

**REASONABLENESS, RACISM
AND
THE ARTICULATION OF BIAS**

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ABSTRACT

One of the ways in which our legal system maintains legitimacy is through its claim to objectivity. Every element in the decision-making process is alleged to be neutral and free of bias. Judges are seen to dispense justice based on the facts and reason, without influence by extraneous factors. The process itself, if it can be seen to operate independently of the people who administer justice, also lays claim to impartiality and neutrality. One of the mechanisms used in the common law to sustain the perception of neutrality is the objective standard as embodied by the fictional Reasonable Man. In this paper I attempt a critique of the Reasonable Man and the concept of reasonableness as it is used in criminal law to show how such standards, when they remain unarticulated can allow bias to infiltrate the decision-making process unnoticed by those making the decisions. I have used police shootings of black men as a context in which to show that racist stereotypes about black men can creep into decisions that on the surface appear race-neutral. I have proposed a possible solution in which triers of fact would acknowledge racist elements so that they can be addressed directly rather than being left to hover overhead and influence the decision-making process unrecognized. In this way, I feel that decisions, by being race-conscious, will be fairer than those that officially ignore bias, but actually let it slip in through the back door.

INTRODUCTION

Patricia Williams wrote that "[t]heoretical legal understanding is characterized, in Anglo-American jurisprudence, by at least three features of thought and rhetoric".¹ She described those three features as:

- (1) The hypostatization of exclusive categories and definitional polarities, the drawing of bright lines and clear taxonomies that purport to make life simpler in the face of life's complication...
- (2) The existence of transcendent, acontextual, universal legal truths or pure procedures...
- (3) The existence of objective, "unmediated" voices by which those transcendent, universal truths find their expression...²

These three features characterize Anglo-Canadian jurisprudence as well. They are the means by which the law, and the common law in particular, maintains its legitimacy. It is of the utmost importance that the law be seen as existing separate and apart from those who administer it. The example that Professor Williams gives in explaining the second feature is of "conservative theorists" who might insist that the tort of fraud has always existed and is in fact part of a universal system of right and wrong. Were one of these so-called conservative theorists to be challenged by the question of whether the first white settlers who landed on Fiji found tortfeasors waiting there to be discovered, the response would be "Yes". This universalizing of legal constructions lends legitimacy to the law by setting it up as existing outside of those who administer

¹ Patricia Williams. *The Alchemy of Race and Rights* (Cambridge, Mass.: Harvard University Press, 1991) [hereinafter Williams] at 8.

it and even from those who have created it, because it is seen not so much as a creation of human beings, but as pre-existing and transcendent. As Professor Williams recognizes,

"[t]he more serious side of this essentialized world view is a worrisome tendency to disparage anything that is nontranscendent (temporal, historical), or contextual (socially constructed), or nonuniversal (specific) as "emotional," literary," personal," or just Not True.³

In describing the third characteristic, Professor Williams points to the "real people" created by the law who are "given power in romanticized notions"⁴ as having "'real' experiences" - not because real people have experienced what they really experienced, but because their experiences are somehow *made* legitimate--either because they are viewed as empirically legitimate (directly corroborated by consensus, by a community of outsiders) or, more frequently, because those experiences are corroborated by hidden or unspoken models of legitimacy.⁵ Examples Professor Williams gives of such "legitimized" creatures are "the Noble Savage", the "Great White Father", the "Good-Hearted Masses", the "Real American", and two legal creatures, the "Rational Consumer" and the "Arm's Length Transactor". To this list I would add the "Reasonable Man".

The Reasonable Man in the law is the anthropomorphism of the law's devotion to "reasonableness" and "rationality", as well as to its claim of "neutrality" and "objectivity". This paper looks at the Reasonable Man and the

² Williams at 8

³ Williams at 9.

