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(EN)RAGED OR (EN)GAGED: THE IMPLICATIONS OF RACIAL CONTEXT TO THE CANADIAN PROVOCATION DEFENCE

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I. INTRODUCTION¹

Ice hockey is Canada's national pastime, much like baseball is for many Americans. This fact makes the case of *Regina v. Smithers*² all the more interesting.

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1. Throughout this article I will not place a [sic] next to the Canadian spellings of words. This choice reflects the fact that these are not incorrect, but rather are different, equally valid spellings. Indeed, the very spelling of the word "defence" differs from country to country. I have decided, since I am focusing on the Canadian defence of provocation, it would be appropriate to adopt the Canadian spelling.

2. [1978] 1 S.C.R. 506 (Can.).

On February 18, 1973, a league hockey game was played between two teams comprised of teenaged young men.³ The leading player on one team—the deceased Barrie Cobby—was sixteen or seventeen years of age at the time.⁴ Paul Smithers, the appellant, was the leading player on the opposing team and was sixteen years of age.⁵

The game was rough, the players were aggressive, and feelings ran high.⁶ The courts indicate that Smithers was black,⁷ yet they do not indicate the race of the other players. As such, it may be reasonable to assume that all of the other players were white. This is relevant insofar as the record indicates that Smithers was “subjected to racial insults by [Cobby] and other members of the opposing team.”⁸ Cobby and Smithers jostled with each other on several occasions during the game.⁹ The animosity between the two hockey players was exacerbated by the alleged racial overtones in Cobby’s conduct.¹⁰

Following heated and abusive exchanges of profanities, both Smithers and Cobby were ejected from the hockey game.¹¹ Smithers was upset by the insulting language directed at him and made threats that he would “get” Cobby.¹² Upon leaving the arena after the game, approximately forty-five minutes later, Smithers attempted to start a fight with Cobby.¹³ While restrained by members of Cobby’s team, Smithers managed to deliver a kick to Cobby’s stomach.¹⁴ Following the kick, Cobby fell to the ground on his back and gasped for air.¹⁵ Within five minutes he had stopped

3. *Id.* at 506.

4. *Id.* The appellate court and the Supreme Court offered different ages of the deceased.

5. *Id.*

6. *Id.*

7. I use the term “black” intentionally, as I find it to be, generally, a more inclusive term than African-American. Besides, I am not African-American, nor am I African-Canadian. If I have to be defined according to this dichotomy, I suppose the most accurate label is Jamaican-Canadian.

8. *Smithers*, [1978] 1 S.C.R. at 506.

9. *Id.*

10. *R. v. Smithers*, [1975] 9 O.R.2d 127, 131 (Ont. C.A.) (Houlden, J., dissenting). The majority adopted the statement of facts in Justice Houlden’s dissent. *Id.* at 128.

11. *Smithers*, [1978] 1 S.C.R. at 506.

12. *Id.* at 508.

13. *Id.*

14. *Id.*

15. *Id.* at 508–09.

breathing and was later pronounced dead upon arrival at the hospital.¹⁶

This tragic case is curious on a number of levels. While clearly articulated and narrowly focused on causation issues, the Court's reasoning as a whole seemed to lack any critical recognition of the disturbing racial context within which the altercation arose. The case involved manslaughter, with provocation being the principal issue.¹⁷ The indictment charged that Smithers killed Cobby by kicking him and thereby committed manslaughter,¹⁸ however, no judicial reasoning averted to the racially abusive context and the relevance, if any, that such a context could have in Smithers's defence. This was all the more disconcerting given that this case traveled all the way to the highest court in the land, the Supreme Court of Canada.

The case of *R. v. Olbey*¹⁹ presents another example of an opportunity for judicial consideration of the relevance of racial context. In *Olbey*, there was evidence that the deceased's reference to the accused, Olbey, as a "two-bit nigger punk" triggered the homicidal reaction of Olbey, who was black.²⁰ Although the ensuing argument resulted in the death of the person who uttered the racial epithet, the courts were adamant that it is "difficult to reach a conclusion that there was any evidence of a wrongful act or insult of such nature as to be sufficient to deprive an ordinary person of the power of self-control."²¹ In this case, the construction of the ordinary person had not yet progressed to the point where the ordinary person could be conceived of as racialized.²²

16. *Id.* at 509.

17. *Id.* at 508.

18. *Id.*

19. [1980] 1 S.C.R. 1008 (Can.). Leonard Olbey was found guilty of murdering Paul Patterson. *Id.* at 1010. The deceased died from bullet wounds due to Olbey shooting him three times. *Id.* at 1017. The murder took place in the home of a known drug dealer after Olbey and Patterson had been chastising each other over who was the better "dope dealer." *Id.* at 1018.

20. *Id.* at 1017.

21. *Id.* at 1022.

22. The term "racialized" recognizes that "race" is not of scientific origin. Rather, race is a manufactured social and cultural construct with structural and personal ramifications and implications. The socio-cultural construction of race highlights that there is no biological reality to these descriptions. Ironically, the necessarily practical adoption of "race-speech" and "racial-identification" creates a tension between denying the validity of race, while at the same time seeking "universal," or at least "translatable" conceptions to convey the information. The term "racialized" is used to refer to persons from communities that

While *Olbey* might be decided differently today, given the directness and specificity of the insults involved, racial contextualization²³ of the situation confronting the defendants appears to be a topic that the courts were, then, unprepared to address. Since the rendering of these decisions, however, the Canadian judiciary has demonstrated less resistance to such contextual investigation and, in some cases, has even embraced the need for greater appreciation of the realities of marginalized communities.²⁴

This article explores the Canadian provocation defence as provided in section 232 of the Criminal Code²⁵ and argues that there

have been traditionally marginalized due to "racial characteristics." Such communities are also commonly referred to as "people of color," "visible minorities," or "racial minorities." For further information on the construction of race, see generally TOMMY L. LOTT, *THE INVENTION OF RACE: BLACK CULTURE AND THE POLITICS OF REPRESENTATION* (1999).

23. I use this term in an effort to capture the relevance of race and/or racism in a given situation. Racism has been defined as a symbolic system organizing a range of social inequalities and negative associations and judgements construed around the concept of race. See David Mason, *On the Dangers of Disconnecting Race and Racism*, 28 *SOCIOLOGY* 845, 855 (1994). Race is a concept generated across a range of discourses and used to distinguish and classify human beings. CAROLINE KNOWLES, *RACE DISCOURSE AND LABOURISM* (1992). The concept of race generally has some phenotypical component such as skin color upon which social, cultural, and psychological differences are constructed. Some scholars describe race as referring to a classification of human bodies which is an instantly recognizable part of who we are. See generally Howard Winant, *Racial Formation and Hegemony: Global and Local Developments*, in *RACISM, MODERNITY AND IDENTITY ON THE WESTERN FRONT* 266-89 (Ali Rattansi & Sallie Westwood eds., 1994). The significance of race is "invented," as it has no general meaning but only acquires significance through social practices, cultural scripts, and political contexts. See Caroline Knowles, *Racism and Psychiatry*, 33 *TRANSCULTURAL PSYCHIATRY RES. REV.* 297 (1996). This invented meaning may be relevant to any formulation of the provocation defence insofar as the defence seeks to address human frailties resulting in violence. Thus, reaction to social inequities and negative associations attributed to race may properly infuse the provocation defence where an accused reacted violently to racism.

24. See *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 (Can.); *R. v. Bartle*, [1994] 3 S.C.R. 173 (Can.); *Moge v. Moge*, [1992] 3 S.C.R. 813 (Can.); *R. v. Lavallee*, [1990] 1 S.C.R. 852 (Can.); *Comm. for Justice and Liberty v. Nat'l Energy Bd.*, [1978] 1 S.C.R. 369 (Can.); *R. v. Parks*, [1993] 15 O.R.3d 324 (Ont. C.A.); see also Claire L'Heureux-Dube, *Economic Consequences of Divorce: A View from Canada*, 31 *HOUS. L. REV.* 451, 462 (1994). Ms. L'Heureux-Dube, a Justice of the Supreme Court of Canada, discusses judicial notice as a concept which mandates that the judiciary be informed of relevant social context.

25. Criminal Code, R.S.C., ch. C-46, § 232 (1985) (Can.) [hereinafter Criminal Code]. Section 232 of the Canadian Criminal Code reads:

(1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.

(2) A wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool.

is precedent and theory supportive of racial contextualization of the defence. Part II explains the theory behind the provocation defence and the potential for racial contextualization, and it recognizes some of the challenges presented by any expansion of the defence. This section also introduces the *Canadian Charter of Rights and Freedoms* (the "Charter")²⁶ as a possible mechanism that might be utilized to prevent oppressive use of the defence. Part III explains each element of the provocation defence and, where relevant, highlights the manner in which the objective test may be expanded to account for racial contextualization. Part IV recognizes some of the criticisms of the provocation defence, including provocation as femicide, validating homophobia, cultural essentialism, and as an illegitimate excuse. Before concluding, Part V considers theoretical support for a reformulation of the defence and recognizes that the defence must guard against recognizing extreme expressions of rage.

II. THE PROVOCATION DEFENCE

Canadian law uses both objective and subjective criteria in the application of the provocation defence. This defence is available only for a charge of murder; where provocation is found to exist, it reduces murder to manslaughter.²⁷ When sentencing for other offences, the courts consider provocation as a mitigating factor. Therefore, the defence of provocation applies to murder only to allow mitigation of what otherwise is an automatic penalty of life

(3) For the purposes of this section, the questions

(a) whether a particular wrongful act or insult amounted to provocation, and

(b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,

are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.

Id.

26. CAN. CONST. (Constitution Act, 1982) (Canadian Charter of Rights and Freedoms) [hereinafter Charter].

27. See *R. v. Campbell*, [1977] 38 C.C.C.2d 6 (Ont. C.A.), which held that provocation is not a defence to attempted murder. See *id.* at 15. The provocation defence is available only where the elements of murder otherwise exist. *Id.* However, provocation could be relevant in deciding whether the accused had the necessary mens rea. *Id.* at 15-16. See also Todd Archibald, *The Interrelationship Between Provocation and Mens Rea: A Defence of Loss of Self-control*, 28 C.L.Q. 454 (1985-1986).

imprisonment.²⁸ Hence, the problematic ramifications of the Canadian scheme of mandatory minimum sentences remains a concern. The lack of judicial discretion in sentencing persons convicted of murder has led me on a quest to determine where "racial context,"²⁹ in the form of mitigation, could be infused into defences when such context has contributed to fatal violence. Provocation is already an anomaly, as it is the only statutory partial defence available in Canadian criminal law.³⁰ As such, it may provide a suitable framework for consideration of racial contextualization as a possible mitigating factor.

If the accused has killed under the circumstances set out in section 232 of the Criminal Code—the provocation provision—he or she may be convicted of the lesser offence of manslaughter.³¹ In order to be provoked, one must be the victim of a wrongful act or insult that is "sufficient to deprive an ordinary person of the power of self-control."³² This part of the test is considered "objective" as the judge or jury must consider whether an "ordinary person" would have lost self-control in the same circumstances in which the accused responded violently.³³ If the objective part of the test is satisfied, the judge or jury next considers the subjective question of whether the accused was, in fact, deprived of self-control.³⁴ Finally, the accused must have acted "on the sudden," before there was time for "his passion to cool."³⁵

The following quote from the Ontario Court of Appeal is helpful in understanding the rationale for the provocation defence.

The defence of provocation exists with respect to a charge of murder even though all the elements of the definition of murder have been established; it is an *allowance made for human frailty which recog-*

28. See ALAN W. MEWETT & MORRIS MANNING, MEWETT & MANNING ON CRIMINAL LAW 729 (1994); Rajvinder Sahni, *Crossing the Line: R. v. Thibert and the Defence of Provocation*, 55 U. TORONTO FAC. L. REV. 143 (1997).

29. For a comprehensive examination of the role of racism in the Canadian criminal justice system, see *Report of the Commission on Systemic Racism, in THE ONTARIO CRIMINAL JUSTICE SYSTEM* (Eric Mills ed., Dec. 1995).

30. See Tim Quigley, *Deciphering the Defence of Provocation*, 38 U.N.B.L.J. 11 (1989). There are, however, common law defences, such as intoxication, that effectively operate as partial defences.

31. Criminal Code § 232(1).

32. *Id.* § 232(2).

33. *R. v. Hill*, [1986] 1 S.C.R. 313, 314 (Can.).

34. *Id.*

35. Criminal Code § 232(2).

*nizes that a killing, even an intentional one, is extenuated by the loss of self-control caused by adequate provocation, and is less heinous than an intentional killing by a person in possession of his self-control. It is unnecessary to invoke the defence of provocation until all the elements of murder have been proved.*³⁶

This justification of the defence is still valid today.³⁷ Hence, the fundamental question is whether an uncontrolled fatally violent impulse can be attributed to human frailty, justifying some compassion.³⁸ Indeed, in the leading Canadian case, *R. v. Hill*,³⁹ Chief Justice Dickson stated that the defence “acknowledge[s] that all human beings are subject to uncontrollable outbursts of passion and anger which may lead them to do violent acts.”⁴⁰ Therefore, in cases of provocation, “the law would lessen the severity of criminal liability.”⁴¹ Thus, the defence of provocation does not negate the intent to kill; rather, it acts as a justification or excuse that mitigates that intention, as a concession to human weakness.⁴²

On its face the defence appears neutral and impartial. Historically, however, it has fallen prey to dubious, if not inappropriate, application, which has been utilized to excuse both femicide and homophobic rage.⁴³ Accordingly, the provocation defence has been the subject of much justifiable criticism.⁴⁴ In Canada, the criticism has culminated in calls for the complete abolition of the provocation defence.⁴⁵ For this reason, the Canadian Department of Justice continues to evaluate the utility and appropriateness of the defence.

The application of the defence of provocation has not been without problems. Yet the defence may provide the sole vehicle available to the defence which could allow for a contextual as-

36. *R. v. Campbell*, [1977] 38 C.C.C.2d 6, 15 (emphasis added).

37. See ISABEL GRANT ET AL., *THE LAW OF HOMICIDE* § 6.2 (1994).

38. *Id.* § 6.2, at 6-3.

39. [1986] 1 S.C.R. 313 (Can.).

40. *Id.* at 323.

41. *Id.*

42. See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 199-200 (1987) (discussing provocation as either a partial justification or partial excuse and concluding that the better classification is as a partial excuse).

43. See GRANT, *supra* note 37, at § 6.2(a); Joanne St. Lewis & Sheila Galloway, *Reforming the Defence of Provocation*, in ONTARIO WOMEN'S DIRECTORATE (1994); Andrée Côté, *The Defence of Provocation and Domestic Femicide* (1994) (unpublished LL.M. thesis, University of Montreal) (on file with author) (Elenor Paul trans.).

44. See sources cited *supra* note 43.

45. See Côté, *supra* note 43, at 29.

assessment of systemic racism when it plays a role in triggering violent responses. The prerequisites for other common law defences, such as self-defence and duress, render them unsuitable for injecting relevant racial context as a mitigating factor.⁴⁶ The defence of insanity would only come into play if the "maddening" effects of racism actually were proven to have altered the psyche to such an extent that the defendant lacked the cognitive or volitional capacity required for criminal responsibility.⁴⁷ Accordingly, only the provocation defence may be useful as a defence where the accused responded to racist abuse with violence, as in *Olbey v. The Queen*⁴⁸ or *R. v. Smithers*.⁴⁹ Furthermore, as the defence is not exculpatory, but instead ultimately provides for a lesser sentence, it may present a more acceptable counterpart to the American system of mitigating sentences mandated by the Model Penal Code.⁵⁰ Canadian jurisprudence has progressed to the point

46. Section 34(1) of the Criminal Code, entitled *Defence of Person*, provides that a person is justified in using force to repel an unprovoked unlawful attack. However, the justification may be invoked by such person only where the force used: (a) was "not intended to cause death or grievous bodily harm" to the assailant; and (b) was "no more than [was] necessary" to defend oneself. Criminal Code § 34(1) (emphasis added). Section 34(2) applies in cases where repelling the assailant results in death or in grievous bodily harm. *Id.* § 34(2). In these circumstances, the accused is justified in using force where: (a) she was under a *reasonable apprehension* that her death or grievous bodily harm would result from the initial or continuing violence of the assault; and (b) she believed on *reasonable grounds* that she could not preserve herself from death or grievous bodily harm, other than by causing death or grievous bodily harm to her assailant. *Id.*

Section 17 of the Criminal Code, entitled *Compulsion by Threats*, provides that for duress to act as an excuse: (a) the threat must be of *immediate* death or bodily harm; (b) the person making the *threat* must be *present* when the offence is committed; (c) the threatened accused must *believe* that the *threats* will be carried out; and (d) the threatened accused must not be a party to a conspiracy or association whereby he is subject to compulsion. *Id.* § 17.

47. *See id.* § 16, amended by ch. 43, 1991 S.C. § 2. The language of the statute, entitled *Defence of Mental Disorder*, is as follows:

(1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

(2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.

(3) The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue.

Id.

48. [1980] 1 S.C.R. 1008 (Can.).

49. [1978] 1 S.C.R. 506 (Can.).

50. *See* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS

where there is support for this contextual interpretation of the defence.

Thus, calls for the wholesale abandonment of the provocation defence may produce the result of foreclosing from trial consideration a contextual assessment of the possible role of racism as a cause and mitigator of a murder. A more scholarly version of “not throwing the baby out with the bath water” may be gleaned from the spirit of Professor Gayatri Spivak’s notion of strategic essentialism.⁵¹ While strategic essentialism entails the conscious decision, hopefully by community members, to essentialize the particular community for the purpose of a specific political goal, perhaps an analogous strategy would be the strategic utilization of a legal defence, despite reservations about its origins and historic utilization. That the provocation defence might operate both as sword and shield for marginalized communities could be recognized by a “strategic deployment” of the defence in racially volatile situations where racial context might otherwise be ignored.

The challenge is whether the conceptual complicity of the provocation defence should automatically invalidate any capacity for the defence to incorporate racial context. Despite the problematic origins of the defence and its questionable use by some members of the judiciary, the defence has a liberatory capacity that may further an emancipatory project. Thus, strategic deployment is helpful in recognizing that it is acceptable to use the defence

PROCESSES: CASES AND MATERIALS 418 (6th ed. 1995). At least fourteen states have adopted, in whole or in part, the Model Penal Code’s “extreme emotional disturbance” formula for reducing murder to manslaughter. *Id.* at 423. Arguably, the standard for such disturbance is more lenient as the defence does not require a provoking or triggering event. As the Connecticut Supreme Court has noted:

A homicide influenced by an extreme emotional disturbance, in contrast [to a “hot blooded killing”], is not one which is necessarily committed in the “hot blood” stage, but rather one that was brought about by a significant mental trauma that caused the defendant to brood for a long period of time and then react violently, seemingly without provocation.

State v. Elliott, 411 A.2d 3, 7 (Conn. 1979).

51. See GAYATRI CHAKRAVORTY SPIVAK, *Subaltern Studies: Deconstructing Historiography*, in *OTHER WORLDS* 197, 205 (1987), where Professor Spivak states:

I would read it [the Subaltern Studies Group text], then, as a *strategic* use of positivist essentialism in a scrupulously visible political interest. . . . This would allow them to use the critical force of anti-humanism . . . even as they share its constitutive paradox: that the essentializing moment, the object of their criticism, is irreducible.

Id.

for this liberatory project, though recognizing all the while that it was complicit with forces of domination.⁵² I would, therefore, advocate for the retention of the defence and a nuanced, contextual approach to its application. Given the sexist and homophobic outcomes for which the defence has been criticized, how might we compensate for this tendency to use the defence in an oppressive manner?

First, equality-seeking⁵³ parameters should be conceptualized in order to curtail inappropriate use of the defence.⁵⁴ The provocation defence ought not be permitted to excuse or justify homicides motivated by bigotry against groups protected by the Charter. The provocation defence would not be applicable if its success would require a usurpation of the spirit or intent of the equality rights provisions contained in the Charter.⁵⁵ The Charter, which is part of the Canadian Constitution, has several specific provisions that may be helpful in addressing the issue of contextualization.⁵⁶

52. See COLONIAL DISCOURSE AND POST-COLONIAL THEORY: A READER (Patrick Williams & Laura Chrisman eds., 1994). See generally GAYATRI CHAKRAVORTY SPIVAK, THE POST-COLONIAL CRITIC: INTERVIEWS, STRATEGIES, DIALOGUES (Sarah Harasym ed., 1990) (discussing strategic essentialism); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

53. I give credit for the term "equality-seeking" to Joanne St. Lewis and Sheila Galloway. See St. Lewis & Galloway, *supra* note 43, at 21. To me, this term presupposes inequality as the unfortunate norm. This inequality is based not only upon the enumerated grounds recognized in the Charter but upon numerous bases, some of which have been recognized as analogous grounds, i.e., sexual orientation.

