorder can lead to higher levels of criminal activity), with Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 *OHIO ST. J. CRIM. L.* 173 (2008) (arguing that the sort of “broken windows” policing and incarcerative punishment associated with targeting low-level crime weakens social bonds and produces increased criminal activity).

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The sheer volume of arguments that Shelby amasses is impressive, but at times overwhelming. Because Shelby seeks to respond comprehensively to arguments that ghetto residents deserve their fate, the book sometimes appears as a list of objections to be briefly, if decisively, refuted.

However, Shelby's method also reinforces his bigger theme: the best way to think of Black ghettos is in terms of arguments about justice. If the goal is simply to show that the justice perspective applies to the circumstances of the ghetto, then he succeeds overwhelmingly. If the goal is to provide a roadmap to the justice-based arguments social justice advocates should develop in support of public action to resist the perpetuation of ghettos and the oppression of their residents, again, Shelby's book is a remarkable success. But the core ideas of injustice, civic reciprocity, and solidarity are expounded and developed through a point-by-point refutation of various opponents' arguments, and this may leave readers wanting a more detailed discussion of some of the opposing arguments in response to which Shelby refines his arguments. However, that is not necessarily a criticism of the book; one way to take the book is as a challenge to further development on each of the battlefronts it opens against those who would unfairly disparage ghettos and their residents. Extending the arguments Shelby outlines may, in fact, be one way in which we can admit our complicity in the continued existence of the ghetto, and express our solidarity with ghetto residents by pursuing his project of corrective justice.