⁴ Williams at 9.

doctrine of reasonableness in the criminal law, specifically as it is used in the reasonableness component of the defence of self-defence. The Reasonable Man is used in the context of criminal defences ostensibly to restrict the availability of the defences, but I intend to show that the concept is also a way for judges to make moral judgments without appearing to do so, and in the process infuse unarticulated biases into the exercise. This paper will focus on racism as one of those biases. The subject of police shootings of blacks will be used as a framework within which to discuss how the notion of reasonableness can be used to conceal racism in the criminal law. The intent of this paper is to make an argument that judges should be required to articulate their underlying biases when they make decisions. I hope to argue that instead of relying on the reified common law construction of the Reasonable Man, judges should be forced to articulate all of the steps they take to reach a decision. I see this as necessary to the decision-making process because if judges are allowed to continue to make decisions without expressing how those decisions are made, then there is little that can be done to change the decisions. Professor Williams cites the example of *stare decisis* as a means to "filter...certain types of systemic input"⁶. I see the concept of reasonableness in the way it is currently applied in much the same way. As long as it remains a largely unarticulated notion, it also remains impervious to certain types of systemic input. To be able to change the types of behaviour that are considered "reasonable" in our heterogeneous society, we must be able to apply a broader analysis to the doctrine. Professor

⁵Williams at 9.

Williams has also remarked that the fact "that life is complicated is a fact of great analytic importance"⁶ The reliance on the Reasonable Man is a means of simplifying life, but ignoring the complexities of life also denies those who fall outside of the narrowly and majority defined "norm" of equal participation. A different approach to reasonableness should allow the experiences of those marginalized groups to be recognized.

Since I am focussing on racism as one type of bias concealed within the concept of reasonableness, I have devoted the first chapter to defining and discussing racism and different understandings of racism. In the second chapter, I will focus on the concept of reasonableness as it applies to the defence of self-defence. In that chapter I also attempt a critique of the concept of reasonableness as it is now used. In the final chapter, I will suggest an approach to reasonableness, in the context of a trial of a police officer who shoots a black suspect, that might lead to fairer, or at least more honest, results in those types of cases.

⁶ Williams at 7.

⁷ Williams at 10.

CHAPTER 1

INTRODUCTION

In this chapter I intend to discuss the concepts of race and racism, and examine different understandings of racism to lay a foundation for a broad-based approach to racism in the criminal law. In order to properly address the problems of racism in the criminal law, judges and lawyers must approach it from many different angles at once. They must understand that racism does not mean one thing: it has many facets and many meanings depending on who is defining it.

Part I - What is race?

It is difficult to launch into a discussion of racism without first defining what it is we mean when we speak of "race". A quick look in the dictionary will tell us that a race is "each of the major divisions of mankind". This concise elucidation of the concept of race gives us an idea of the biological basis to the notion of race as somewhat akin to a sub-species. A subject so invidious and divisive as race, however, surely cannot be reduced to such a simple definition. Indeed the notion of race does embody more than just the division of humankind based on distinct physical characteristics. In fact, in some cases it involves the division of humankind based on characteristics having nothing to do with physical appearance.

Depending on the use to which the concept of race is to be put, it can be defined in a myriad of ways. For some, like those adhering to the dictionary's version, race is biologically determined. There are distinct "races" of people, just as there are distinct species of animal, distinguishable from one another, by so-called racial characteristics. These characteristics may be purely physical, such as skin pigmentation or hair texture, or they may be non-physical. The legitimacy of non-physical racial characteristics is, however, questionable. At different times in history, "scientists" have tried to allege that race was connected with such things as intelligence, disposition and innate morality. These "scientific" efforts have been discredited repeatedly only to resurface in different forms depending on the times.

The biological basis of race is by no means universally accepted. Many scientists now eschew the use of "race" as a way of classifying human beings. Dan Gardner, in an article about a new Statistics Canada census that will attempt to classify Canadians according to race, states: "revolutionary developments in the study of biology over the past 25 years undermine the very idea of race".¹ Gardner discusses how recent developments in genetics show that there is very little biological or genetic difference between races.

The results [of a 1972 survey by world-renowned geneticist Richard Lewontin] confounded the old assumption that there are profound biological differences between the races. Of all the genes in human beings, about 75 per cent are identical in every person; only 25 per cent vary from person to person. And of that variable amount, Professor Lewontin demonstrated, 85 per cent of the difference would be present even if the two people were fairly closely related; that is, an ethnic subgroup, like Norwegians.

¹ Dan Gardner, "When racial categories make no sense", *Globe and Mail*, October 21, 1995, D8.