54. By this I mean some mechanism to prevent reliance on the defence where the outcome of such reliance would be a result which flies in the face of recognized equality principles.

55. This approach is consistent with the views articulated in *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 (Can.), *Dagenais v. CBC*, [1994] 3 S.C.R. 835 (Can.), and *RWDSU v. Dolphin Delivery*, [1986] 2 S.C.R. 573 (Can.), whereby the Supreme Court of Canada articulated that the spirit and intent of the Charter was persuasive even if the Charter did not apply directly, and that the law should be interpreted and adopted in a manner consistent with "Charter values."

56. Specifically, the Charter contains three relevant provisions. Section 15, entitled "Equality before and under law and equal protection and benefit of law" states as follows:

- (1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or

The Charter offers explicit protection against discrimination based upon race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability, and it has been interpreted to extend as well to certain analogous grounds, such as sexual orientation.⁵⁷

Advocating this position would be difficult if the defence was not statutory and subject to the actions of the Crown prosecutor, an agent of the state. Since the Charter is applicable only to government actions, the role of the Crown prosecutor and the involvement of federal legislation provide the necessary basis for invoking the Charter.⁵⁸

Not only is the role of the Crown as government actor persuasive, but the Charter has also been deemed to have an indirect effect upon the common law.⁵⁹ Specifically, Justice McIntyre, writing for the court in *Dolphin Delivery*, asserted that "the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution."⁶⁰ Since *Dolphin Delivery* concerned private litigants, the principle should be all the more applicable in a criminal trial where the state is the moving party. Therefore, I do not think it is inappropriate to assert that the provocation defence should be construed by the judiciary in a manner which promotes the equality-seeking protections in the Charter. The defence

ethnic origin, colour, religion, sex, age or mental or physical disability.

CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15.

Section 27 of the Charter entitled "Multicultural heritage" states that "[t]his Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." *Id.* § 27. Lastly, section 28 of the Charter entitled "Rights guaranteed equally to both sexes" provides that "[n]otwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." *Id.* § 28.

57. See, e.g., *M. v. H.*, [1999] 2 S.C.R. 3 (Can.); *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (Can.); *Egan v. Canada*, [1995] 2 S.C.R. 513 (Can.).

58. Section 32 of the Charter specifies:

(1) This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territories and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Charter § 32.

59. See *Dolphin Delivery*, [1986] 2 S.C.R. 573 (Can.).

60. *Id.* at 603.

should be reformulated and applied in a manner consistent with the fundamental principles and values of the Charter.

Application of the provocation defence should be subject to “policy parameters” informed by the equality-seeking protections of the Charter.⁶¹ With little substantive innovation or expansion, a racial contextualization of the provocation defence may be accomplished, and thus be used to inform the judge and jurors more fully of the social reality under which a racialized accused may have responded with fatal violence in a racially provocative context.

The tightrope presented by my thesis relates to the dual restriction and expansion of the defence which I am advocating. Insults and acts, which effectively reinforce and validate the oppression of women, for instance, *should not* be sufficient to ground the defence of provocation, for to do so is to eradicate Charter values for equality-seeking communities. However, insults and acts which effectively further oppress persons from equality-seeking communities based upon protected grounds under the Charter *should* be sufficient to ground the defence. For example, acts or insults which are provocative due to the accused’s sexism, racism, or homophobia or which would lead to sexist, racist, or homophobic results should not be catalysts for the operation of the provocation defence. Permitting such oppressive use of the defence flies in the face of the spirit of the equality, multiculturalism, and gender protections of the Charter. Acts or insults which are provocative due to the accused bearing the burden of racism, or other systemically oppressive forces, however, may properly be seen as provocative. Hence, an oppressive outcome versus a liberatory or emancipatory result from deployment of the defence should be a consideration in its application. Of course, further contextual analysis is necessitated by the reality of overlapping identities, intersectionality, and a recognition that people are multidimensional.⁶² Accordingly, the complexity of

61. While I have certain views about how the provocation defence should be changed, it is beyond the scope of this paper for me to delve into the nature of the changes that I would suggest. I leave that for another paper. At present, my task is merely to emphasize that even without significant amendments the current paradigm for the defence has reached the point in Canada where a proper contextualized investigation of racism can be made.

62. See, e.g., Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 371–76; Kimberle Williams Crenshaw, *Mapping*

subordination must unravel the many layers of being which may compound the oppression of a given individual.

Thus under the leading case, *R. v. Hill*,⁶³ courts should consider insults that are based upon the accused's membership in an equality-seeking community, as defined by the Charter.⁶⁴ Specifically, those insults intended to attack the accused on the basis of gender, race, color, ethnicity, religion, age, disability, or sexual orientation, may legitimately ground the provocation defence. Interestingly, a number of scholars have explored the injurious nature of hate speech.⁶⁵ For instance, Professor Richard Delgado studied the implications of developing a tort of racial insult for "words that wound."⁶⁶ He stated that "[t]he failure of the legal system to redress the harms of racism, and of racial insults, conveys to all the lesson that egalitarianism is not a fundamental principle; the law, through inaction, implicitly teaches that respect for individuals is of little importance."⁶⁷ Similarly, the Canadian legal system has failed to redress the effects of racism.⁶⁸ In support of permitting such insults to ground provocation, it must be recognized that human frailty, which the defence seeks

the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 STAN. L. REV. 1241, 1242 (1991); Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (Or Other -isms)*, 1991 DUKE L.J. 397, 401-10; Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1184 (1991). For a compilation of literature on this subject generally, see CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 1997) and Darren Lenard Hutchinson, "Claiming" and "Speaking" Who We Are, in BLACK MEN ON RACE, GENDER, AND SEXUALITY: A CRITICAL READER 28, 28-31 (Devon W. Carbado ed., 1999).

63. [1986] 1 S.C.R. 313 (Can.).

64. See Charter § 15.

65. See Okianer Christian Dark, *Violence and the Mass Media: Lessons Learned From the Battle Over "Words That Wound"*, 4 KAN. J.L. & PUB. POL'Y 25 (1995); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) [hereinafter Delgado, *Words That Wound*]; Richard Delgado & Jean Stefancic, *Hateful Speech, Loving Communities: Why Our Notion of "A Just Balance" Changes So Slowly*, 82 CAL. L. REV. 851 (1994); Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

66. Delgado, *Words that Wound*, *supra* note 65, at 141.

67. *Id.*

68. See generally CANADIAN COUNCIL ON SOCIAL DEVELOPMENT, *UNEQUAL ACCESS: A CANADIAN PROFILE OF RACIAL DIFFERENCES IN EDUCATION, EMPLOYMENT AND INCOME* (2000), available at <http://www.crr.ca/En/Publications/ePubHome.htm>; REPORT OF THE COMMISSION ON SYSTEMIC RACISM IN THE ONTARIO CRIMINAL JUSTICE SYSTEM (1997); St. Lewis & Galloway, *supra* note 43.

to recognize, is compounded by the psychological, physiological, and economic consequences of living in a racist environment.⁶⁹

III. ELEMENTS OF THE DEFENCE OF PROVOCATION

A. "Wrongful Act"

While undoubtedly informed by moral underpinnings, the legal concept of "wrongful act" has been described as any act which, if considered objectively and without any regard for the peculiar rights of the parties involved, would be "wrongful" although not necessarily illegal.⁷⁰ It is noteworthy that the wrongful act is not one for which the actor can advance a legal right.⁷¹ Examples of conduct found by the courts to constitute wrongful acts include a sudden painful blow, a push, a slap to the face, an attack with a weapon, an apprehended assault, and an uninvited homosexual advance.⁷²

The current scope of the "wrongful act" criteria is troubling insofar as its application to uninvited homosexual advances is concerned. A possible way of countering this concern is to limit the defence to provocation caused by an "unlawful act."⁷³ It has been suggested that this would have a definite impact on male accuseds who kill their female partners or who claim offence from a homosexual advance.⁷⁴ Specifically, since neither infidelity, ending a relationship, nagging, nor homosexual advances is illegal in

69. See PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 62-63 (1991); Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

70. See GRANT, *supra* note 37, at 6-7 to 6-9.

71. See *id.*

72. See, e.g., *R. v. Hill* [1986] 1 S.C.R. 313 (Can.) (uninvited homosexual advance); *Taylor v. The King*, [1947] S.C.R. 462 (Can.) (slap to the face); *R. v. Jackson*, [1991] 68 C.C.C.3d 385 (Ont. C.A.), *aff'd* [1993] 4 S.C.R. 573 (push); *R. v. Demaria*, [1984] 1 O.A.C. 348 (Ont. C.A.) (attack with a weapon); *R. v. Hansford*, [1987] 33 C.C.C.3d 74 (Alta. C.A.) (apprehended assault); *R. v. Parnell*, [1983] 9 C.C.C.3d 353 (Ont. C.A.) (sudden blow).

73. This suggestion is particular to the Canadian context. In particular, in the United States, I note that adultery and sodomy are criminalized in some states. Additionally, racial slurs might be protected in the American context by the First Amendment.

74. See GRANT, *supra* note 37, at § 6.8; *St. Lewis & Galloway*, *supra* note 43, at 8.

Canada, resort to these actions as sufficiently insulting or wrongful could no longer be legitimately made.⁷⁵

Making an unlawful act a prerequisite to provocation would also facilitate recognition of the provocative nature of racial slurs against persons of color. The Ontario Human Rights Commission (the "Commission") has developed a *Policy on Racial Slurs and Harassment, and Racial Jokes*⁷⁶ ("Policy Statement") that interprets such behavior as unlawful pursuant to the Ontario Human Rights Code (the "Code").⁷⁷ The Code regulates private behavior, as opposed to public behavior, which is governed by the Constitution.⁷⁸ The *Policy Statement* reflects the Commission's interpretation of the Code provisions, and therefore should be considered in conjunction with the specific provisions found therein.

The Code states that it is the public policy of Ontario to recognize the inherent "dignity and worth of every person and to provide for equal rights and opportunities without discrimination."⁷⁹ Additionally, the *Policy Statement* notes that:

Everyone has the right to live and work in an environment that is free of demeaning comments and actions when such behaviours are based on race, ancestry, place of origin, colour, or ethnic origin. Racial harassment through slurs, jokes or behaviour intended to demean a person because of his or her race, is discriminatory. Even when meant as a joke, racial comments are derogatory and may be humiliating.⁸⁰

This policy sets out the Commission's interpretation of the provisions of the Code relating to racial slurs, jokes, and harassment.⁸¹ The *Policy Statement* defines "race" broadly to include "race, ancestry, colour and ethnic origin."⁸² Furthermore, "[i]n some circumstances, citizenship, place of origin and creed are

75. See DRESSLER, *supra* note 42; St. Lewis & Galloway, *supra*, note 43.

76. ONTARIO HUMAN RIGHTS COMMISSION, POLICY ON RACIAL SLURS AND HARASSMENT AND RACIAL JOKES (1996), available at <http://www.ohrc.on.ca/english/publications/racial-harassment-policy.shtml> (last modified Dec. 31, 1996) [hereinafter POLICY STATEMENT].

77. Human Rights Code, R.S.O. ch. H.19 (1990) (Can.) [hereinafter Human Rights Code].

78. See POLICY STATEMENT, *supra* note 76.

79. Human Rights Code pmbl.

80. POLICY STATEMENT, *supra* note 76.

81. *Id.*

82. *Id.*

linked to issues of racial discrimination and harassment.⁸³ Harassment is also defined broadly in the *Policy Statement*. There is specific recognition of the Code's prohibition of harassment in employment, accommodation, services, goods, and facilities.⁸⁴ Hence, racial harassment is broadly construed as unlawful pursuant to the Code.⁸⁵

As such, the fact that racial insults and abuse are not only wrongful but also unlawful pursuant to the Code suggests that Canadian courts may legitimately allow racist insults to ground the defence of provocation under current law. Therefore, courts could take into consideration the impact of insults that compound

83. *Id.*

84. *Id.* Subsection 4 of the Harassment section of the *Policy Statement* deals with "General Principles."

a) Code Definition

Harassment is defined in subsection 10(1) of the *Code* as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome."

The reference to comment or conduct "that is known or ought reasonably to be known to be unwelcome" establishes an objective test for harassment.

i. In some situations it should be obvious that the racially-based conduct or comments will be offensive or unwelcome.

ii. Since the individual may be in a vulnerable situation, there is no requirement that the individual object to the behaviour in order for there to be a violation of the *Code*. It may be unrealistic to require an individual who is the target of harassment to object to the offensive treatment as a condition of being able to claim a right to be free from such treatment.

iii. Conduct or comments which are motivated by a person's race may not, on their face, be offensive. However, they may still be "unwelcome" from the perspective of a particular individual. If the individual objects and if a similar behaviour is repeated, it may constitute a violation of the *Code*.

Each situation that may be brought to the attention of the Commission through a human rights complaint will be assessed on its own merits. However, racial epithets, comments ridiculing individuals because of race related [sic] characteristics, religious dress, etc., or singling out an individual for humiliating or demeaning "teasing" or jokes related to race, ancestry, place of origin or ethnic origin, would in most instances be viewed as conduct or comments which "ought reasonably to be known to be unwelcome."

b) Comments or Conduct Need Not be Explicit

In order for the harassment provisions of the *Code* to apply, the comments or conduct need not be explicitly racial in order to constitute harassment based on race.

Id. (quoting Human Rights Code § 10(1)).

85. *Id.*

the accused's experience of oppression and that are an exacerbating element within the context of systemic racism.

It is unfortunate that the "wrongful act" element is seldom scrutinized since taking the wrongfulness of the provocative act or insult into account could assist in furthering an equality-seeking application of the defence. The Charter can be a compass and guide for what is properly labeled a wrongful act or insult. Additionally, common sense would dictate that only certain types of behaviors are properly referred to as "wrongful" or as an "insult." Recognition should be made of the dynamic nature of insults and wrongful acts. For instance, although the term "Negro" might never have been the manner in which an African-American would ideally refer to herself in the 1950s, the term would likely not have been as problematic then as it is considered today.⁸⁶

The point has been made that:

Social attitudes towards what is wrongful and insulting do change over time: what might have been totally offensive 100 years ago may be tolerated today. Thus, wrongful acts or insults are essentially fluid and open-ended in character. It is our challenge to consider how to incorporate an understanding of the experiences of all members of society, including members of equality-seeking communities, to ensure that legal rules operate without reinforcing systemic or historically discriminatory perspectives.⁸⁷

B. *Insult*

The *Oxford English Dictionary* defines the word "insult" as, among other things, "[a]n act, or the action, of attacking or assailing;" or as an "open and sudden attack or assault without formal preparations;" or as "injuriously contemptuous speech or behaviour; scornful utterance or action intended to wound self-respect;

86. Recall concerns over the term "Negro" used in the 2000 United States Census. Part of the government's response has been to claim that this term is not offensive to older blacks. See, e.g., Lyle V. Harris, *On Our Own Terms; A.J.C. Southern Focus Poll: Racial Identify*, ATLANTA J. & CONST., July 25, 1999, at 1F.

87. St. Lewis & Galloway, *supra* note 43, at 7 (citing Rosemary Cairns Way, *The Criminalization of Stalking: An Exercise in Media Manipulation and Political Opportunism*, 39 MCGILL L.J. 379 (1994)).

an affront, indignity [or] outrage" to another person.⁸⁸ "Wrongful" does not qualify "insult."⁸⁹

It has been stated that:

[t]he traditional understanding of insult, a statement or action intended to lower the dignity or embarrass another, has disturbing breadth when one looks at . . . what courts have actually accepted as "insult." Behaviours that are lawful—articulating one's rights, expressing a difference of opinion, taking a job, having relationships with persons other than one's spouse/partner/lover, selecting one's friends, maintaining family relationships, striking back when being battered—are used by men to justify battering [and killing] their partners.⁹⁰

C. "Sufficient to Deprive the Ordinary Person of Self-Control"

The objective element of section 232 is the most controversial aspect of the provocation defence.⁹¹ Accordingly, it deserves particular attention. Using an objective test, the act or insult must have been sufficient to deprive an ordinary person of self-control.⁹² The underlying rationale for the "ordinary person" test is to preclude an accused from relying on self-generated and self-serving excuses. Thus, it was held in *Hill* that the ordinary or reasonable person under the objective test has a "normal temperament and level of self-control. It follows that the ordinary person is not exceptionally excitable, pugnacious or in a state of drunkenness."⁹³ It has been further explained that:

[t]he test is, therefore, that of the ordinary person with those characteristics of the accused that do not prevent him being, himself, a person of ordinary temperament—his sex, his age, his colour, his education, his physical condition and so on, *but not those characteristics which make his temperament, at the time, extraordinary*. Fundamen-

88. OXFORD ENGLISH DICTIONARY 1057 (2d ed. 1989). A number of Canadian courts have cited these definitions in the provocation context. See *R. v. Thibert*, [1996] 1 S.C.R. 37, 44 (Can.); *R. v. Parnerkar*, [1974] S.C.R. 449, 462 (Can.); *R. v. Tripodi*, [1995] S.C.R. 438, 445 (Can.); *Taylor v. The King*, [1947] S.C.R. 462, 475 (Can.).

89. See GRANT, *supra* note 37, § 6.2(a), at 6-9.

90. *St. Lewis & Galloway*, *supra* note 43, at 8; see also GRANT, *supra* note 37, § 6.2(a), at 6-8 to 6-9.

91. Criminal Code § 232.

92. *Id.* § 232(2).

93. *R. v. Hill*, [1986] 1 S.C.R. 313, 331 (Can.).

tally, this must refer to his mental ability and his intoxication, though there may be other such conditions.⁹⁴

In order to avoid reliance on the defence by a racist, such people shall be characterized as “pugnacious,” or “exceptionally excitable,” thereby ensuring that they cannot properly rely upon the defence. Through this characterization, the racist would have characteristics which make his temperament by definition not that of the “ordinary person.” I leave this possibility for further study, as it is arguable whether racist views and racism generally are, in fact, abnormal—unfortunately, they may indeed be normative.

It is important to consider the concept of the “ordinary or reasonable person” and its antecedent—the “reasonable man.” As social sensitivity to sexism developed, legal institutions changed the term to “reasonable person.”⁹⁵ However, when the legal term of art, the “reasonable person,” was initially introduced, it was written about men, by men.⁹⁶ Thus, criticism of the objective standard centers around the charge that the content and character of the “reasonable person” test has not changed and is still, essentially, the “reasonable man” in disguise.⁹⁷ Specifically, “the application of the reasonable person test has meant that women, racial minorities, lesbians, and gays have been evaluated against a standard that was not designed with them in mind and that does not reflect their experiences and realities.”⁹⁸

At some point it becomes necessary, in the interest of justice, to consider some of the attributes that an accused might not share with the ordinary person. For example, the potentially provocative impact of the desecration of a crucifix might only be understood if the ordinary person is Catholic, whereas the same event for an agnostic or an atheist may be a matter of indifference. Similarly, it may be pointless to ask what the effect on an ordinary person would be of the desecration of the Koran, if the ordinary person was not a Muslim. To fully appreciate and appropri-

94. MEWETT & MANNING, *supra* note 28, at 741 (emphasis added).

95. St. Lewis & Galloway, *supra* note 43, at 11.

96. *Id.*

97. *See, e.g., id.* at 12.

98. *Id.*

ately consider the provocative impact of the desecration of a synagogue, the reasonable person constructed should be Jewish.⁹⁹

The difficulty posed by the traditional objective test in responding to different social realities is illustrated by the following questions:

What kind of person might be ordinary? Is the ordinary male enraged by a homosexual advance? Is the ordinary woman tolerant of or enraged by unwanted heterosexual advances, sexual touchings, misogynist statements, the display of pornography? Is she feminist or anti-feminist? Is the ordinary white person enraged by racist statements? The ordinary person of colour? Is the ordinary Black woman enraged by the idea that she is fit only for domestic work or that she has an insatiable sexual appetite? Does the ordinary male insist on total control of his spouse so that signs of independence are enraging? Is he enraged by infidelity or by the ending of a relationship, by a physical attack? Is he committed to sex equality or not? Are the commonplace reminders of sexual and racial hierarchies provocation, or instead the not-so-commonplace rebellions against inequality? Would a "nagging" wife provoke an ordinary person, but not a racist sexual harasser?¹⁰⁰

Accordingly, the test has been criticized as unable to respond to the social realities of each individual and for superimposing a notion of abstract equality where systemic inequality is the norm.¹⁰¹ This is precisely what may now be considered with a contextual approach to the provocation defence and a liberal reading of existing jurisprudence. There is little standing in the way of such a re-interpretation—nothing except judicial ignorance of these realities and societal reluctance.¹⁰² An examination of the case law be-

99. These hypotheticals relate only to the objective test. It may well be that the objective reasonable Catholic, for instance, would not be provoked by the offensive conduct. Nevertheless, the construction of the reasonable person should be inclusive of such relevant characteristics. Additionally, while the reasonable person constructed may allow for the possibility of provocation, the accused may not, in fact, have been provoked by the offensive conduct—this relates to the subjective test.

100. GRANT, *supra* note 37, § 6.2(b), at 6-12 to 6-14.

101. *Id.* at 6-14. See Sue Bandalli, *Provocation—A Cautionary Note*, 22 J.L. SOC'Y 398 (1995); Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. 435 (1981).

102. I mean no disrespect to members of our judiciary. By ignorance I mean the common dictionary definition of: "lack of knowledge, learning, information, etc." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 952 (2d ed. 1987).

low reveals, however, just how far the judiciary has come in constructing the reasonable/ordinary person.¹⁰³

Over the years, the objective standard of the provocation defence has been expanded and modified. I wish to highlight the manner in which the objective standard has evolved to the point where taking the context of racism into account should no longer present an insurmountable hurdle.

Initially, based on the House of Lords's decision in *Bedder v. Director of Public Prosecutions*,¹⁰⁴ the courts interpreted the objective ordinary person test narrowly, disregarding the accused's specific personal characteristics. *Bedder* involved a sexually impotent accused who killed a prostitute upon her taunting him about his impotence.¹⁰⁵ The court determined that the accused's impotence was irrelevant to the objective test.¹⁰⁶

The test applied in *Bedder* has been referred to as a good example of the application of a purely objective test.¹⁰⁷ While I am reluctant to acknowledge the possibility of a standard such as "the reasonable impotent man" in terms of *stare decisis*, the House of Lords's refusal to consider any of the accused's characteristics led to numerous problems in trying to construct the ordinary person.¹⁰⁸ An act or insult may only be meaningful in light of the particular characteristics of the accused such as race, gender, or age. In other words, the insult or act should be considered within the context of the objective attributes of the accused.

Taking an example from the previously mentioned case of *R. v. Olbey*,¹⁰⁹ calling the accused a "two-bit nigger punk"¹¹⁰ is only provocative if his race is considered. If the jury is not permitted to consider characteristics such as race, gender, or age, they may arrive at the erroneous conclusion that acts and insults, which are indeed provocative, have not met the threshold ordinary person test. Furthermore, "[i]f the 'ordinary' person is judged to have

103. See *infra* notes 104–22 and accompanying text.

104. [1954] 2 All E.R. 801 (H.L.).

105. *Id.* at 801.

106. *Id.* at 802.

107. See STANLEY YEO, UNDERSTANDING KILLINGS AND THE LAW: PROVOCATION AND EXCESSIVE SELF-DEFENCE IN INDIA, ENGLAND, AND AUSTRALIA 60 (1998).

108. See *Bedder*, [1954] 2 All E.R. at 803–04.

109. [1980] 1 S.C.R. 1008 (Can.). See *supra* text accompanying notes 19–22.

110. *Olbey*, [1980] 1 S.C.R. at 1017.

none of the characteristics of the accused, provocation may cease to be very meaningful to him."¹¹¹

Recognizing some of the problems associated with a narrow objective test, the courts later rejected *Bedder* and opted for a "modified objective ordinary person" test. The subjectivizing of the objective test is a relatively recent development that began with the House of Lords case of *Director of Public Prosecutions v. Camplin*.¹¹² The facts of this case involved the violent response of a young man to an alleged homosexual advance.¹¹³ Lord Diplock stated "[f]or the purposes of the law of provocation the 'reasonable man' has never been confined to the adult male. It means an ordinary person of either sex, not exceptionally excitable or pugnacious."¹¹⁴ He later added:

[T]he reasonable man referred to in the question is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as [jurors] think would affect the gravity of the provocation to him; and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but also whether he would react to the provocation as the accused did.¹¹⁵

Lord Simon also stated:

I think that the standard of self-control which the law requires before provocation is held to reduce murder to manslaughter is still that of the reasonable person . . . but that, *in determining whether a person of reasonable self-control would lose it in the circumstances, the entire factual situation, which includes the characteristics of the accused, must be considered.*¹¹⁶

Thus, the modified objective test from *Camplin* allowed for consideration of characteristics such as age, gender, and race, but not factors such as ill temperament or intoxication that suggest the accused was particularly excitable. The Supreme Court of Canada followed *Camplin* in *R. v. Hill*,¹¹⁷ the leading Canadian case.

111. MEWETT & MANNING, *supra* note 28, at 739.

112. [1978] A.C. 705 (H.L.).

113. *Id.* at 712.

114. *Id.* at 716-17.

115. *Id.* at 718.

116. *Id.* at 727 (emphasis added).

117. [1986] 1 S.C.R. 313 (Can.).

In *Hill*, a sixteen-year-old boy killed a man after an allegedly unwanted homosexual advance.¹¹⁸ The Supreme Court of Canada held that the ordinary person should be invested with those physical attributes that have a direct bearing on the provocation received.¹¹⁹ Writing for the majority, Chief Justice Dickson stated:

Indeed, it would be impossible to conceptualize a sexless or ageless ordinary person. Features such as sex, age, or race do not detract from a person's characterization as ordinary. Thus particular characteristics that are not peculiar or idiosyncratic can be ascribed to an ordinary person without subverting the logic of the objective test of provocation.¹²⁰

Thus, accepting the evolution in *Camplin*, the Supreme Court of Canada attempted to take into account the ordinariness of human diversity. It should be noted that Chief Justice Dickson did not require judges to charge juries as to which of the accused's characteristics may be imputed to the ordinary person.¹²¹ Instead, he left it to the "collective good sense of the jury" which he believed would naturally "lead it to ascribe to the ordinary person any general characteristics relevant to the provocation in question."¹²²

I do not believe justice is served by such an omission. Many scholars have reservations about the "collective good sense" of juries for good reason.¹²³ A direct instruction may better equip the

118. *Id.* at 319–20.

119. *Id.* at 331.

120. *Id.*

121. *Id.* at 332.

122. *Id.* at 331; see also DON STUART, *CANADIAN CRIMINAL LAW* 495 (3d ed. 1995).

123. See Darryl K. Brown, *The Role of Race in Jury Impartiality and Venue Transfers*, 53 MD. L. REV. 107 (1994); Sophia R. Friedman, *Sixth Amendment—The Right to an Impartial Jury: How Extensive Must Voir Dire Questioning Be?* 82 J. CRIM. L. & CRIMINOLOGY 920 (1992); Hiroshi Fukurai & Darryl Davies, *Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Juries of the Hennepin Model and the Jury De Medietate Linguae*, 4 VA. J. SOC. POL'Y & L. 645 (1997); James J. Gobert, *Criminal Law: In Search of the Impartial Jury*, 79 J. CRIM. L. & CRIMINOLOGY 269 (1988); Scott W. Howe, *Juror Neutrality or an Impartiality Array? A Structural Theory of the Impartial Jury Mandate*, 70 NOTRE DAME L. REV. 1173 (1995); Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95 (1997); Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201 (1992); John W. Perloff, *State v. Neil: Approaching the Desired Balance Between Peremptory Challenges and Racial Equality in Jury Selection*, 39 U. MIAMI L. REV. 777 (1995); M.A. Widder, Comment, *Neutralizing the Poison of Juror Racism: The Need for a Sixth Amendment Approach to Jury Selection*, 67 TUL. L. REV. 2311 (1993).

jurors for their difficult tasks during deliberations. If told specifically the considerations they must weigh, jurors should be better positioned to contemplate matters which they have perhaps never turned their minds to in any real sense. Jury instructions aside, I believe the more pressing and, perhaps, more complex issue revolves around the ability to truly select a jury of one's peers, given the inclination of many lawyers to challenge racialized jurors for cause, in an attempt to disqualify them from serving as jurors for racialized accuseds.¹²⁴ This tendency must be considered in conjunction with venue changing motions, which often remove trials of racialized accuseds from communities with large populations of people of color. Larger questions are thereby created concerning the ability of an all-white jury to apply a test that requires them to construct and contemplate the effect of racial abuses on the reasonable racialized person. Hence, the issue of jury selection and jury competence is one calling for much study, especially when matters of race are to be considered.¹²⁵

In *Hill*, the majority of the Supreme Court of Canada felt that in cases in which the provocation is a racial slur, the jury would think of an ordinary person as an individual with the racial background that formed the substance of the insult.¹²⁶ To this extent, the particular characteristics which form the nexus between the characteristic and the insult will be ascribed to the ordinary person.

Chief Justice Dickson's opinion drew another important distinction:

It is important to note that, in some instances, certain characteristics will be irrelevant. For example, the race of a person will be irrelevant if the provocation involves an insult regarding a physical disability. Similarly, the sex of an accused will be irrelevant if the provocation relates to a racial insult. Thus the central criterion is the relevance of the particular feature to the provocation in question.¹²⁷

However, the majority's analysis in *Hill* failed to recognize the reality of intersectionality.¹²⁸ "Because the intersectional experi-

124. See, e.g., Fukurai & Davies, *supra* note 123, at 653.

125. See, e.g., Fukurai & Davis, *supra* note 123, at 654; Gobert, *supra* note 123, at 287; Minow, *supra* note 123, at 1205.

126. *Hill*, [1986] 1 S.C.R. at 331.

127. *Id.* at 331-32.

128. See sources cited *supra* note 62 for a further discussion of intersectionality.

ence is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.¹²⁹ Another commentator has stated that "I cannot separate my gender from my culture: I am not a woman sometimes and Cree at others."¹³⁰

The Court viewed characteristics such as race and gender, however, as isolated parallel factors that never intersect.¹³¹ However, "[g]ender as an isolated category is useful, primarily, to women who do not encounter racial, cultural, or class-based discrimination when they participate in Canadian society."¹³² This is not reality for women of color who are often subjected to various forms of oppression because of their dual susceptibility.¹³³ The following analogy illustrates this concept:

Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in the intersection, injury could result from sex discrimination or race discrimination.¹³⁴

I would assume the above analogy holds true for women of color generally. For example, a First Nations¹³⁵ woman may be sexually abused specifically because of her race—therefore her sex is not the only characteristic that is relevant to the provocation assessment. Calling a Mohawk woman a "squaw" or a black woman a "whore" implicates both her race and sex in intermingling and layered ways—a neat dissection of motive and import, of cause and effect, is likely impossible or is, at least, an exercise

129. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Anti-racist Politics*, 1989 U. CHI. LEGAL F. 130, 140 (1989).

130. Mary Ellen Turpel, *Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women*, 6 CAN. J. WOMEN & L. 174, 184 (1993).

131. See *Hill*, [1986] 1. S.C.R. at 331–32.

132. Turpel, *supra* note 130, at 183–84.

133. PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT* 163 (1991) (The majority analysis is ignorant of the sexual politics at work in a patriarchy whereby black women, for example, inhabit a sex/gender hierarchy in which inequalities of race are transformed, via sexualization, into power structures that define and confine her to the realm of sexual animal.).

134. Crenshaw, *supra* note 129, at 149.

135. The term "First Nations" is the Canadian equivalent of the American term "Native Americans" or "American Indians."

in futility. Clearly a court may have to take into account the fact that the accused is a woman of color in attempting to understand the full impact of the provocation. Similarly, a man with a disability may be abused and provoked because he is gay or racialized. Persons of color are frequently subjected to insulting comments or abuse that do not implicate their race or ethnic origin *specifically because* of their membership in a minority group. Generally, today's racial harasser knows that there is more than one way to move towards the goals of discrimination and/or white supremacy—the “N” word and other racial epithets are not the only way, and are perhaps some of the least effective forms of oppression. Instead, modern practices of racial discrimination take a multitude of forms; some more subtle or structural, others explicit; however, all are relentless.¹³⁶

Thus, the majority test in *Hill* may be somewhat fanciful. The test would require that an accused identify the basis of the insult or wrongful act, i.e., “did he call me an idiot because of my race or my sex? Did he spit on me because of my sex or my sexual orientation?” Indeed, forcing this dissection of characteristics, this either/or framework, reduces the analysis to the merely academic, as it is only when engaged in legal thinking that racism and sexism become distinct characteristics.¹³⁷

The full context of the oppressive reality should be assessed in order to properly situate the insult or offensive act within the provocation defence. Therefore, the majority decision in *Hill* may not provide the courts with the best guidance, as provocative behavior might not relate to discrete features of identity in the straightforward way suggested by the court.

136. A large body of scholarly work has developed around this very concept. See, e.g., ANATOMY OF RACISM (David Theo Goldbard ed., 1990); JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA (1997); BENJAMIN BOWLING, VIOLENT RACISM: VICTIMIZATION, POLICING AND SOCIAL CONTEXT (1998); MARK NATHAN COHEN, CULTURE OF INTOLERANCE: CHAUVINISM, CLASS AND RACISM IN THE UNITED STATES (1998); HENRY LOUIS GATES JR. & CORNEL WEST, THE FUTURE OF THE RACE (1996); ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992); THE HOUSE THAT RACE BUILT (Wahneema Lubiano ed., 1997); GEORGE LIPSITZ, THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS (1998); KATHERYN K. RUSSELL, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS (1998).

137. See Nitya Duclos, *Disappearing Women: Racial Minority Women in Human Rights Cases*, 6 CAN. J. WOMEN & L. 25 (1993).

Instead, when considering the application of the provocation defence, courts should be required to consider the Charter as an interpretive tool. A court could rely upon an intersecting analysis, which would require it to recognize how the vulnerabilities of race, sex, or sexual orientation, for example, might simultaneously and indivisibly interact to create the discrimination experienced by the accused. Such an analysis would assist judges in filtering diverging viewpoints that could and most likely would be presented by defence counsel, prosecutors, and expert witnesses.¹³⁸

1. Possible Expansion of the Objective Test

Interestingly, Madame Justice Wilson, in her dissenting judgement in *Hill*, advocated expanding the objective test.¹³⁹ She stated that insults do not occur in a vacuum and facts pertinent to the individual accused need to be taken into account in assessing the reaction to an insult.¹⁴⁰ Additionally, in order to conform to reality, an insulting remark or gesture must be placed in the specific socio-cultural *context* before the extent of its provocation can be realistically assessed.¹⁴¹ It is exactly the relevance of this context that is the main concern of my research—how and when can context be used to inform the provocation defence? Justice Wilson's dissent is informative in this regard:

[T]he most appropriate formulation of the objective standard is that of *an ordinary person similarly situated and similarly insulted*. The jury must be instructed to put themselves, as the embodiment of the ordinary person, in the accused's shoes to the extent that they perceive themselves *as confronted with a remark that has the same insulting effect on them as the actual remark had on the accused*.¹⁴²

138. In playing devil's advocate with my own thesis, I recognize the potential difficulty posed when an accused may play one "ism" off against another. What I would advocate against, in this hypothetical, is the creation of a hierarchy of discrimination whereby race, trumps sex, which trumps sexual orientation for instance. This is wholly unacceptable. The defence clearly requires a nuanced appreciation of the intricacies of a diverse society and moreover, an explicit goal of promoting the interests of a multicultural discrimination-free society, per the Charter.

139. See *Hill*, [1986] 1 S.C.R. 313, 345–53 (Can.) (Wilson, J., dissenting).

140. *Id.* at 345–46.

141. See *id.* at 346.

142. *Id.* at 347 (emphasis added).

Clearly, in order for the reasonable person to be "similarly situated and similarly insulted" and to assess racial abuse, the context of the reality and legacy of racism must be considered. Surprisingly and unfortunately, the consequences on the body, mind, and spirit of living in a world where one is subject to systemic discrimination on a regular basis have largely been unexplored by criminal justice systems. The courts are in a pivotal role of evaluating expert evidence in a manner that will not add to the vulnerabilities of those who come to them seeking justice. "Only by integrating scientific advancements with our ideals of justice can law remain a part of the living fiber of our civilization."¹⁴³

The concept of judicial notice, which obviates the formal necessity for proof when the matter does not require proof, is another avenue for expansion. According to Canadian Supreme Court Justice Claire L'Heureux-Dube:

Judicial notice is one of the oldest doctrines in the common law and is traceable to two ancient maxims: *manifesta non indigent probatione* (that which is known need not be proved) and *non refert quid notum sit iudici, si notum non sit in forma iudicii* (it matters not what is known to a judge if it is not known in judicial form).¹⁴⁴

It is further pointed out that:

[T]he judge . . . must be assumed to have a fund of general information, consisting of both generalized knowledge and knowledge of specific facts, and the capacity to relate it to what he has perceived during the proceeding, as well as the ability to draw reasonable deductions from the combination by using the ordinary processes of thought. That fund of general information must be at least as great as that of all reasonably well-informed persons in the community. He cannot be assumed to be ignorant of what is so generally accepted as to be incapable of dispute among reasonable men.¹⁴⁵

Justice L'Heureux-Dube notes that in the Canadian family law context, courts have taken judicial notice of various issues regarding the disparate placement of women in Canadian society; these issues include "economics, employment, and child care costs."¹⁴⁶

143. *Fisher v. United States*, 328 U.S. 463, 494 (1946) (Murphy, J., dissenting).

144. L'Heureux-Dube, *supra* note 24, at 462 (quoting Murl A. Larkin, *Article II: Judicial Notice*, 30 HOUS. L. REV. 193, 193 (1993)).

145. *Id.* at 462-63 (quoting Edmund M. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 272 (1944)).

146. *Id.* at 463.

Indeed, the Supreme Court of Canada, in the case of *R. v. S.(R.D.)*,¹⁴⁷ recently considered the doctrine and the spirit of judicial notice in a case that touched upon racism in Nova Scotia specifically, and Canada generally.¹⁴⁸ The concurring decision of Justices L'Heureux-Dube and McLachlin recognize the conceptual tension between judicial impartiality and judicial neutrality.¹⁴⁹

Cardozo recognized that objectivity was an impossibility because judges, like all other humans, operate from their own perspectives. As the Canadian Judicial Council noted in *Commentaries on Judicial Conduct* . . . “[t]here is no human being who is not the product of every social experience, every process of education, and every human contact.” What is possible and desirable, they note, is impartiality:

. . . the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.

True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.¹⁵⁰

The doctrine of judicial notice is closely linked to the common sense and intuition of a given judge. Life experiences and perspectives are a valuable part of judging. Accordingly, how a judge conceptualizes the reasonable person, even mentally as opposed to doctrinally, is influenced by who the judge is and from where

147. [1997] 3 S.C.R. 484 (Can.).

148. *Id.* at 484–85. The facts of the case are described as follows:

A white police officer arrested a black 15-year-old who had allegedly interfered with the arrest of another youth. The accused was charged with unlawfully assaulting a police officer, unlawfully assaulting a police officer with the intention of preventing an arrest, and unlawfully resisting a police officer in the lawful execution of his duty. The police officer and the accused were the only witnesses and their accounts of the relevant events differed widely. The Youth Court Judge [a black woman] weighed the evidence and determined that the accused should be acquitted. While delivering her oral reasons, the Judge remarked in response to a rhetorical question by the Crown, that police officers had been known to mislead the court in the past, that they had been known to overreact particularly with non-white groups, and that that would indicate a questionable state of mind. She also stated that her comments were not tied to the police officer testifying before the court. The Crown challenged these comments as raising a reasonable apprehension of bias.

Id.

149. *See id.* at 501–13 (L'Heureux-Dube & McLachlin, J.J., concurring).

150. *Id.* at 504 (quoting CANADIAN JUDICIAL COUNCIL, COMMENTARIES ON JUDICIAL CONDUCT 12 (1991)).

she comes.¹⁵¹ With increasing diversification of the judiciary and increased diversity training, the typical conception and formulation of the reasonable person should expand to be more reflective of the population. As Justices L'Heureux-Dube and McLachlin further note:

[J]udges in a bilingual, multiracial and multicultural society will undoubtedly approach the task of judging from their varied perspectives. They will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. In fact, such a transformation would deny society the benefit of the valuable knowledge gained by the judiciary while they were members of the Bar. As well, it would preclude the achievement of a diversity of backgrounds in the judiciary. The reasonable person does not expect that judges will function as neutral ciphers; however, the reasonable person does demand that judges achieve impartiality in their judging.

It is apparent, and a reasonable person would expect, that triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function. As David M. Paciocco and Lee Stuesser write:

*"In general, the trier of fact is entitled simply to apply common sense and human experience in determining whether evidence is credible and in deciding what use, if any, to make of it in coming to its finding of fact."*¹⁵²

It is noteworthy that other legal forums are exploring similarly expanded concepts of the reasonable person.¹⁵³ For instance, in the *United Nations Convention on Contracts for the International Sale of Goods* (the "Convention") the *social identity* of the reasonable person is factored into some contractual formulations of the objective test.¹⁵⁴ The meaning of words and conduct is assessed

151. See *id.* at 505.

152. *Id.* at 505-06 (alteration in original) (quoting DAVID M. PACIOCCO & LEE STUESSER, *THE LAW OF EVIDENCE* 277 (1996))

153. See, e.g., *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) (expanding the reasonable person standard to the reasonable woman standard in sexual harassment cases); *Harris v. Int'l Paper Co.*, 765 F. Supp. 1509, 1516 n.12 (D. Me. 1991) ("The appropriate standard to be applied in hostile environment harassment cases is that of a reasonable person from the protected group of which the alleged victim is a member.").

154. See *United Nations Convention on Contracts for the International Sale of Goods* art. 8, U.N. Doc. A/CONF.97/18 (1980), *reprinted in* 19 I.L.M. 668-99 (1980). [hereinafter

according to the understanding of an observer who has the social identity of the recipient and is placed in the position of the recipient of the communication.¹⁵⁵ This socially situated reasonable person test contained in the Convention states that the recipient of communications in a contract dispute be “of the same kind” as the recipient.¹⁵⁶ Article 8 of the Convention provides that statements and conduct of contracting parties should be interpreted according to the parties’ own shared meanings; but if these cannot be ascertained, then the statements and conduct should be interpreted according to the understanding that “a reasonable person of the same kind as the other party would have had in the same circumstances.”¹⁵⁷

Clearly, Article 8 is an attempt to contextualize contractual negotiations and to recognize alternative, but equally legitimate, manners of approaching a contract. Representatives of developing nations objected to provisions that would hold their traders to “reasonable” standards or practices that had been developed among traders from Western industrialized nations without the participation of the developing nations.¹⁵⁸ To be held to a standard to which one has had no input—a foreign standard—struck some representatives from developing nations as existing for the sole furtherance of Western interests.¹⁵⁹ The following statement of the Mexican government succinctly illustrates this point:

[T]he subordination of . . . [interpretive rules] to normative and interpretive usages and practices could result in the imposition of unfair usages and inequitable practices . . . which in standard contracts were usually laid down by the economically stronger party to the detriment of the weaker party.¹⁶⁰

This has also occurred in the criminal law jurisprudential hierarchy and power structure and has meant that certain interests and voices are subjugated in order to further the interest of the

Convention].

155. *Id.*

156. *Id.*

157. *Id.*

158. AMY HILSMAN KASTELY ET AL., *CONTRACTING LAW* 139 (2d ed. 2000).

159. *Id.*

160. *Id.* (citing *Analysis of Replies and Comments by Government on Hague Conventions of 1964, Report of the Secretary-General*, U.N. Doc. A/CN.9/31 (1970) (alteration in original)).

stronger party—the majority-run State.¹⁶¹ Professor Patricia Williams challenged the legal system to recognize the “deeply painful and assaultive” nature of racism, which she has identified as “spirit murder.”¹⁶² Social science and medical expert evidence may be used to inform the judge and jury of this racial context.¹⁶³ Under a “socially situated” construction of the reasonable person, relevant evidence would include not only the history and circumstances of the accused in the immediate homicide investigation, but also in society at large.¹⁶⁴ Therefore, in order to consider the insulting effect of racial abuses on a person of color, for example, the legacy of such racist abuse is relevant, otherwise the assessment of the provocation is undertaken in a vacuum—devoid of any societal underpinnings and context.¹⁶⁵

This premise is furthered by Canadian courts that have modified the “ordinary person” standard in some cases by directing juries to take into account background events in assessing whether the provocation was sufficient to meet the objective test. A series of appeals cases have held that the jury must consider, in relation to the objective test, *the same external pressures of insult by acts or words as were on the accused*.¹⁶⁶

161. See DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 101–78 (1999) (discussing jury discrimination and selective prosecution); FRANTZ FANON, *THE WRETCHED OF THE EARTH* 35–106 (1963) (discussing the suppression and psychological turmoil that Western colonialism has caused the colonized and how violence has been used to effect change); HACKER, *supra* note 136, at 3–64 (explaining why many black Americans “define [their] citizenship as partial and qualified”); BRUCE WRIGHT, *BLACK ROBES, WHITE JUSTICE* 61–146 (1987) (discussing the role that judges play in racism).

162. Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law’s Response to Racism*, 42 U. MIAMI L. REV. 127, 129 (1987) (explaining that the jury should consider “the external events which triggered the accused for the violent reaction”).

163. See generally Patricia J. Falk, *Novel Theories of Criminal Defense Based Upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 N.C. L. REV. 731, 774–80 (1996) (discussing examples of social science and medical studies of racism).

164. *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484, 508 (Can.) (L’Heureux-Dube & McLachlin, J.J., concurring) (explaining that the reasonable person possesses knowledge of the history of discrimination in his or her community).

165. For an example of this phenomenon, see Omar Saleem, *The Ages of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on Terry “Stop and Frisk,”* 50 OKLA. L. REV. 451, 486–87 n.242 (1997) (criticizing the United States Supreme Court for treating racism as an isolated event committed by only a few deviant individuals).

166. See *R. v. Desveaux*, [1986] 26 C.C.C.3d 88, 96 (Ont. C.A.) (explaining that the jury

In *R. v. Daniels*,¹⁶⁷ Appellate Justice Laycraft held that the trial judge should instruct the jury to consider *all* of the external events putting pressure on the accused.¹⁶⁸ The Supreme Court of Canada approved this case and its underlying reasoning.¹⁶⁹ Accordingly, *Daniels* is instructive and indicates the validity of a contextual approach to the provocation defence, as follows:

The purpose of the objective test prescribed by S. 215 [now section 232] is to consider the actions of the accused in a specific case against the standard of the ordinary person. Hypothetically, the ordinary person is subjected to the same external pressures of insult by acts or words as was the accused. Only if those pressures would cause an ordinary person to lose self-control does the next question arise whether the accused did, in fact, lose self-control. In my view, the objective test lacks validity if the reaction of the hypothetical ordinary person is not tested against *all of the events which put pressure on the accused*.

The requirement for suddenness of insult and reaction *does not preclude a consideration of past events*. The incident which finally triggers the reaction must be sudden and the reaction must be sudden but *the incident itself may well be coloured and given meaning by a consideration of events which preceded it*. Indeed, one could imagine a case in which a given gesture, in itself innocuous, could not be perceived as insulting unless the jury was aware of previous events. They disclose the nature, depth and quality of the insult.¹⁷⁰

Thus, jurisprudentially, the application of the objective test may include all of the events that put pressure on the accused and gave meaning to the final triggering act or insult. Racial abuses are but one example of such events. Similarly, sexual abuses and the abuses perpetrated because of homophobia may give meaning to ultimately fatal violence, which occurs in response to oppressive forces bearing down upon the accused. While *Daniels* and the other two appeals cases cited were decided prior to *Hill*, the Supreme Court of Canada did not disapprove them.

should consider the history of tensions and pressures between the victim and accused); *R. v. Conway*, [1985] 17 C.C.C.3d 481, 487 (Ont. C.A.) (explaining that the jury should consider "an ordinary man who had experience the same series of acts or insults as experienced by the appellant"); *R. v. Daniels*, [1983] 7 C.C.C.3d 542, 554 (N.W.T.C.A.).

167. [1983] 7 C.C.C.3d 542 (N.W.T.C.A.).

168. *Id.* at 554.

169. See *R. v. Thibert*, [1996] 1 S.C.R. 37, 48 (Can.); *R. v. Hill*, [1986] 1 S.C.R. 313, 330 (Can.).

170. *Daniels*, 7 C.C.C.3d at 554 (emphasis added).

The analysis found in the above mentioned cases is helpful in my advocacy for an appreciation of racial context and contextualization generally. Consideration of a racial slur or assault should be grounded in the reality of other "external pressures" including the context of racism, if relevant. Similarly, the events putting pressure on a person of color may include his or her context of suffering racist abuses and racial micro-aggressions¹⁷¹—this is especially relevant when the caselaw speaks of a final triggering act or insult.¹⁷² A racial epithet hurled at a racialized person may produce a violent reaction for any number or reasons, including the outrage and anger evoked from an accumulation of racial assaults and abuses.¹⁷³ Of course, this is not the ideal reaction, nor is it the only reaction.¹⁷⁴ However, a violent reaction should not be surprising in situations where racism has created a particularly tense and volatile context,¹⁷⁵ such as the *Smithers* fact pattern.¹⁷⁶ Recall that consideration of human frailty was meant to prevent the simple assumption of malice in all circumstances of murder.¹⁷⁷ One such human frailty involves the claim that the accused has been provoked into committing the act. Accordingly, a "thin-skulled"¹⁷⁸ accused who is subjected to racial taunting may

171. Peggy Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1565 (1989) (explaining that microaggressions are the "subtle, stunning, often automatic, and non-verbal exchanges which are 'put downs' of blacks by offenders" (quoting Chester M. Pierce et al., *An Experiment in Racism: TV Commercials*, in TELEVISION AND EDUCATION 66 (Chester M. Pierce, ed. 1978))).

172. See cases cited *supra* note 166.

173. See Falk, *supra* note 163, at 752–55.

174. See generally IAN FRAZIER, *ON THE REZ* (2000) (portraying the American Indians and how they have survived through toughness and humor). Thank you to Professor Sidney Watson for referring me to this book.

175. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 680, 716 (1995) (arguing that black criminals should not be punished for retributive purposes because their crime is a predictable reaction to pervasive racial subordination and white supremacy); see also PAUL HARRIS, *BLACK RACE CONFRONTS THE LAW* (1997) (arguing for diminished capacity defense against criminal liability for crimes by black defendants committed in the heat of "black rage" caused by living in discriminatory environment).

176. See *R. v. Smithers*, [1978] 1 S.C.R. 506 (Can.); *supra* notes 2–16 and accompanying text.

177. See *supra* notes 36–38 and accompanying text.

178. The tort law concept of the "thin skull" plaintiff is a traditional part of negligence theory and application. It has been held that the reasonable foreseeability test instructs that a tortfeasor "takes his victim as he finds him." *Smith v. Leech Brain & Co.*, [1962] 2 Q.B. 405, 414 (Eng.).

In *Smith v. Leech Brain & Co.*, spattering molten metal burned a workman's lip. *Id.* at 408. The burn triggered the development of cancer at a place where the plaintiff had pre-

manifest the very type of human frailty for which the defence was created.

In a recent decision, *R. v. Thibert*,¹⁷⁹ the majority of the Supreme Court of Canada reviewed the jurisprudence on the ordinary person standard and concluded: “[i]f the test is to be applied sensibly and with sensitivity, then the ordinary person must be taken to be of the same age, and sex, and must share with the accused such other factors as would *give the act or insult in question a special significance*.”¹⁸⁰

The majority in *Thibert* relies on the following passage from the appellate court decision in *R. v. Conway*:¹⁸¹

[The trial judge] should have told [the jury] present acts or insults, in themselves insufficient to cause an ordinary man to lose self-control, *may indeed cause such loss of self-control when they are connected with past events and external pressures of insult by acts or words* and accordingly in considering whether an ordinary man would have lost self-control they *must consider an ordinary man who had experienced the same series of acts or insults as experienced by the appellant*.¹⁸²

I would suggest that this language, referencing a series of acts or insults, could be interpreted as recognizing the existence of cumulative provocation generally, and the possibility of cumulative racist provocation specifically. Such provocation occurs over time and does not originate merely from one provocative incident. Rather, numerous insults and wrongful acts from numerous sources and abusers may accumulate over time to become the proverbial “straw that breaks the camel’s back.”

malignant cancerous tissues. *Id.* The workman died from this cancer three years later and his wife sued his employer. *Id.* Lord Chief Justice Parker chose to preserve the thin-skull plaintiff rule and stated that:

The test is not whether these employers could reasonably have foreseen that a burn would cause cancer and that he would die. The question is whether these employers could reasonably foresee the type of injury he suffered, namely, the burn. What, in the particular case, is the amount of damage which he suffers as a result of that burn, depends on the characteristics and constitution of the victim.

Id. at 415.

179. [1996] 1 S.C.R. 37 (Can.).

180. *Id.* at 46–47 (emphasis added).

181. [1985] 17 C.C.C.3d 481 (Ont. C.A.).

182. *Thibert*, [1996] 1 S.C.R. at 48–49 (quoting *Conway*, 17 C.C.C.3d at 487) (emphasis added).

In the domestic setting, cumulative provocation typically involves a course of cruel or violent conduct on the part of the deceased over a substantial period of time.¹⁸³ This conduct may culminate in the victim of the cruel behavior intentionally killing their tormentor.¹⁸⁴ Reliance is then placed on the whole course of conduct as a basis for the legal defence of provocation (rather than a single, more serious provoking event occurring immediately before the killing).¹⁸⁵ In such cases the conduct of the accused immediately before the murder, if viewed in isolation, may seem relatively minor.¹⁸⁶ However, if the incident is viewed in the context of previous cumulative abuses, it may elucidate the accused's response to the deceased's act or insult.¹⁸⁷

Serial or cumulative provocation is the context which concerns me the most. It is at this juncture that the cumulative impact of racism becomes relevant. An isolated racial epithet may seem trivial, but may have added significance as a provocative catalyst when assessed in light of longstanding cumulative provocation in the form of systemic, structural, and direct or indirect racism.

A plea of provocation is conceptually able to cover not only single, stand-on-their-own provoking events but also the cumulative effects of a pattern of objectionable provocative behaviour directed towards the defendant. To date, Canadian law has narrowly interpreted provocation to consist in a single "sudden" or "immediate" provoking event, but there is no reason why the idea of provocation need be so confined.¹⁸⁸

Accordingly, I would suggest that "contextualization" of the provocation defence is the next logical step in the evolution of the defence if any relevant racial context is to be appreciated.

2. Contextualization

Contextualization as an approach places the crime, including

183. See Martin Wasik, *Cumulative Provocation and Domestic Killing*, 1982 CRIM. L. REV. 29, 29 (1982).

184. *Id.*

185. *Id.*

186. See *id.*

187. See *id.*

188. Brenda M. Baker, *Provocation as a Defence for Abused Women Who Kill*, 11 CAN. J.L. & JURIS. 193, 195 (1998).

the insult or offensive conduct, in societal context and attempts to deconstruct any prejudices and assumptions at work.¹⁸⁹ Expert evidence should be admissible as to such context. I leave for further and later exploration the exact types of evidence which may properly inform the record at trial. Some will undoubtedly have concerns with the necessary expansion of trials that would take place if contextualization occurs. My response is simply to highlight the educative role of the justice system and to have faith in the ability of a judge to control her docket and the administration of justice, yet simultaneously strive to have herself and the jury properly and fully informed. We must err on the side of justice, not administrative expediency.¹⁹⁰

Judicial inquiry into the factual, social, and psychological “context provides the requisite background for the interpretation and the application of the law.”¹⁹¹ The Supreme Court of Canada has recently had occasion to expound upon this point, and the concurring opinion in *R. v. S.(R.D.)* makes the point that a conscious, contextual inquiry is a necessary part of any judicial inquiry.¹⁹²

An understanding of the context or background essential to judging may be gained from testimony from expert witnesses in order to put the case in context: . . . from academic studies properly placed before the Court; and from the judge’s personal understanding and experience of the society in which the judge lives and works. *This process of enlargement is not only consistent with impartiality; it may also be seen as its essential precondition.*

*A reasonable person far from being troubled by this process, would see it as an important aid to judicial impartiality.*¹⁹³

189. See *supra* note 23. See generally Michelle Adams, *Knowing Your Place: Theorizing Sexual Harassment at Home*, 40 ARIZ. L. REV. 17 (1998) (addressing contextualization of sexual harassment).

190. See *Singh v. Minister of Emp. & Immigr.*, [1985] 1 S.C.R. 177, 179–80 (overruled on other grounds) (granting appellant’s demand for due process in immigration hearings, despite increased administration, because to do otherwise would be counter to Charter section 7 protections of fundamental freedoms). Section 7 of the Charter guarantees that “everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Charter § 7.

191. *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484, 507 (Can.) (L’Heureux-Dube & McLachlin, J.J., concurring).

192. *Id.* at 506.

193. *Id.* at 507 (citations omitted) (emphasis added).

The notion that social conditions influence criminal behavior is certainly not new; this approach is consonant with a broad literature documenting the effects of adverse conditions on the incidence of crime.¹⁹⁴ With this approach it is permissible to take into account characteristics such as ethnic and racial identity, sex, language, or physical infirmity, among other characteristics of an accused.¹⁹⁵ Furthermore, the context of any systemically oppressive factors relevant to those characteristics may be considered for the purpose of properly situating the insult or wrongful act.¹⁹⁶ To do otherwise is to do a disservice to the objective test because ordinary people do, in fact, come from all walks of life.

The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical "reasonable man."¹⁹⁷ If it strains credulity to imagine what the "ordinary white man" would do in the position of a black man bombarded with racial slurs, it is probably because white men do not typically find themselves in that situation. Some blacks do, however.

Contextualization would assume that the reasonable person would or should have knowledge of and behave consistently with

194. One of the first criminal cases involving a "rotten social background" defence was *United States v. Alexander*, 471 F.2d 923 (D.C. Cir. 1973). The black defendant killed a white marine after an altercation involving racial epithets directed at him. *Id.* at 928-29. The defendant claimed he acted from an irresistible impulse caused by racism and economic deprivation he experienced as a child which caused him to hate white people. *Id.* at 957-58 (Bazelon, C.J., dissenting). At trial, the defence was denied on the ground that, regardless of whether defendant's background contributed to his actions, it had not rendered him mentally incompetent at the time of the crime. *Id.* at 968 (McGowan, J.) In his dissent, Judge Bazelon asserted that a rotten social background had deprived the defendant of control over his actions even if he remained sane at the time of the crime. *Id.* at 959 (Bazelon, C.J., dissenting). Judge Bazelon further articulated his viewpoint in an article that sparked scholarly debate over these issues. See David L Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 403 (1976). But see Steven J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247 (1976). For additional discussion of this issue, see Falk, *supra* note 163, at 736-37 (arguing that socially toxic factors, such as racism, poverty, and crime can so accumulate upon particular individuals as to cause criminal and other dysfunctional behavior). See generally NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* (1982) (discussing mental illness and the criminal justice system).

195. See Falk, *supra* note 163, at 733-34.

196. See *id.* at 752-57.

197. This framework is borrowed from the reasoning of Justice Wilson in *R. v. Lavallee*, [1990] 1 S.C.R. 852, 874 (Can.). Justice Wilson reasoned that it is hard to imagine what "an ordinary man" would do if he was a battered spouse because it is women who are most often in these situations. *Id.*

the Charter.¹⁹⁸ Thus, in addition to setting out the requirements of the Criminal Code, a judge would make specific reference to the Charter and the right of all persons to be free from discrimination on its enumerated and analogous grounds.¹⁹⁹ Further, the charge to the jury would state that the reasonable person is presumed to hold Charter values or to be aware of these legal strictures. Again there is an inherent tension implicit in this thesis. I suggest that the racial victimization of the accused could be taken into account as potentially mitigating, but not the accused's racism, as this would fall outside of the equality-seeking parameters and, therefore, be contrary to Charter values. A commitment towards ending all forms of discrimination should inform, if not drive, the use of the defence in a manner which promotes the spirit of the Charter.

The defence of provocation should be governed by an equality analysis that permeates the "ordinary person" test. The court could take judicial notice that knowledge of and commitment to the Charter and its values is an essential feature of the reasonable person.

The reasonable person, . . . is an informed and right-minded member of the community, a community which, in Canada, supports the fundamental principles entrenched in the Constitution by the *Canadian Charter of Rights and Freedoms*. Those fundamental principles include the principles of equality set out in s. 15 of the *Charter* and endorsed in nationwide quasi-constitutional provincial and federal human rights legislation. The reasonable person must be taken to be aware of the history of discrimination faced by disadvantaged groups in Canadian society protected by the *Charter's* equality provisions. These are matters of which judicial notice may be taken. In *Parks*, . . . Doherty J.A., did just this, stating:

"Racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes."²⁰⁰

Thus, behaviors that are motivated by hatred, fear, or the

198. See *S.(R.D.)*, [1997] 3 S.C.R. at 507–08 (L'Heureux-Dube & McLachlin, J.J., concurring).

199. See *id.*

200. *Id.* (quoting *R. v. Parks*, [1993] 15 O.R.3d 324, 342 (Ont. C.A.)).

stereotypes of persons entitled to protection under the Charter would be, by definition, unreasonable, pugnacious, or temperamental and, thus, unacceptable. Therefore, the reasonable person is not racist, sexist nor homophobic, just as the reasonable person is not excitable nor idiosyncratic. As the concurring opinion in *R. v. S.(R.D.)* observed:

We conclude that the reasonable person . . . endorsed by Canadian courts is a person who approaches the question . . . *with a complex and contextualized understanding of the issues in the case*. The reasonable person understands the impossibility of judicial neutrality, but demands judicial impartiality. *The reasonable person is cognizant of the racial dynamics in the local community, and, as a member of the Canadian community, is supportive of the principles of equality.*²⁰¹

To allow a reasonable person to hold racist, sexist, or homophobic beliefs and to be provoked by such discriminatory tendencies would be to allow peculiar or idiosyncratic characteristics into the objective standard. Thus the addition of parameters preventing utilization of Charter-infringing remarks and actions, versus defensive reactions, as catalysts for the defence may be possible.²⁰²

This defensive-offensive dichotomy may prove helpful in delineating the tightrope between a defensive reaction to discriminatory behavior and invective on the one hand, and the ramifications of offensive discrimination on the other. Offensive discrimination sanctions and reinforces existing prejudicial power structures, subjugating already marginalized communities. This conduct has been explicitly prohibited in *Hill*.²⁰³

Moreover, a contextual approach would have very specific consequences for men who try to avail themselves of the defence of provocation in circumstances where women were expressing their

201. *Id.* at 509 (emphasis added).

202. Acceptance of the expansion of the provocation defence for racial contextualization does not necessarily require acceptance of a corresponding restriction of the defence where it may be utilized by persons operating under oppressive ideologies, such as racism or sexism. Indeed, one might believe that mitigation for human frailty should include mitigation for people harmed by experiences of racism, and also for people who are the product of a culture which prescribes acceptance of oppressive ideologies. Some may prescribe to the "eye for an eye" philosophy whereby the provocation defence should be accessible to victims of racism and sexism as well as racists and sexists, for example.

203. *R. v. Hill*, [1986] 1 S.C.R. 313, 331-35 (Can.).

autonomy or desire to leave a relationship or where the accused was subjected to a homosexual advance. Specifically, the Charter prohibits discrimination based upon the enumerated grounds of gender discrimination and the analogous ground of sexual orientation.²⁰⁴ Insults based on such views should not ground the provocation defence. Further, as women's assertions of autonomy and a homosexual advance are not unlawful, they should not provide a defence to murder. For instance, the "gay panic" defence attempted last year in the trial of one of the men accused of fatally beating Matthew Shepard, a gay Wyoming college student, should similarly be rejected as prohibited by the Charter.²⁰⁵

The reasonable person standard articulated in *R. v. S.(R.D.)* takes the analysis one step further. The concurring decision arguably supports the proposition that not only is the reasonable person not a racist, but he or she is assumed to have knowledge of the reality of racism and oppression.²⁰⁶

The reasonable person is not only a member of the Canadian community, but also, more specifically, is a member of the local communities in which the case at issue arose (in this case, the Nova Scotian and Halifax communities). *Such a person must be taken to possess knowledge of the local population and its racial dynamics, including the existence in the community of a history of widespread and systemic discrimination against blacks and aboriginal people, and high profile clashes between the police and the visible minority population over policing issues.* The reasonable person must thus be deemed to be cognizant of the existence of racism in Halifax, Nova Scotia. *It follows that judges may take notice of actual racism known to exist in a particular society.* Judges have done so with respect to racism in Nova Scotia. [It has been noted that:] "[Racism] is a pernicious reality. The issue of racism existing in Nova Scotia has been well documented in the Marshall Inquiry Report. *A person would have to be stupid, complacent or ignorant not to acknowledge its presence, not only individually, but also systemically and institutionally.*"²⁰⁷

At this point it should be pointed out that Canadian courts have accepted contextualization in other criminal law defences.²⁰⁸

204. Charter § 28; see also cases cited *supra* note 57.

205. For information on the Matthew Shepard trial see *McKinney Guilty of Murder: Death Penalty Possible for Shepard Slaying*, at http://more.abcnews.go.com/sections/us/dailynews/shepard_verdict.html (Nov. 3, 2000).

206. *S.(R.D.)*, [1997] 3 S.C.R. at 508 (L'Heureux-Dube & McLachlin, J.J., concurring).

207. *Id.* at 508–09 (quoting *N.S. Minster Cmty. Servs. v. S.M.S.*, [1992] 110 N.S.R.2d 91, 108 (Fam. Ct.)) (emphasis added).

208. See *R v. Lavalée*, [1990] 1 S.C.R. 852 (Can.).

The law of self-defence has tended to infuse the reasonable person with the characteristics of the accused, and to examine the circumstances and contexts in which the accused found themselves.²⁰⁹ Specifically, Canadian courts have recognized the plight of women in situations of domestic violence and have recognized battered woman syndrome and evidence of the legacy and history of abuse as relevant to construing the “reasonable person” in this context.²¹⁰

An extension of this sort has already taken place in Canada’s law of self defence where both a woman’s gender and her experience of continued abuse are considered to be central in determining the reasonableness of her belief in the need for self defence. The 1994 Government Consultation Paper called for a reformed defence of provocation which showed compassion for women by reducing a murder charge to manslaughter when “provoked by prolonged and severe domestic abuse or oppression,” acknowledging the “slow-building effects of such abuse.”²¹¹

Such contextual consideration may necessitate the allowance of expert testimony to elucidate the reality of racism. In *R. v. Lavallee*,²¹² Madame Justice Wilson, writing for the majority, recognized the need for expert assistance in appreciating a context that may be foreign to the average juror.²¹³

The need for expert evidence in these areas can, however, be obfuscated by the belief that judges and juries are thoroughly knowledgeable about “human nature” and that no more is needed. They are, so to speak, their own experts on human behaviour. . . . Expert evidence on the psychological effect of battering on wives and common law partners must, it seems to me, be both relevant and necessary in the context of the present case. How can the mental state of the appellant be appreciated without it?²¹⁴

209. See *R. v. Hill*, [1986] 1 S.C.R. 313, 331–32 (Can.).

210. For the first time the Supreme Court of Canada contextualized woman battering in *Lavallee*. In this landmark case, the Supreme Court of Canada recognized the “battered woman syndrome,” whereby expert testimony was admissible to establish the reasonableness of the accused’s belief regarding the need for self-defensive action. *Lavallee*, [1990] 1 S.C.R. at 882.

211. Baker, *supra* note 188, at 195 (quoting CRIM. L. POL’Y SEC., CAN. DEP’T OF JUST., REFORMING CRIMINAL CODE DEFENCES: PROVOCATION, SELF-DEFENCE AND DEFENCE OF PROPERTY: A CONSULTATION PAPER (1998)) [hereinafter CONSULTATION PAPER].

212. [1990] 1 S.C.R. 852 (Can.).

213. See *id.* at 871.

214. *Id.*

Courts need help to understand the psychological effects of racism, battering, homophobia, and other “-isms.” This help is available to courts from trained professionals. As the *Lavallee* Court noted in regard to this type of testimony in battering cases:

It is aimed at an area where the purported common knowledge of the jury may be very much mistaken, an area where jurors' logic, drawn from their own experience, may lead to a wholly incorrect conclusion, an area where expert knowledge would enable the jurors to disregard their prior conclusions as being common myths rather than common knowledge.²¹⁵

Common misperceptions about the existence of racism make Justice Wilson's comments equally applicable to the contextualization of the provocation defence. Knowledge of racism, its manifestations, and ramifications is similarly beyond the ken of the average juror. Additionally, the unpopularity of notions such as cumulative provocation, fear of the slippery slope, and flood-gate concerns likely necessitate the introduction of social science evidence to educate judges and jurors about this relevant racial context.

The stress induced by racism operates on at least two levels: (1) a system-wide derogation of members of the minority group, and (2) the personal experiences of the individual. *Often, it is the cumulative impact of both types of stresses that is so destructive and explains why one precipitating event may seem trivial yet causes the individual acute distress.* The response to this stress is not the same for all black persons. Individual differences in responsiveness to the stresses produced by racism have been explored only slightly. Some factors implicated in vulnerability to racism include degree of community support, personality, and attitudes.²¹⁶

3. The Context of Cumulative Provocation

“This frustration with the whites,” Ola said, thoughtfully, and not responding to her smile, “is a natural reaction to what they have, collec-

215. *Id.* at 873 (quoting *State v. Kelly*, 478 A.2d 364, 378 (N.J. 1984)).

216. Falk, *supra* note 163, at 778 (emphasis added) (citations omitted); see Joe R. Feagin, *The Continuing Significance of Race: Antiblack Discrimination in Public Places*, 56 AM. SOC. REV. 101, 114–15 (1991); Jeanne Spurlock, *Black Americans*, in CROSS-CULTURAL PSYCHIATRY 165 (Albert Gaw ed., 1982) (“The foregoing accounts of psychological assaults daily mar the mental health of Black people. Some will ‘weather the storm.’ Some will break down.”).

tively, done to you, not simply as an individual, but as a people, a culture, a race. The instinct for self-defence and self-preservation is innate."²¹⁷

The above passage is from the novel *The Temple of My Familiar* by Alice Walker. In addressing his daughter's fear that she will murder whites, Ola, one of the main characters, touches upon a very real phenomenon: at times the pressure of living in an oppressive society (that is in a constant state of denial), might be too much to bear. Currently there are no criminal defences that would explicitly allow for this reality. The defence of provocation is one possible avenue for exploration of these issues.

At its core, what pushes the margins with my proposal is not the emphasis on expanding the relevant considerations for the objective test. The novel element is that this expansion includes an appreciation of serial or cumulative provocation.

[R]acism is stressful for the persons subjected to it. The stress for minority group members induced by racism is greater than that experienced by other members of society, a phenomenon Cash terms "extra-dimensional systemic frustrations." The result of stress are fairly well-known. As one commentator opined, "In the case of Blacks, extrapsychic sources of stress often lead to intrapsychic maladaptive behavior, that is, poor self-concept, feelings of hopelessness, and rage."²¹⁸

Unlike the case law addressing "battered woman's syndrome," which focuses on the cumulative abuse inflicted by one batterer upon the accused woman, the distinction which I am advocating would critically examine the role, if relevant, of "serial abuse" lev-

217. ALICE WALKER, *THE TEMPLE OF MY FAMILIAR* 316 (1989).

218. Falk, *supra* note 163, at 777-78 (citations omitted). For further information on the serious health concerns brought about by racism, see *id.* at 774 nn.234-36. See also Feagin, *supra* note 216, at 115 ("The individual cost of coping with racial discrimination is great and, as he says, you cannot accomplish as much as you could if you retained the energy wasted on discrimination."); Harold W. Neighbors, *Clinical Care Update: Minorities/The Prevention of Psychopathology in African Americans: An Epidemiologic Perspective*, 26 *CMTY. MENTAL HEALTH J.* 167, 167 (1990) ("Many have argued that stressful social conditions are the major cause of mental disorder in blacks and thus, psychopathology can be prevented by eliminating racism, oppression and poor economic conditions."). Neighbors further notes that it is commonly assumed that blacks experience more stress than whites because of discrimination and prejudice. *Id.* For an older, but still important, exploration of this theme, see Charles A. Pinderhughes, *Understanding Black Power: Processes and Proposals*, 125 *AM. J. PSYCHIATRY* 1552, 1554 (1969) (noting the "chronic external conflict and distress" suffered by black individuals who experience a "flood of unpredictable stimuli" and find the culture a constant threat).

ied at the accused by a number of abusers over time. In this scenario, such abuse may render the next abusive contact the proverbial “last straw.”

It is the transformation of *this* quantum of grief into aggression of which we now speak. As a sapling bent low stores energy for a violent backswing, blacks bent double by oppression have stored energy which will be released in the form of rage—black rage, apocalyptic and final.²¹⁹

Such recognition of “serial provocation” would better appreciate the reality of racist abuses. Unlike the case of the battered woman who might be in a longstanding relationship with her abuser, victims of racism are bombarded by various abuses from many different persons and sources. If the accused is a black person who has been the victim of routine racist microaggressions,²²⁰ the racist act or racist insult should be situated in the context of such racism. Psychiatrists who have studied black populations view such microaggressions as “incessant and cumulative” assaults on black self-esteem.²²¹ Racism affects mental well-being, in addition to causing stress, by compromising the self-concept of the person subjected to racial abuses. If racism is premised upon the notion of racial superiority, it is no wonder that one sequela is self-contempt on the part of some racialized persons.²²² As one group of authors has poignantly noted: “What is it like to be a black person in white America today? One step from suicide! . . . [I]t’s really a mental health problem. It’s a wonder we haven’t all gone out and killed somebody or killed ourselves.”²²³

Within the context of systemic racial abuses there may be circumstances that mitigate the “innocence” of the victim. These are considerations that must be explored in order to fully appreciate any underlying or background information that gives context to violence which may result from the context of racial abuses.

219. WILLIAM H. GRIER & PRICE E. COBBS, *BLACK RAGE* 210 (1968).

220. See Davis, *supra* note 171, at 1560; Chester Pierce et al., *An Experiment in Racism: TV Commercials*, in *TELEVISION AND EDUCATION* 62, 66 (Chester Pierce ed. 1978); Chester Pierce, *Psychiatric Problems of the Black Minority*, in *AMERICAN HANDBOOK OF PSYCHIATRY* 512 (Silvane Arieti ed., 2d ed. 1974) [hereinafter Pierce, *Psychiatric Problems of the Black Minority*].

221. Pierce, *Psychiatric Problems of the Black Minority*, *supra* note 220, at 515.

222. Falk, *supra* note 163, at 778; see Williams, *supra* note 162, at 141.

223. JOE R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* vii (1994).

The multifaceted nature of psychological dysfunction engendered by racism, only one aspect of which is rage, is one reason that the sobriquet "black rage" is not only unduly provocative, but also inaccurate. A better term might be the one suggested by Aggrey Burke—"racism-related disorder."²²⁴

If the law does not acknowledge serial racial abuses, the reality of the cumulative impact of racism will continue to be ignored in the criminal defence setting. It is precisely this context, if relevant, that should be taken into account upon a reexamination of the earlier discussed cases of *R. v. Smithers*²²⁵ and *R. v. Olbey*.²²⁶

a. *Smithers v. The Queen*²²⁷

Recall Paul Smithers, the young black hockey player who was taunted with racial slurs throughout a game and later killed one of his taunters.²²⁸ The court's reasoning did not discuss the issue and impact of the racial slurs and abuses on the behavior of the accused. Indeed, the Supreme Court of Canada characterized the principle issue as "whether the appellant had committed homicide by directly or indirectly, by any means, causing the death of Cobby and whether such homicide was culpable for the reason that it was caused by an unlawful act."²²⁹ Provocation was deemed not to be a factor and was dismissed by the court.²³⁰ This is evident from the Court's statement that "the appellant alone was the aggressor. He relentlessly pursued Cobby some forty-five minutes later for the purpose of carrying out his threats to 'get' Cobby."²³¹

Regardless of whether this forty-five minute time lag was sufficient to undermine fulfillment of the "on the sudden"²³² require-

224. Falk, *supra* note 163, at 774 (quoting Aggrey W. Burke, *Is Racism a Causatory Factor in Mental Illness?*, 30 INT'L J. SOC. PSYCHIATRY 1, 1 (1984)); see also Joe Ravetz, *Ethnicity, Race and Mental Health*, 8 SOC. WORK EDUC. 37, 38 (1989).

225. [1978] S.C.R. 506 (Can.).

226. [1980] 1 S.C.R. 1008 (Can.).

227. For the earlier discussion of *Smithers*, see *supra* notes 2-16 and accompanying text.

228. *Smithers*, [1978] S.C.R. at 508-09.

229. *Id.* at 515.

230. *Id.* at 522.

231. *Id.*

232. Criminal Code § 232(2).

ment, the Court should have seriously addressed the provocative context within which the murder was committed. The Court did not examine the racially charged atmosphere, nor the fact that during the game the accused was bombarded with racial abuses from multiple sources in the form of verbal insults and threats. No mention was made that Smithers was subjected to “goon tactics” on the ice, nor was any examination undertaken of what he might have been subjected to as one of the few black hockey players.²³³ I do not mean to suggest that these racial abuses should have been completely exculpatory, but had the provocation defence been a consideration, the context of racist abuse would have been relevant to the analysis of the case. Greater scrutiny of the terms “nigger” and the history of the deployment of this epithet would have, at the least, situated this slur as a wrongful act or insult—the catalyst for provocation. Therefore, the objective black man similarly situated should have been considered insofar as the deprivation of self-control was concerned. The third criterion—the subjective test—would likely have been made out on the facts.

b. *Olbey v. The Queen*²³⁴

At the accused’s trial for murder, one of the Crown prosecution witnesses testified that she heard the deceased call the accused a “two-bit nigger punk.”²³⁵ After this statement, the witness testified that there was an argument and that four or five minutes later she heard shots fired.²³⁶ These shots killed the deceased.²³⁷

233. *Smithers*, [1978] S.C.R. at 506–08. Racial issues in professional hockey have been addressed in news reports over the past several years. See Andrew Campbell, *NHL Must Address the Racism Issue*, TORONTO STAR, Feb. 26, 1990, at A16; *Housley’s Day Marred by Incident; Racial Remarks Spoil 1,000th Point*, HOUSTON CHRON. Nov. 9, 1997, at 14; Sharon Raboin, *After Second Slur, Caps Get Sensitivity Training*, USA TODAY, Nov. 26, 1997, at 13C; *Racial Incident Follows Caps’ 2-1 Win*, BALT. SUN, Nov. 9, 1997, at 14C; *Tampa Players Accused of Racial Slurs*, ST. LOUIS POST-DISPATCH, Oct. 7, 1998, at D2.

234. For the earlier discussion of *Olbey*, see *supra* notes 19–22 and accompanying text.

235. *R. v. Olbey*, [1980] 1 S.C.R. 1008, 1012 (Can.).

236. *Id.* at 1016–17.

237. *Id.* at 1017.

The Supreme Court of Canada again dismissed the provocative context, as it had done in *Smithers*, and ignored the reality of racist abuses.²³⁸ Speaking for the majority Justice McIntyre held:

I have read the evidence with care and find it difficult to reach a conclusion that there was any evidence of a wrongful act or insult of such nature as to be sufficient to deprive an ordinary person of the power of self-control. Further, I was unable to find any evidence that the accused acted on the sudden before his passion cooled.²³⁹

Later in the case the Court stated that “[i]n this case, there was little if any evidence to support the proposition that provocation had been given.”²⁴⁰

Clearly the Supreme Court used an objective standard that was devoid of any racial context in reaching its conclusion. In determining that there was no provocation from the racial epithet, the Court failed to recognize the clear nexus between the insult and the relevant characteristic—race. In this case, even a simple infusion of the ordinary person in keeping with the basic approach employed in *Hill* would have been sufficient.

c. Parnerkar v. The Queen

In *R. v. Parnerkar*,²⁴¹ the accused, charged with the non-capital murder of Anna Mazeros, was convicted of manslaughter on the verdict of the jury.²⁴² The Crown appealed, claiming that there was no evidence of a wrongful act or insult within the meaning of the provocation defence.²⁴³

The accused met the deceased after he emigrated from India, and the two had been on friendly terms for a number of years.²⁴⁴ Their relationship cooled, but the two remained friends nonetheless.²⁴⁵ The accused wished to rekindle the relationship and flew in to visit with Mazeros and her children.²⁴⁶ The accused was al-

238. *Id.* at 1022.

239. *Id.*

240. *Id.* at 1024.

241. [1974] S.C.R. 449 (Can.).

242. *Id.* at 451.

243. *Id.*

244. *Id.* at 455.

245. *Id.* at 456.

246. *Id.* at 455-56.

legedly provoked by the deceased's statement, "I am not going to marry you because you are a black man."²⁴⁷ It was held by the Saskatchewan Court of Appeal²⁴⁸ (and affirmed by the Supreme Court of Canada) that the cultural and religious background of the accused was not relevant to the determination of the objective test.²⁴⁹

Madame Justice Wilson critiqued this holding in her dissent in *Hill*.²⁵⁰ She stated that the court in *Parnerkar* assumed that insults occur in a vacuum and that, therefore, no facts pertinent to the individual accused need be taken into account in assessing the reaction to an insult.²⁵¹ This assumption, however, does not conform to reality since an insulting remark or gesture must be placed in context before the extent of its provocation can be realistically assessed.²⁵² Thus, Madame Justice Wilson advocated for an examination of certain characteristics of the accused in order to properly contextualize the wrongful act or insult.²⁵³

I agree with Justice Wilson that the insult must be contextualized to provide a realistic assessment of its provocative capability. I would take her approach even farther, however, and argue that the characteristics of the victim (white woman), the nature of the insult (racist), and the interplay of racism and sexism in society should also have been considered by the Court.

In the ideal situation an investigation would be made of certain variables. For instance, is it racist to call an East Indian man a black man? Is it racist for an East Indian man to be enraged at being referred to as a black man? Was the accused regularly subjected to racist insults? Was the accused's response to the victim not wanting to marry him—whatever the reason—sexist? What was the nature of the relationship between the accused and the victim?

Such a holistic approach presents a clearer picture of what actually happened and the level of mitigation, if any, which may be appropriate. One could also question whether there had been

247. *Id.* at 457.

248. *Parnerkar v. The Queen*, [1972] 5 C.C.C.2d 11, 27–28 (Sask. C.A.).

249. *Parnerkar*, [1974] S.C.R. at 455.

250. *R. v. Hill*, [1986] 1 S.C.R. 313, 345–48 (Can.) (Wilson, J., dissenting).

251. *Id.* at 345.

252. *Id.* at 345–46.

253. *Id.* at 346.

previous incidences of domestic violence. It is doubtful whether the totality of this fully contextual exercise can easily fit within the confines of the present provocation defence. As such, I would ultimately advocate for a more complete contextual reconstruction of the defence. However, there is clearly some room within the confines of the current defence for consideration of basic contextual questions.

In recognition of our diverse society, I am cautious of advocating for an approach to the defence of provocation which could lead to the construction of a hierarchy of equality-seeking groups. What I would advocate against, therefore, is the creation of a ranking system of discrimination whereby membership in one marginalized group is used to trump membership in another. This is to be avoided. The defence requires a nuanced appreciation of the intricacies of a diverse society. The *Parnerkar* case illustrates the challenges posed and the necessity of utilizing a fully intersectional, multi-dimensional, and contextual analysis. This is clearly a complicated issue requiring appropriate focus and consideration of a multiplicity of perspectives.

4. "On The Sudden Before There Was Time For His Passions To Cool"²⁵⁴

If the objective test is satisfied, a subjective test is used to determine whether the accused was provoked "suddenly" and, further, whether the accused actually acted upon the provocation.²⁵⁵ The subjective test for provocation involves a determination of what actually occurred in the mind of the accused at the time of the alleged provocation.²⁵⁶ While the character, background, temperament, idiosyncrasies or drunkenness of the accused are not to be considered in the objective test, they can be considered in the subjective test.²⁵⁷ Expert evidence may also be adduced to show that because of his/her emotional make-up, the accused was more likely to respond to the provocation.²⁵⁸

With respect to the first issue, the impact of the wrongful act or

254. Criminal Code § 232(2).

255. *See id.*

256. *See R. v. Tripodi*, [1955] S.C.R. 438 (Can.).

257. *See CONSULTATION PAPER, supra* note 211, at 3–4.

258. *See id.*

insult, the accused cannot have been prepared for the provocation. It has been held that, “[t]he wrongful act or insult must strike upon a mind unprepared for it, that it must make an unexpected impact that takes the understanding by surprise and sets the passions aflame.”²⁵⁹

Again playing devil’s advocate, I raise a potential issue with this point. Specifically, the consequences of a wrongful act or insult to a “conscious” racialized person versus a person who discovers his or her racialization late in life may be entirely different. A person who might have been oblivious to the realities of racism only to be suddenly jarred to the stark realities of discrimination might, in fact, have a more violent reaction than a more “conscious” racialized person who is more savvy in her negotiation of racial matters.²⁶⁰ While one may not be able to predict with certainty the disparities in reactions, one should contemplate the role of “consciousness” as either a further exacerbating or vitiating circumstance impacting the availability of the defence.

On its face, this requirement presents a potential hurdle for marginalized persons.²⁶¹ For instance, many marginalized communities, and persons of color in particular, have come to expect some degree of racism on a frequent basis.²⁶² The reality is, however, that the sting of racial abuse can never be underestimated—it is always painful and upsetting, no matter how many times one is abused or mistreated because of his or her race. Further, women have been socialized to expect some level of sexual harassment—does this mean women cannot be provoked by such abuse? These considerations reveal the strength of patriarchy, heterosexism, and racism, and the fact that the suddenness requirement of the provocation defence may disparately impact women and minorities.²⁶³

259. *Tripodi*, [1955] S.C.R. at 443.

260. See generally PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* (1999); Michael St. Patrick Baxter, *Black Bay Street Lawyers and Other Oxy-mora*, 20 CAN. J. BUS. L. 267, 269 (1998).

261. See *St. Lewis & Galloway*, *supra* note 43, at 12.

262. See *Davis*, *supra* note 171, at 1560.

263. *Donovan & Wildman*, *supra* note 101, at 460.

There is, however, helpful jurisprudence in this regard. In a case involving an abusive friendship,²⁶⁴ the Supreme Court of Canada recognized that just because the accused had routinely suffered hurt and insults from the victim over a considerable period of time, he was not made immune from the victim's abuse and insults that allegedly led to the killing.²⁶⁵ The Court recognized that "anyone may have a breaking point."²⁶⁶

The crucial issue with respect to the suddenness requirement is whether the accused was in fact reacting on the sudden.²⁶⁷ There must be a causal connection between the provocation and the killing: the accused must have killed because he was provoked, not merely because provocation existed.²⁶⁸ In some circumstances it is possible that, where an ordinary person would have been provoked, the accused was not. This could occur where the accused was more resistant to the provocation than an ordinary person would be. This might be the response to the "conscious black" person hypothetical posed earlier. There may also be specific evidence indicating that the accused was not, in fact, provoked or reacted in a measured way and therefore not out of passion.

As to the temporal connection between the provocation and the accused's reaction, it is a matter of common sense that the longer the gap in time, the more likely a jury will come to the conclusion that the retaliation was calculated, rather than the result of passion. This reality of the suddenness requirement poses several acute problems for women and members of racialized communities.

While it is implicit, given the history of the defence, that women can provoke men by way of "insult" into committing murder, the courts have rarely accepted that battered women can be

264. *Linney v. The Queen*, [1978] 1 S.C.R. 646 (Can.). The accused and the deceased had been friends but on the day of the killing the deceased had entered the accused's house uninvited and drunk. *Id.* at 647. The deceased had physically assaulted the accused who initially retreated to his bedroom but later shot the still abusive deceased. *Id.* at 648. There was evidence that the deceased had acted in this manner towards the accused over a long period of time. *Id.*

265. *Id.* at 653.

266. *Id.*

267. See GRANT, *supra* note 37, at § 6.2(d).

268. See *R. v. Tripodi*, [1955] S.C.R. 438, 443 (Can.).

provoked into killing their male partners.²⁶⁹ Traditionally, very few women have successfully used the defence of provocation. Impediments to women's access include the requirement of suddenness and loss of control, as women are less likely to kill "on the sudden" or in the "heat of passion."²⁷⁰ It has been noted:

where women do kill their husbands, it is invariably because of a history of battering and abuse. Battered women tend not to react with instant violence to taunts or violence, as men tend to do. For one thing, they learn that this is likely to lead to worse beating. Instead, they typically respond by suffering a "slow-burn" of fear, despair and anger that may erupt in the killing of their batterer.²⁷¹

Interestingly, in Australia and England the law on provocation with respect to battered women has been reformed in order to make its use by women offenders easier.²⁷² In Australia, the "on the sudden" requirement has been shifted to a broader period of time as there can be a "cooling off" period.²⁷³ The offender need

269. The incidence of violence against women is commonplace. OTTAWA MINISTER OF SUPPLY AND SERVS., FINAL REPORT OF THE CANADIAN PANEL ON VIOLENCE AGAINST WOMEN (1993). The Panel documented the pervasiveness of violence against women and the failure of the justice system to adequately respond to this pressing issue. Between 1974 and 1990, women killed by their intimate partners accounted for at least sixty-one percent of all adult female victims of homicide. On the other hand, men killed by their female partners accounted for approximately eight percent of all adult male victims of homicide. A large percentage of these men would have subjected their female partners to physical and/or mental abuse. Additionally, it was found that although the number of wives killing their husbands is decreasing considerably, the murder of husbands killing their wives remains stable. See also MARIA CRAWFORD & ROSEMARY GARTNER, WOMAN KILLING: INTIMATE FEMICIDE IN ONTARIO, 1974-1990, 43-44 (1992); St. Lewis & Galloway, *supra* note 43, at 4 (collating the statistics).

270. St. Lewis & Galloway, *supra* note 43, at 22.

271. *Id.* at 22-23.

272. See N.S.W. CRIMES ACT § 23.

273. The Australian provocation statute is as follows:

23. (1) Where, on the trial of a person for murder, it appears that the act or omission causing death was an act done or omitted under provocation and, but for this subsection and the provocation the jury would have found the accused guilty of murder, the jury shall acquit the accused of murder and find the accused guilty of manslaughter.

(2) For the purposes of subsection (1), an act or omission causing death is an act done or omitted under provocation where:

(a) the act or omission is the result of a loss of self-control on the part of the accused that was induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused, and

(b) that conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased, whether that conduct of the deceased occurred immediately before the act or

not have acted in the heat of passion. Additionally, the entire relationship between the offender and the deceased is examined.²⁷⁴ The objective test is satisfied by proof that the ordinary person could have viewed and responded to the provocation as the accused did.²⁷⁵ A similar proposal has also been put forward as an option by the Department of Justice in Canada.²⁷⁶

IV. CRITICISMS OF THE PROVOCATION DEFENCE—FEMICIDE, HOMOPHOBIA, CULTURAL ESSENTIALISM

Much of the controversy surrounding the provocation defence relates to the purpose and systemic effects of its application.²⁷⁷ These concerns relate both to the theory behind the defence, as well as its practical application.

omission causing death or at any previous time.

(3) For the purpose of determining whether an act or omission causing death was an act done or omitted under provocation as provided by subsection (2), there is no rule of law that provocation is negated if:

(a) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission,

(b) the act or omission causing death was not an act done or omitted suddenly, or

(c) the act or omission causing death was an act done or omitted with any intent to take life or inflict grievous bodily harm.

(4) Where, on the trial of a person for murder, there is any evidence that the act causing death was an act done or omitted under provocation as provided by subsection (2), the onus is on the prosecution to prove beyond reasonable doubt that the act or omission causing death was not an act done or omitted under provocation.

(5) This section does not exclude or limit any defence to a charge of murder.

Id.

274. *See id.*

275. Such cumulative effects have already been recognized in Australian law which permits a time interval between the final provoking event and the killing; the New South Wales Crimes Act of 1990 incorporated an amended provocation provision that was sensitive to domestic violence, saying that provocative conduct is relevant whether it "occurred immediately before the act or omission causing death or at any previous time." *Id.* § 23(2)(b). Cumulative provocation has also been recognized in practice by some United Kingdom courts that will, in a case of long standing provocation, take the slightest 'new' act on the part of the victim as "allowing the entire train of events to be included." *See Baker, supra* note 188, at 196. There is already therefore, some movement in other jurisdictions to extend the scope of provocation to accommodate the experience of domestic abuse, and there is some precedent in our recent law of self-defence for such an extension. *See id.* at 195.

276. *See CONSULTATION PAPER, supra* note 211, at 11–19.

277. *Id.* at 7.

While the theory behind the defence is the recognition of human frailty, some would argue that provocation is applied to excuse violence in a manner which is outdated by modern societal values.²⁷⁸ Indeed, the fact that the defence is available to excuse outbursts of violence in response to non-violent as well as violent acts is seen by some as a fundamental shortcoming of the defence.²⁷⁹

The defence is particularly disconcerting for some feminists and gay rights advocates.²⁸⁰ The critical issue is whether the law of provocation reflects antiquated societal values which condone violence against already marginalized communities.

A. *Femicide and Unavailability of the Defence to Women*

The provocation defence, as applied, reinforces patriarchal ideals.²⁸¹ Many critics claim that the assumptions underlying the defence are based on an outmoded model of male behavior.²⁸² Commentators have indicated that archaic notions of women as the property of their present or former male partners still surface in provocation cases.²⁸³ For instance, the provocation defence has

278. *See id.*

279. *Id.*

280. *See, e.g.,* Baker, *supra* note 188; Adrian Howe, *Green v. The Queen: The Provocation Defence: Finally Provoking Its Own Demise?*, 22 MELB. U. L. REV. 466 (1997).

281. When I deploy the term "patriarchy," I mean a system that orders not only gender and sex, but also sexuality. Not only does patriarchy privilege males in society, but heterosexuals are privileged as well. *See* Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161 (1996).

282. CONSULTATION PAPER, *supra* note 211, at 7–8. *See* GRANT, *supra* note 37; Côté, *supra* note 43, at 61; J. Greene, *A Provocation Defence for Battered Women Who Kill*, 123 ADEL. L. REV. 145, 146 (1989) (asking to "what degree is the proposition [that a provoked killing is less blameworthy than a cold-blooded killing] grounded in the law's understanding of and acceptance of male behavior patterns?"); Howe, *supra* note 280; Jenny Morgan, *Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them*, 21 MELB. U.L. REV. 237 (1997); Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331 (1997); Melissa Spatz, *A Lesser Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives*, 24 COLUM. J.L. & SOC. PROBS. 597 (1991); Laurie J. Taylor, *Comment, Provoked Reason In Men and Women: Heat-Of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679 (1986).

283. GRANT, *supra* note 37; Côté, *supra* note 43, at 61; St. Lewis & Galloway, *supra* note 43, at 3; *see also* Kevin Jon Heller, *Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 AM. J. CRIM. L. 1 (1998); Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A Study of Capital Domestic Murder in the Post-Furman Era*,

been used to justify or excuse male violence towards women who have attempted to assert some form of control over their own lives.²⁸⁴ In this way, men have successfully argued that their wife's or girlfriend's obtaining employment, leaving the home, being with friends, or seeing other men or women was provocative.²⁸⁵

The crux of much of the feminist critique of the provocation defence stems from a view of provocation as excusing homicidal rage generally and homicidal rage towards women specifically.²⁸⁶ Because there is no defence if the motivating emotion for homicide is compassion or pity, as in the case of euthanasia, the existence of the defence is even more questionable.²⁸⁷ The following argument from a feminist criminal law textbook is persuasive:

The idea that a killing is partially justified seems to flow into the idea that the deceased in some sense deserved to die. Even if provocation were argued in very different cases, for instance with respect to the killing of smokers, sexual harassers, or pornographers, there is something offensive about the implication of just desserts. The offensiveness becomes even more acute where it is a defence used by men to justify, albeit partially, the killing of women as a form of control.²⁸⁸

The problematic origins of the defence belie its troubled history. By the early nineteenth century, provocation would reduce murder, still a capital offence, to manslaughter, a non-capital offence, in three situations:

- 1) "Chance Medley" (a sudden falling out or spontaneous fight between men, including coming to the assistance of a kinsman);
- 2) a husband discovering his wife in the act of adultery; and
- 3) a father discovering someone in the act of sodomizing his son.²⁸⁹

49 SMU L. REV. 1507 (1996); Deborah E. Milgate, Note, *The Flame Flickers, But Burns On: Modern Judicial Application of the Ancient Heat of Passion Defense*, 51 RUTGERS L. REV. 193 (1998).

284. See GRANT, *supra* note 37, § 6.2; Côté, *supra* note 43, at 61; St. Lewis & Galloway, *supra* note 43, at 3.

285. See GRANT, *supra* note 37, § 6.2.

286. See St. Lewis & Galloway, *supra* note 43, at 3-4.

287. See GRANT, *supra* note 37, § 6.2, at 6-3; see also Rodriguez v. British Columbia, [1993] 3 S.C.R. 519 (Can.).

288. GRANT, *supra* note 37, § 6.2, at 6-9.

289. For a detailed analysis of the developmental history of the defence of provocation,

Arguably these foundations of the defence would similarly benefit women accused of murder. However, as history has not borne this proposition out, there is scholarship criticizing these sources of the provocation defence.²⁹⁰ Additionally, there is concern that battered women have not benefited from the provocation defence when they murder their abusers.²⁹¹ Much of this inequity stems from the requirement that the accused have acted before his or her passions cool.²⁹² Women in battering situations typically do not kill their abusers in the "heat of passion" as traditionally contemplated by the defence.²⁹³ Rather there is an accumulation of fear, which properly implicates a re-examination of situations.²⁹⁴ Additionally, women of color, especially black women in the United States and First Nations women in Canada, have had greater difficulty in convincing the courts to admit expert testimony on battered woman's syndrome in their cases.²⁹⁵ Even though the provocation defence is only a partial excuse, unlike self-defence, it is all the more important for women who have difficulty benefiting from the battered woman's syndrome.²⁹⁶ As such, the defence may also be useful to battered women who kill after ongoing provocation by their batterer.

In Canada, other than self-defence, there is no criminal law defence or plea that has been effective as a (partial) excuse or justification for killings by abused women.²⁹⁷ This has led some com-

see JEREMY HORDER, *PROVOCATION AND RESPONSIBILITY* 24 (1992). See also TONI PICKARD ET AL., *DIMENSIONS OF CRIMINAL LAW* 804, 805 (2d ed. 1996) (They ask "[w]hat can be made of the fact that originally the only exception accommodated by the law was murderous patriarchal rage?").

290. See GRANT, *supra* note 37, § 6.2; St. Lewis & Galloway, *supra* note 43, at 1-4; see also Joshua Dressler, *When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and The "Reasonable Man" Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726 (1995); James J. Sing, *Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law*, 108 YALE L.J. 1845 (1999); Milgate, *supra* note 283.

291. See PICKARD, *supra* note 289.

292. See St. Lewis & Galloway, *supra* note 43, at 22.

293. See *id.*

294. See *id.* at 22-23.

295. See Sharon Angella Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L.J. 191 (1991); Angela Mae Kupenda, *Law, Life, and Literature: A Critical Reflection of Life and Literature to Illuminate How Laws of Domestic Violence, Race, and Class Bind Black Women*, 42 HOW. L.J. 1 (1998); Laura E. Reece, *Women's Defenses to Criminal Homicide and the Right to Effective Assistance of Counsel: The Need for Relocation of Difference*, 1 UCLA WOMEN'S L.J. 53 (1991).

296. Baker, *supra* note 188, at 199.

297. Cf. GRANT, *supra* note 37, § 6.2, at 6-3 (noting that defences such as necessity and

mentators to reject the defence as unhelpful to women.²⁹⁸ Given its relative ineffectiveness in mitigating the situation confronting both the battered woman who responds with violence and the woman who reacts violently to her partner's adultery, these calls for abolition are persuasive. It is not, however, the case that the defence (even as currently structured) is incapable of benefiting women. Rather it is the misapplication of the defence and ignorance of the plight of women that has effectively stymied an equitable and informed application of the defence.

The reality of an essentially homogenous judiciary dealing with the plight of marginalized communities, whether victims or accused, is clear.²⁹⁹ The legal system has failed to recognize and critique the fundamentally elitist, heterosexist, sexist, and racist aspects of its value system. "This is not an indictment of the legal system *per se*: it is inevitable that the legal system can only reflect the culture in which it sits."³⁰⁰

Since homicides by women make up a small fraction of all homicides, even a reformed defence of provocation would be rarely used. But the more important question is whether a plea which has been available to men for several centuries *should not also be (much more) available to women who kill, and whether closer attention to the situations and perspectives of women in abusive relationships yields good grounds for thinking some kill as excusable or reasonable responses to serious provocation.* The underlying concern is an equality concern; that women have equal access to suitable defences for their putative breaches of the criminal law, and that standards of reasonableness operative in criminal case deliberation be as responsive to women's experience and women's values as they are to men's.³⁰¹

duress cannot reduce a charge of murder).

298. See St. Louis & Galloway, *supra* note 43, at 22.

299. See Richard Devlin et al., *Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a "Triple P" Judiciary*, 38 ALBERTA L. REV. 734, 736 (2000) (stating that "Canada is a heterogeneous democratic society characterized by widespread diversity and pluralism. However, one of the most powerful institutions in Canadian society, the judiciary, is relatively homogeneous. In this article, we submit that this apparent contradiction is indefensible."). Part III of the article, which features an empirical study, surveys the current appointment processes and the demographic profile of the Canadian judiciary—federally, provincially, and territorially. *Id.* at 758. The numbers show that only modest improvements have been made in changing the composition of the Canadian bench. *Id.* at 762–63. While there has been some progress in the representation of women, other historically marginalized groups remain significantly under-represented. *Id.* at 763. See also *Final Report and Recommendations of the Eighth Circuit Gender Fairness Task Force*, 31 CREIGHTON L. REV. 9 (1997); Ifill, *supra* note 123; Ifill, *Racial Diversity on the Bench: Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405 (2000).

300. St. Lewis & Galloway, *supra* note 43, at 7.

301. Baker, *supra* note 188, at 193–94 (emphasis added).

B. *Validation of Homophobic Rage and Gay Panic*

Courts have regularly accepted the provocation defence in circumstances where the accused claimed to have been offended by an unwanted homosexual advance.³⁰² Indeed, *Hill*, the leading Canadian provocation case, involved such an alleged advance.³⁰³

As the law now stands “gay panic,” as a response to a nonviolent homosexual advance, may constitute sufficient provocation to incite the reasonable man to lose his self-control and kill in the heat of passion, thus mitigating murder to manslaughter.³⁰⁴ This renders visible the problematic judicial construction of the reasonable homophobic man. Critics of this result argue that provocation, as a homosexual-advance defence or gay panic defence, is a misguided application of provocation theory and a judicial institutionalization of homophobia.³⁰⁵ I agree. “The homosexual-advance appeals to irrational fears, revulsion, and hatred prevalent in heterocentric society, focusing blame on the victim’s real or imagined sexuality.”³⁰⁶ Hopefully, an evaluation of this construction of the reasonable man through the lens of Charter values would operate to curtail inequitable application of the defence. This should be the case given judicial recognition of sexual orientation as an analogous ground of prohibited discrimination.³⁰⁷

In allowing the defence to operate as an oppressive tool against already marginalized communities, the judiciary reinforces and

302. *R. v. Hill*, [1986] 1 S.C.R. 313 (Can.); *Dir. Pub. Prosecutions v. Camplin*, [1978] A.C. 705 (H.L.); *R. v. Hansford*, [1987] 33 C.C.C.3d 74 (Alta. C.A.); see also GRANT, *supra* note 37, § 6.2(b), at 6-13 n.53.

303. *Hill*, [1986] 1 S.C.R. at 320.

304. See *Hill*, [1986] S.C.R. at 335; *People v. Schmitz*, 586 N.W.2d 766 (Mich. Ct. App. 1998). The Chicago Tribune noted the use of this defence in the Schmitz case. See *Risky “Gay Panic” Defense Emerges at Murder Trial*, CHI. TRIB., Oct. 27, 1999, at 10 (stating that Jonathan Schmitz’s case was “a perfect example” of using the homosexual panic defence to mitigate a murder conviction); see also Robert G. Bagnall et al., *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497, 497-515 (1984) (detailing case law involving the gay panic defence); Gary David Comstock, *Dismantling the Homosexual Panic Defense*, 2 TUL. J.L. & SEXUALITY 81, 81 (1992); Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133 (1992).

305. See Mison, *supra* note 304, at 133.

306. *Id.*

307. See *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (Can.).

institutionalizes violent prejudices at the expense of norms of self-control, tolerance, and compassion that ought to be encouraged in society. The defence has been used to affirm homophobia. This undermines the ability of courts to produce fair verdicts because it creates a lower standard of protection against violence for a marginalized class of victims.³⁰⁸

Some commentators have concluded that we ought to expect more from our courts—that judges should hold as a matter of law that a homosexual advance is not sufficient provocation to incite a reasonable man to kill.³⁰⁹ Murderous homophobia should be considered an irrational and idiosyncratic characteristic of the killer in such a way as to deny the application of the defence, as the ordinary person standard rejects such peculiarities.³¹⁰

The judiciary's acceptance of this defence in circumstances where a woman or gay man would seldom receive similar benefits is problematic and is perhaps an unfortunate result of the origins of the defence. For instance:

- (1) it is highly unlikely that a heterosexual woman would ever have recourse to the defence when confronted with an unwanted heterosexual advance;
- (2) similarly it is doubtful that a lesbian would have access to the defence in the case of an unwanted sexual advance from another woman or from a man; and
- (3) it is unlikely that a gay man would have recourse to the defence when confronted with an unwanted homosexual advance or an unwanted heterosexual advance.

C. *Cultural Essentialism / Cultural Paternalism*

I have additional concerns with the application of the defence

308. See Mison, *supra* note 304, at 136.

309. *Id.* at 135.

310. See Dressler, *supra* note 290; Howe, *supra* note 280; Mison, *supra* note 304.

Homophobic rage should be viewed as normatively objectionable, despite the fact that prejudice against lesbians and gays may not be "idiosyncratic" or "peculiar" in our society. The question, then, is not whether it is unusual to kill based upon such beliefs; all provoked killings should be viewed as unusual. The question should be whether the equality-seeking mandate of the Charter should be used to prevent a rage or panic defence based upon prescribed grounds, despite the fact that homophobic-based rage may not, statistically, be more unusual than other provoking experiences.

in such a way as to foster what may translate into cultural paternalism and essentialism.³¹¹ Examples include instances where the defence is advanced to show that an accused, from a particular cultural background, is more easily provoked by adultery, for example, because it causes him to lose face in his community. Similarly, it has been articulated that when applying the provisions of the defence, persons from certain "ethnic" backgrounds cannot be expected to have the same measured temperament as cool and collected "Westerners."³¹²

One scholar concludes that there are several reasons why ethnicity has a strong claim to being recognized alongside age, as a qualification to the power of self-control aspect of the ordinary person test.³¹³ He claims that the same justifications for making age a qualification are equally supportive of ethnicity.³¹⁴ It could be argued that the law should account for the comparative lack of exposure on the part of the immigrant to the various socializing institutions of the host country, such as family and school, when compared to one who has been raised in the host country since childhood.³¹⁵

311. Essentialism has been defined as "the set of fundamental attributes which are necessary and sufficient conditions for a thing to be [considered] a thing of that type." Jane Wong, *The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond*, 5 WM. & MARY J. WOMEN & L. 273, 274 (1999) (quoting M.A. Ntuny, *Essentialism and the Search for the Essence of Law*, 18 MELANESIAN L.J. 64, 64 (1990)).

To define a *thing* is to express its *essence* in words. Thus, definition involves two steps: first, distinguishing the object from other objects by referring to certain parts of its characterization in order to capture its intuitive essence, and second, characterizing the object within a single concept so as to permit the definition to move to a discursive understanding. The result is that the characteristics used to define a thing are thought to inhere in its very essence and, thus, to be unchangeable.

Id. at 274-75 (alteration in original). The precise meaning of essentialism in feminist legal theory and critical race theory may not be a fixity. *Id.* at 275. Essentialism assumes that all women or racialized people share the same inherent characteristics which are generated either biologically or socially. *Id.* Naturally, anti-essentialists oppose such assumptions. *Id.*

312. I acknowledge that the term "ethnic" is not mutually exclusive of the term "Westerner." Indeed, part of the challenge of overcoming bigotry is to recognize the ethnicity and racialization of all people. The colloquial usage of these terms cloaks the cultures of the majority and transfers ethnicity as otherness. STANLEY YEO, UNDERSTANDING KILLINGS AND THE LAW: PROVOCATION AND EXCESSIVE SELF-DEFENCE IN INDIA, ENGLAND AND AUSTRALIA 80 (1998).

313. *Id.*

314. *Id.*

315. *Id.*

Such assimilationist sentiment is unfortunate as the clear expectation is that, with time and development, the immigrant will acquire a greater acceptance and appreciation of western ways.³¹⁶ Thus, cultural acclimation will be the eventual result, and immigrants will come to govern themselves according to the "more adult" cultural dictates of Westerners.³¹⁷ It is submitted that cultural paternalism is manifest in this theory.

The ethnic derivation of the accused might also be relevant in another respect, namely, the power of self-control to be expected of an ordinary person of the same ethnic origin as the accused. Hence, in the face of the same type of provocative conduct, a Latin, such as an Italian who are by popular tradition impulsive by nature might more readily lose his self-control than, say, the theoretically phlegmatic Anglo-Saxon.³¹⁸

Unlike the excuse/justification basis for the provocation defence, which is applicable only after the elements of murder are satisfied, the "cultural defence" is a legal strategy that is used by defendants, who are often recent immigrants, in order to excuse criminal behavior or to mitigate culpability based on a lack of the requisite mens rea.³¹⁹ Unlike this "cultural defence," the provocation defence is only applicable once the requisite elements of murder are established—thus provocation does not relate specifically to either the mens rea or the actus reus of murder. The underlying theory for the cultural defence is that the defendant acted according to the dictates of his or her culture and, therefore, leniency in the investigation of the mental element is necessary in our multicultural society.³²⁰ Such cultural determinism is problematic. Not only is this assessment frequently based on stereotypes, but the role of culture is largely viewed as a non-dynamic, static fixity.³²¹ While there is no formal "cultural defence," cul-

316. *See id.*

317. *See* Stanley Meng Heong Yeo, *Ethnicity and the Objective Test in Provocation*, 16 MELB. U. L. REV. 67, 70–71 (1987).

318. *Id.* at 70. *See also* Stanley Yeo, *Proportionality in Criminal Defences*, 12 CRIM. L.J. 211 (1988).

319. *See* Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311, 1312 (1991); Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense"*, 17 HARV. WOMEN'S L.J. 57, 57–58 (1994); Daina C. Chiu, Comment, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053, 1053–54 (1994).

320. *See* Volpp, *supra* note 319, at 57.

321. *See id.* at 63.

tural factors have been considered in assessing the mental state of the accused or the culpability of the defendant.³²² As one scholar has noted:

The “cultural defense” presents several complex problems inherent in essentializing a culture and its effect on a particular person’s behavior . . . I argue that any testimony about a defendant’s cultural background must embody an accurate and personal portrayal of cultural factors used to explain an individual’s state of mind and should not be used to fit an individual’s behavior into perceptions about group behavior.

Presentation of cultural factors must also be informed by a recognition of the multiple, intersectional layers of group-based oppression that may be relevant to understanding any particular case.³²³

In *R. v. Ly*,³²⁴ the defence argued for a culturally sensitive application of the provocation defence.³²⁵ Defendant Ly, who was born and raised in Vietnam, strangled his common law wife after coming to believe that she had been unfaithful to him.³²⁶ In arguing that he was provoked, the defence claimed that Ly had lost face in his community, as it was a great dishonor for one’s wife to commit adultery.³²⁷ As such, defence counsel argued that the standard to which Ly should be held was that of the ordinary Vietnamese man.³²⁸ Regarding the objective test, the court held that the jury was properly instructed to disregard the accused’s cultural background and information about the alleged attitude of Vietnamese men towards suspected infidelity.³²⁹ It was further held that the fact that Ly was Vietnamese would be relevant only if a racial slur had been involved.³³⁰

Accordingly, great care must be taken to ensure that the current dynamics of the cultural defence debate do not perpetuate dominant or stereotypical cultural values such as sexism and the subordination of women in the name of racial and ethnic solidar-

322. *See id.*

323. *Id.* at 58.

324. [1987] 33 C.C.C.3d 31 (B.C.C.A.).

325. *Id.* at 31.

326. *Id.*

327. *Id.*

328. *Id.* at 37.

329. *Id.* at 39.

330. *Id.* at 38.

ity.³³¹ Because the definition of culture is not value-neutral, it is necessary to ensure that the perspectives of women have an influence in the analysis of the culture at issue, and that evidence of culture is solicited from a multiplicity of sources.³³² Specifically, in the Canadian setting, theorizing about the implications of adultery for a given cultural group should not be made without testimony from women's groups from within the relevant community, or other directly affected and *inherently* knowledgeable experts from the equality-seeking communities at issue. I specify *inherent knowledge* in distinction from removed and distantly acquired book knowledge. Of course, an inherent expert may and should have some book knowledge, but my distinction is an attempt to prevent what I see as anthropological predation, to the exclusion of the recognition of in-group expertise. For too long experts have been given the role of anthropological overseer—remaining aloof from, yet exerting control over cultures by enunciating “expertise.” Accordingly, I believe such extra-group articulation of expertise should give way to enlightened deference to those from within the community or culture at issue when such expertise is clearly existent and forthcoming.

D. The Abuse Excuse by Alan Dershowitz³³³

When Professor Dershowitz penned *The Abuse Excuse*, he devoted three pages to what he referred to as the “black rage defense.”³³⁴ Professor Dershowitz begins the chapter by stating, “[i]t was only a matter of time before the abuse excuse was taken to its illogical conclusion and extended to cover an entire race of ‘abused’ people.”³³⁵

Written in 1994, prior to the date that Professor Dershowitz joined the O.J. Simpson “dream team,” the chapter addresses the Colin Ferguson case.³³⁶ Professor Dershowitz ironically describes

331. See Chiu, *supra* note 319, at 1057.

332. See Volpp, *supra* note 319, at 58–59.

333. ALAN DERSHOWITZ, *THE ABUSE EXCUSE* (1994).

334. *Id.* at 89–91.

335. *Id.* at 89.

336. *Id.* at 89–91.

the tactics used by Mr. Kunstler, one of the attorneys in the case, as “play[ing] the race card.”³³⁷

It is unlikely that this racial gambit will succeed, regardless of the composition of the jurors, since the “black rage” variation on the abuse-excuse defense is an insult to millions of law-abiding black Americans. The vast majority of African Americans who never break the law have not used the mistreatment they have suffered as an excuse to mistreat others. Crime is not a function of group characteristics: It is an individual phenomenon that must be treated on an individual basis.

Indeed, it is the essence of racism to make the kind of group “rage” and group “abuse” arguments that Kunstler is now raising. It will reaffirm racist fears among too many Americans that violent crime is a “black problem.” If black rage produces violent crime, or even if it is a “catalyst” for it, then racists will be quick to justify their fear of blacks as a group.³³⁸

While I agree with Professor Dershowitz that crime is not a function of group characteristics, it is an easy and convenient strategy to insist that such logic is an insult to black Americans. Of course most black Americans are law-abiding. What is needed, however, is an appreciation of the role of the legacy of systemic racism. This “context” may or may not be relevant to the *individual* case at hand.

As such, I agree with Professor Dershowitz’s notion that the analysis should not be framed at the group level.³³⁹ The collective experience of racism might, however, be used in a principled way to infuse an individual defence if there is a proper evidentiary foundation upon which to introduce such experiences and place the accused individual in context. Specifically, Professor Dershowitz has not made any allowance for the realities of systemic racism as directly relevant to an individual’s experience. He cites no sources, and alludes to no studies. Nonetheless, he confidently declares that “[t]here is no evidence to support the notion that groups that have been victimized by injustice turn to rage and violence.”³⁴⁰ Clearly this is wrong. Part of the error would seem to stem from Professor Dershowitz’s notions of the group. Are bat-

337. *Id.* at 90.

338. *Id.*

339. *See id.*

340. *Id.* at 91.

tered women a group? Were “rebellious” slaves a group? In any event, it is irrelevant whether groups turn to violence. Certainly, individual members of groups may experience rage, which may or may not manifest itself as violence. The analysis must focus on the realities of the accused while appreciating the manner in which societal and historic legacies of racism may infuse that reality.

Accordingly, I agree with Professor Dershowitz that “[t]he search for the particular causes of Colin Ferguson’s rage must begin by looking at him, at his own life experiences as a person, and at his prior history.”³⁴¹ What Dershowitz fails to appreciate, however, is that if Ferguson’s “life experiences” and “prior history” reveal racial abuses of such magnitude as to be a catalyst for violence, this factor, while it may not be exculpatory, may be relevant as a mitigating factor in sentencing.

Thus, as Professor Dershowitz states, “[t]o understand is not to forgive”; clearly “[a] history of racial victimization is not a license to kill at random.”³⁴² However, as lawyers, we should recognize that there are instances where the individual circumstances of our clients may reveal an appropriate space for information regarding the impact of destructive societal forces. As such, while not a license to kill, information regarding systemic oppressions may prove insightful for numerous defences including, but not limited to, provocation and insanity. Therefore, contrary to Dershowitz’s view that such information would be an abuse of legitimate defences,³⁴³ it is my sense that for some accuseds and for certain marginalized communities, such an appreciation of reality may prove to legitimate and genuinely ground the defences. Indeed, it may be unethical to turn a blind eye to this reality of one’s client.

While bell hooks listened to her rage, she channeled it towards writing her book *Killing Rage* in the heat of the moment.³⁴⁴ Of course, this is the best way to use rage—nonviolently, towards the ends of justice. However, not everyone has hook’s ability to channel that rage and turn it into something positive and eloquent. It is the less fortunate, perhaps more enraged persons, for

341. *Id.*

342. *Id.*

343. *See id.*

344. BELL HOOKS, *KILLING RAGE: ENDING RACISM* 19 (1995).

whom the provocation defence may provide recognition for rage which heretofore had unfortunately found no other outlets. As hooks observes, “[r]age can be consuming. It must be tempered by engagement with a full range of emotional responses to black struggle for self-determination.”³⁴⁵ It is precisely this range of emotional responses that may be lacking in those whose rage leads to violent retaliation. In my opinion, it is precisely such recognition for human frailty which the defence of provocation was intended to provide.

Many African-Americans feel uncontrollable rage when we encounter white supremacist aggression. *That rage is not pathological. It is an appropriate response to injustice.* However, if not processed constructively, it can lead to pathological behavior—but so can any rage, irrespective of the cause that serves as a catalyst. In my own case, the anger I felt about white supremacy that surfaced so intensely as to be murderous shocked me. I had never felt such uncontrollable “killing rage.” Had I killed the white man whose behavior evoked that rage, I feel that it would not have been caused by “white racism” but by the madness engendered by a pathological context. *Until this culture can acknowledge the pathology of white supremacy, we will never create a cultural context wherein the madness of white racist hatred of blacks or the uncontrollable rage that surfaces as a response to that madness can be investigated, critically studied, and understood.*³⁴⁶

I appreciate that the suggested changes to the application of the provocation defence may generate numerous sentiments, including:

- (1) resistance based upon fear, particularly on the part of whites, that their own unwitting behavior may trigger violence from some hapless racialized person;
- (2) concerns that these suggestions constitute a license to kill;
- (3) dreadful recollections of Colin Ferguson—the Long Island gunman whose counsel threatened to use the so call “black rage” defence;
- (4) confusion as to why white racists should not similarly be entitled to have evidence tendered of their racial context in order to properly contextualize their actions; and
- (5) reactions that homicide, under any circumstances, should

345. *Id.*

346. *Id.* at 26 (emphasis added).

not be excused or justified.

While I understand and respect many of the above concerns, they support my advocacy for the need for continued education, either through expert evidence, or plain-old everyday contact and information, about the reality of racism for blacks and other persons of color. There is an African proverb that states, "Until the enemy comes to attack me in my camp, and I hear the fusillade and I see them with my eyes, not until then shall I send out my army in order of battle."³⁴⁷ The fear of widespread racial violence is likely of little real concern since many persons of color are schooled to "pick our battles" wisely.

V. REFORMULATION OF THE DEFENCE OF PROVOCATION

Against the backdrop of Critical Race Theory, African-American and Diaspora literature, civil rights speeches and articles there is evidence to suggest the legitimacy of what has come to be known as "Black Rage"³⁴⁸ or what bell hooks refers to as "Killing Rage."³⁴⁹ Even a cursory review of this literature highlights the legitimacy of what I shall refer to as the phenomenon of "cumulative provocation" and how this concept may well have a place in our understanding of the defence of provocation.³⁵⁰ Ra-

347. VOICES OF AFRICA: ITS WORDS AND PEOPLE 42 (1998).

348. The theory behind "Black Rage" is that in certain individuals, the right stimuli will release an uncontrollable amount of rage. The stimuli or "rage button" is typically a devaluation or racial insult. See generally GRIER & COBBS, *supra* note 219, at 210 (discussing the causes of "Black Rage.").

349. See HOOKS, *supra* note 344, at 26.

350. See THE AFRICAN DIASPORA (Joseph E. Harris et al. eds 1996); THE AFRICAN DIASPORA: AFRICAN ORIGINS AND NEW WORLD IDENTITIES (Isidore Okpewho, et al. eds. 1999); THE AFRICAN DIASPORA: AFRICANS AND THEIR DESCENDANTS IN THE WIDER WORLD 1800 TO THE PRESENT (The Black Diaspora Comm. of How. Univ. ed. 1996); AGYEMANG ATTAH-POKU, AFRICAN STABILITY AND INTEGRATION: REGIONAL, CONTINENTAL, AND DIASPORIC PAN-AFRICAN REALITIES (2000); DERRICK BELL, JR., RACE, RACISM AND AMERICAN LAW (Richard A. Epstein et al. eds., 3d ed. 1992); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds. 2000); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberle Crenshaw et al. eds., 1995); JACQUELINE DE WEEVER, MYTHMAKING AND METAPHOR IN BLACK WOMEN'S FICTION (1992); THE EYES ON THE PRIZE: CIVIL RIGHTS READER (Clayborne Carson et al. eds., 1991); MICHEL FABRE, FROM HARLEM TO PARIS: BLACK AMERICAN WRITERS IN FRANCE, 1840-1980 (1991); DONALD B. GIBSON, THE POLITICS OF LITERARY EXPRESSION: A STUDY OF MAJOR BLACK WRITERS (1981); NORMAN HARRIS, CONNECTING TIMES: THE SIXTIES IN AFRO-AMERICAN FICTION (1988); CHARLES JOHNSON, BEING AND RACE: BLACK WRITING SINCE 1970 (1988); RACE-ING JUSTICE, *EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY* (Toni Morrison ed., 1992);

cism may engender feelings of frustration and rage which may in turn lead to criminal behavior.³⁵¹

A. *Cumulative Provocation*

In her poignant article on militant resistance, bell hooks asserts "I am writing this essay sitting beside an anonymous white male that I long to murder."³⁵² Although shocking, this statement may resonate for many African-Americans and black people generally. We automatically understand the racial assaults leading to such a statement long before hooks details the exhausting sequence of racial harassment that compel her towards this position.³⁵³

It was these sequences of racialized incidents involving black women that intensified my rage against the white man sitting next to me. I felt a "killing rage." I wanted to stab him softly, to shoot him with the gun I wished I had in my purse. And as I watched his pain, I would say to him tenderly "racism hurts."³⁵⁴

Part of this project involves an examination of that hurt. In psychiatric terms, research suggests that black individuals may suffer from serious racism-related disorders.³⁵⁵ Whether this phenomenon is a proper consideration for the criminal law requires further exploration.

What hooks has described so vividly is cumulative provocation.³⁵⁶ The white man sitting beside her was the proverbial "straw that broke the camel's back" in a day and a lifetime filled with racial abuses. If bell hooks had killed that white man, it is

RONALD T. TAKATI, *VIOLENCE IN THE BLACK IMAGINATION: ESSAYS AND DOCUMENTS* (Herbert Hill ed. 1993); RAJAGOPALAN RADHAKRISHNAN, *DIASPORIC MEDIATIONS: BETWEEN HOME AND LOCATION* (1996).

351. LAWRENCE N. HOUSTON, *PSYCHOLOGICAL PRINCIPLES AND THE BLACK EXPERIENCE* 130 (1990). One pair of sociologists have even suggested that more subtle forms of racism within our society are more pernicious because black individuals are lulled into believing that the achievement of the American dream is at hand, although severe obstacles actually prevent its attainment. FEAGIN & SIKES, *supra* note 223, at vii.

352. HOOKS, *supra* note 344, at 8.

353. *Id.*

354. *Id.* at 11.

355. Robert L. Bragg, *Discussion: Cultural Aspects of Mental Health Care for Black Americans*, in *CROSS-CULTURAL PSYCHIATRY* 182 (Albert Gaw ed., 1982); Billy E. Jones & Beverly A. Gray, *Problems in Diagnosing Schizophrenia and Affective Disorders Among Blacks*, 37 *HOSP. & CMTY. PSYCHIATRY* 61, 62-63 (1986); Pinderhughes, *supra* note 218, at 108; Spurlock, *supra* note 216, at 168.

356. See HOOKS, *supra* note 344, at 11.

highly unlikely that she would or should have been privy to the defence of provocation for the following reasons:

- (1) The law does not account for serial provocation at the hands of different and numerous provocateurs;
- (2) while the white man in hooks's scenario had irritated her due to his refusal to appreciate his complicity in racism and sexism, there was no wrongful act or insult that the law would easily appreciate as a catalyst;
- (3) while hooks would have been acting before there was time for her passions to cool, the provocation she describes would have resulted from a slow burning anger, rather than a sudden loss of control;
- (4) it has been held that the provocative act or insult must strike a mind that is unprepared for it. Given the daily reality of racial harassment, it is likely that this requirement may pose difficulty as many persons of color have come to expect some level of racial harassment.

Of course it is possible that such a hypothetical situation properly falls outside of the defence of provocation. However, my concern is that such sentiments are certainly not uncommon in contemporary black culture. A magazine article of several years ago nicely captures the sense of rage felt by many blacks.

A big-city police officer once shared with me his frustration at waiting nineteen years to make detective. In those days before affirmative action, he had watched, one year after another, as less qualified whites were promoted over him. Each year he had swallowed his disappointment, twisted his face into a smile, and congratulated his white friends as he hid his rage—so determined was he to avoid being categorized as a race-obsessed troublemaker.

He had endured other affronts in silence, including a vicious beating by a group of white cops while carrying out a plain-clothes assignment. As an undercover officer working within a militant black organization, he had been given a code word to whisper to a fellow officer if the need arose. When he was being brutalized, he had screamed out the word and discovered it to be worthless. His injuries had required surgery and more than thirty stitches. When he was asked by his superior to identify those who had beat him, he feigned ignorance; it seems a fellow officer had preceded his commander and bluntly passed along the message that it was safer to keep quiet.

Even though he made detective years ago, and even though, on the side (and on his own time), he managed to become a successful businessman and an exemplary member of the upwardly striving

middle class, he says that *the anger still simmers within him. He worries that someday it will come pouring out, that some luckless white person will tick him off and he will explode, with tragic results.*³⁵⁷

The failure of the defence to address such “killing rage” may produce systemic inequality in a criminal justice system that is already overly harsh on racialized persons.³⁵⁸ Indeed, the failure of the provocation defence to address such rage may be yet another instance where we should ponder “whether black folks and white folks can ever be subjects together if white people remain unable to hear black rage, if it is the sound of that rage which must always remain repressed, contained, trapped in the realm of the unspeakable.”³⁵⁹

What many whites may take for the absence of rage may, in fact, be a skill honed to the point of precision—the ability to hide that rage or to reserve it for life at home in one’s community.³⁶⁰ Repression of such rage is likely not only unhealthy but destructive.³⁶¹ Specifically, what has been described as “black on black” violence may be linked to the myriad abuses and humiliations blacks suffer daily when we interact with whites.³⁶² To express our rage in that context has traditionally been suicidal, so it has generally been turned inward or towards our own communities.³⁶³

Nor does class stifle such rage; in fact, *Newsweek* magazine ran a cover story on *The Hidden Rage of Successful Blacks* as if this were a new phenomenon and not just something they were acknowledging.³⁶⁴

357. Ellis Cose, *Rage of the Privileged*, NEWSWEEK, Nov. 15, 1993, at 61 (emphasis added).

358. See generally THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS (2000) (discussing disparity in criminal sentencing and proposing ways to remedy the problem).

359. HOOKS, *supra* note 344, at 12.

360. *Id.* at 13.

361. See *id.* at 14.

362. *Id.*

363. *Id.* For more information on this point see JUDY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM (1997); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999); JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN MALES IN THE CRIMINAL JUSTICE SYSTEM (1996); KATHERYN K. RUSSELL, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEARS, BLACK PROTECTIONISM, POLICE HARASSMENT AND OTHER MACROAGGRESSIONS (1998).

364. *White and Black Ties*, NEWSWEEK, Nov. 15, 1993, at 52.

In these times most folks associate black rage with the *underclass*, with desperate and despairing black youth who in their hopelessness feel no need to silence unwanted passions. Those of us black folks who have "made it" have for the most part become skilled at repressing our rage. . . . "Everyday we are choking down that rage."³⁶⁵

With increased politicization and self-recovery, rage is not the exclusive domain of the so-called underclass. Dr. Richard Dudley, Jr., writes that "even 'highly educated,' 'middle-class,' or 'successful' professional Blacks do not, and cannot escape the ravages of racism."³⁶⁶ It is precisely because professional blacks have to work in predominantly white institutions that they are required to spend a considerable amount of time on the "Black/White interface."³⁶⁷ Consequently, they are forced to cope not only with the institutionalized forms of racism, but also with heavy exposure to the more insidious, day-to-day, personal insults that are consciously or unconsciously directed at them by white people.³⁶⁸ As hooks states, "white folks have colonized black Americans, and a part of that colonizing process has been teaching us to repress our rage, to never make them the targets of any anger we feel about racism."³⁶⁹

As hooks and some psychiatrists have pointed out, such rage may not be a pathological response to ongoing racial harassment.³⁷⁰ It may be a completely legitimate response to cumulative provocation, and hooks, for one, "urge[s] the larger culture to see black rage as something other than a sickness, to see it as a potentially healthy, potentially healing response to oppression and exploitation."³⁷¹

B. *Extreme Expressions of Rage*

I want to acknowledge that some expressions of "killing rage" are pathological and may be a manifestation of mental illness. If

365. HOOKS, *supra* note 344, at 12 (quoting ANN PETRY, *THE STREET* (1946)).

366. Richard Dudley, Jr., *Blacks in Policy-Making Positions*, in *BLACK FAMILIES IN CRISIS: THE MIDDLE CLASS 15* (Alice F. Coner-Edwards & Jeanne Spurlock eds., 1988).

367. *Id.*

368. *Id.*

369. HOOKS, *supra* note 344, at 14.

370. Telephone Interview with Dr. Richard Dudley, Jr., Forensic Psychiatrist (Mar. 18, 1999); see HOOKS, *supra* note 344, at 12.

371. HOOKS, *supra* note 344, at 12.

the retaliation is not measured, if there is no clear spark or catalyst from the victim and the impetus of the incident seems to be violence for violence's sake, the violence may not fit within the confines of traditional criminal law defences, excepting insanity. My understanding of the Reginald Denny assault leads me to the conclusion that this incident was such a pathological attack.

Denny, a truckdriver, entered the intersection of Florence and Normandie Avenues in South-Central Los Angeles.³⁷² As one newspaper described the incident:

As Denny's truck slowly entered the intersection, a young man named Antoine Miller yanked open the door of the cab, allowing others to pull Denny into the street. Another young man named Henry Watson held Denny's head down with his foot. Someone else kicked him in the belly. [Another] man . . . hurled a five-pound piece of medical equipment from the looted truck at Denny's head and hit him three times with a claw hammer. The most damaging blow was administered by 19-year-old Damian Williams, who at point-blank range hurled a . . . ("brick") . . . at Denny's head. It struck Denny on the right temple and knocked him unconscious. Williams did a victory dance over the hapless man.³⁷³

A final young man spit on Denny and walked away with Williams, leaving the trucker bleeding and unconscious in the street.³⁷⁴ The beating of Mr. Denny was a delayed reaction to another brutal beating, in March 1991, also caught on video-tape: that of a black motorist, Rodney King, by four white police officers.³⁷⁵ Although these actions are deplorable by any standard, it is often forgotten that it was also black people who rushed in to assist the injured trucker.

Damian Williams was charged with attempted murder in the brutal and unprovoked assault on Denny.³⁷⁶ He was convicted in state court on lesser charges.³⁷⁷ Williams argued that he had been intoxicated by the riot. bell hooks concludes:

372. Lou Cannon, *Worlds Collide at Florence and Normandie: As Four Police Officers Go Free, an Intersection Ignites a Riot That Will Change Los Angeles*, WASH. POST, Jan. 26, 1998, at A14.

373. *Id.*

374. *Id.*

375. *Id.*

376. *Prosecutors to Seek 10-Year Term*, WASH. POST, Nov. 30, 1993, at A18.

377. *Id.*

[W]ithout a more sophisticated understanding of those particularly extreme expressions of rage which indicate serious mental disorder, we will not be able to address the complexity and multidimensional nature of black rage. We will not be able to understand the psychological displacement of grief and pain into rage. And without that understanding the deeper dimensions of black rage cannot be acknowledged, nor the psychological wounds it masks attended to.³⁷⁸

Clearly, a line has to be drawn between a justifiable or excusable reaction to cumulative provocation and systemic oppression via the provocation defence and a pathological response to racism, which implicates the insanity defence or an appropriate denial of mitigation altogether. My initial thoughts are that such a line will depend on several factors already recognized in the defence of provocation:

- (1) the existence of a wrongful act, insult or Charter violating behavior;
- (2) the timing of the violence, i.e., whether it occurred “out of the blue” or in relation to a racial incident;
- (3) the proportionality and responsiveness of the violence to the catalyst—i.e., whether one blow was administered or whether one shot was fired as opposed to a continuation of violence if the victim was no longer able to struggle, as in the Denny case; and
- (4) the implication of the psychological background of the accused, i.e., in cases where there is a history of mental disorder, drug use, random violence, or other similar factors.

In the course of writing this paper another incident took place which should also be assessed in light of the alleged racial context. Ronald Taylor, a black man, went on a deadly shooting rampage near Pittsburgh, Pennsylvania, killing three and wounding two others.³⁷⁹ Taylor is charged with three counts of criminal

378. HOOKS, *supra* note 344, at 27.

379. *Accused Killer of 3 Is Linked to Racist Writing*, N.Y. TIMES, Mar. 3, 2000, at A12 [hereinafter *Accused Killer*]; *Investigators: Racist Writings Found in Home*, PRESS. J., Mar. 6, 2000, at A14 [hereinafter *Investigators*]; *Punish Hate Crimes*, KAN. CITY STAR, Mar. 6, 2000, at B4 [hereinafter *Punish Hate*]; *Rampage Suspect's Papers Filled With Hate*, DALLAS MORNING NEWS, Mar. 4, 2000, at 9A [hereinafter *Rampage Suspect*]; *Services Aim at Healing After Shooting Rampage*, ATLANTA J. & CONST., Mar. 6, 2000, at A4 [hereinafter *Services Aim*]; Todd Spangler, *Hate Filled Gunman, Police Say; Officials in Wilksburg Say They Found Racist Writings and "Target" List in Suspect's Home*, MORNING CALL, Mar. 4, 2000, at A3; *Writings of Suspect Are Filled with Hate, Police Say*, SEATTLE POST-INTELLIGENCE, Mar. 4, 2000, at A3 [hereinafter *Writings of Suspect*].

homicide, aggravated assault, arson, and “ethnic intimidation,” the Pennsylvania equivalent of a hate crime.³⁸⁰ All five of his victims were white, and police claim to have found messages of hate in Taylor’s apartment.³⁸¹ Taylor apparently became enraged over work being done in his apartment and began screaming racial epithets at repairmen.³⁸² He shot and killed one of the workers, set fire to the apartment, and proceeded to two fast-food restaurants, where he shot four others, killing two.³⁸³

Ronald Taylor . . . has emerged, in interviews with neighbors, witnesses and authorities, as a man filled with rage, but no criminal record. Police said his anger apparently had been simmering for some time. He had complained about one thing or another since at least October, his landlord said. Police said an argument over a broken door triggered the 39-year-old black man to go on a shooting spree that killed three people and wounded two. Investigators said Taylor targeted white people Wednesday, at one point telling a black woman, “Not you, sister,” as he waved a gun and threatened a group of women. Police said he told a black man that his gun was only for “crackers.”³⁸⁴

While more facts need to be elicited to fully appreciate the context of this tragedy, it is becoming apparent that Mr. Taylor was motivated to some extent by what he saw as a racial context. The preliminary facts of this incident resemble the facts in the case of *United States v. Robertson*.³⁸⁵ After shooting the white victim, “Robertson raced down the middle of the street, brandishing his pistol and cursing ‘white sons-of-bitches.’”³⁸⁶ Seeing a police officer, he shouted, “You are doing it; why can’t I? Yes, I shot the white honkey son-of-a-bitch. What are you all going to do about it?”³⁸⁷ At trial, it was revealed that Robertson continued to make such statements even upon being taken into the police station.³⁸⁸

380. *Accused Killer*, *supra* note 379; *Services Aim*, *supra* note 379.

381. *See* sources cited *supra* note 379.

382. *Investigators*, *supra* note 379; Jere Longman, *Gunman Surrenders After Killing 2 in Restaurants in Pittsburgh Suburb*, N.Y. TIMES, Mar. 2, 2000 at A25; Spangler, *supra* note 379; *Writings of Suspect*, *supra* note 379.

383. *Accused Killer*, *supra* note 379; *Investigators*, *supra* note 379; Longman, *supra* note 381; Spangler, *supra* note 379; *Writings of Suspect*, *supra* note 379.

384. *National Briefs*, THE TIMES-PICAYUNE, Mar. 5, 2000, at A3.

385. 507 F.2d 1148 (D.C. Cir. 1974), *supp. opinion*, 529 F.2d 879 (D.C. Cir. 1976) (*per curiam*), *appeal after remand*, 430 F. Supp. 444 (D.D.C. 1977).

386. *Id.* at 1150.

387. *Id.*

388. *Id.*

Robertson rejected the insanity defence partly due to his rejection of the racial stereotype that "all angry Blacks are mentally ill."³⁸⁹

Mr. Taylor, on the other hand, acknowledged a history of mental illness at his arraignment.³⁹⁰ I query, however, the role of racism in contributing to and exacerbating this illness. "The underlying . . . assumption in the black-rage cases is that . . . racism affects the mental functioning of individuals."³⁹¹ It is clear, however, that such an investigation is not welcome by all and is seen as an unwelcome and unnecessary investigation into the foundations of criminal defences.³⁹²

VI. CONCLUSION

A move toward contextualization in the doctrine of provocation does not create an "open season" for a racialized person to kill indiscriminately. To understand why the accused acted as he or she did does not necessarily lead to complete forgiveness or exoneration. Indeed, the defence of provocation operates only as a mitigating defence—a fact that cannot be overemphasized. The result of taking into account the social reality of an accused is merely a more realistic assessment of his or her criminal responsibility or culpability.

Unlike the cultural defences which have at their essence a presumption of America or Canada as cultureless—operating from the perspective that it is only the immigrants who have culture—the extrapolation proposed in this paper posits an examination of "majority" culture as discriminatory in a way which may be provocative to racialized persons.³⁹³

The criminal justice system must strive to acknowledge the various roles of law generally, and the criminal justice system in

389. Falk, *supra* note 163, at 750 n.105.

390. *Accused Killer*, *supra* note 379.

391. Falk, *supra* note 163, at 773.

392. See Abbe Smith, *Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer*, 21 N.Y.U. REV. L. & SOC. CHANGE 433 (1994); George Vuoso, *Background, Responsibility, and Excuse*, 96 YALE L.J. 1661 (1987); Kimberly M. Copp, Note, *Black Rage: The Illegitimacy of a Criminal Defense*, 29 J. MARSHALL L. REV. 205, 237 (1995); Judd F. Snierston, Comment, *Black Rage and the Criminal Law: A Principled Approach to a Polarized Debate*, 143 U. PA. L. REV. 2251 (1995).

393. See Volpp, *supra* note 319, at 66.

particular. Socially engineering a society that promotes justice for all, yet recognizes and seeks to alleviate discriminatory burdens and disadvantages faced by other members of society, must be a central focus of the criminal justice system. Additionally, law must serve an educative role and perhaps even a collectively cathartic role.

It is true that my suggestions would lengthen trials. This would, however, be more than compensated for by the increase in fair results and increased perceptions of fairness. Justice must not only be done—it must be *seen* to be done by *all* who come in contact with the criminal justice system. Of course judicial education would be needed—but this is needed in any event, and is part of an ongoing commitment to achieving justice for all.

Canadian jurisprudence is only now reaching the point where a legitimate argument can be made for contextualization of the role of systemic oppression. Judicial inquiry into the factual, social, and psychological context within which litigation arises is not unusual.³⁹⁴ Rather, a conscious, contextual inquiry has become an accepted step towards judicial impartiality.³⁹⁵

The law is not a static entity. It should not be frozen in time and divorced from the current realities of modern life. Law must continue to evolve in response to the changing world in which it functions. As Holmes commented, “[t]he life of the law has not been logic: it has been experience.”³⁹⁶ Legal evolution requires the integration of information coming from other bodies of knowledge, including the social sciences, about the social realities of all persons who come in contact with the legal system.³⁹⁷ Racial contextualization may be seen as one such legal evolution.

394. See *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484, 506 (Can.).

395. *Id.*

396. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

397. Falk, *supra* note 163, at 811.