Another 9 per cent of the genetic variation will result from individuals being members of separate nations or tribes within a "race" -- a Spaniard and an Italian, for example. And only about 6 per cent is the result of the two people being from what we call separate races. Hence Prof. Lewontin discovered that any person's race accounts for only about 0.24 per cent (or 6 per cent of 25 per cent) of his genetic make-up.²

Gardner quotes from another scientist, Professor Jan Sapp of York University, who says that, "since [most] of the diversity between human beings exists within so-called races, the categories 'white' and 'black' are nonsense, genetically speaking."³ Professor Sapp warns against the use of "race" in the study of human biology because it is so tied up with political and cultural meanings. Society has determined that "race" should be based on skin colour, but as Gardner points out other genetic traits could have been chosen, and would have produced a completely different racial map than the one we currently use.

I see race more as a social construction than as a biological reality. Race may be viewed as a socially constructed means for the dominant group to maintain its power and control over the "racialized".⁴ To those who hold this view, race is simply a hegemonic fiction. Race maintains the existing power structure by allowing the dominant majority⁵ to reduce the racialized minority to

² Gardner, *Globe and Mail*, October 21, 1995, D8.

³ Gardner, *Globe and Mail*, October 21, 1995, D8.

⁴ The idea of race is created, sustained and promoted by "racialization", which may be defined as the "social constructions of races as real, different and unequal" Racialization involves "selecting some human characteristics as meaningful signs of racial difference; sorting people into races on the basis of variations in these characteristics; attributing personality traits, behaviours and social characteristics to people classified as members of particular races; and acting as if race indicates socially significant differences among people": *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995) [hereinafter *Systemic Racism Report*] at 40-45.

⁵ "Majority" is used in this sense to mean those who have the majority of the power, regardless of whether they are a numeric majority. An example of this would be the fact that women make up

a stereotype. The emphasis on the racialized group's race or "racial characteristics" deprives that group's members of their individual uniqueness and dignity. Instead of being a person with an infinite number of unique and personalized attributes, the racialized group becomes, for example, blacks or Indians or Jews. They are identified first and foremost according to their membership in the group. The racial moniker carries with it a set of well-defined, albeit implicit, characteristics having nothing to do with the individual and everything to do with the dominant group's efforts to deny the minority their right to full "personhood". Blacks, for example, are well known for their ability to dance, as well as for their propensity to commit violent crimes. Whether an individual black person has two left feet, or abhors violence matters little in race shorthand because he or she is seen as an anomaly. White people, on the other hand, cannot realistically be seen by the dominant majority to possess such "racial characteristics". They are not reducible to stereotypes because they are full persons with individual personalities. It is much more difficult to exert power over one who is viewed as another person, and thus one's equal, than it is to assume power over a depersonalized stereotype.⁶

The socially constructed concept of race, like the biological, lends itself equally well to racism because it still allows the dominant group to ascribe characteristics beyond the merely physical to racialized peoples. To characterize race as a fiction or social construction may in some sense negate

the numeric majority in the population, but men constitute a "majority" by virtue of the relative power they hold.

or minimize its real harm. A social construction, once widely accepted, takes on the dimension of "fact", and as such assumes legitimacy, whether originally warranted or not. Gardner makes the point, in relation to the biological basis of race, that "[e]ven if race has become meaningless to scientists, it is very real to practically everyone else. 'Society's belief in the existence of races creates what social scientists call a social reality.'"⁷

Race is important on a somewhat benign level as a means of classifying individuals into easily managed groups. It is much easier to process information when we can associate it with something we are already familiar with. When we see someone who looks similar to someone we have already met, then it is simpler to associate the two rather than to create a separate individual category for the new person. The more invidious side of race is apparent, however, when we examine why we classify those we meet along racial lines. Why do we not group people together according to hair or eye colour or some other genetic trait? There must be something more to race than just one's physical characteristics. The added element is the social dimension that race carries with it. Admittedly, this argument is somewhat circular, but so is the nature of race and racism. We pay attention to race because it is important, and it is important because we pay attention to it. In an essay tracing anti-black racism in Canada, James St. G. Walker⁸ argues that race is used, after the fact, to explain oppressive treatment of all blacks who came to Canada, regardless

⁶ see *infra* note 23 and accompanying text discussing what Albert Memmi called the "mark of the plural".

⁷ Gardner, *Globe and Mail*, October 21, 1995, D8.

of their class or origins. He argues that because blacks came to Canada initially as ex-slaves, and occupied positions as servants or labourers here that this created or perpetuated the perception of blacks as being fit only for positions of servitude. I am not sure that I agree entirely with Walker's argument because many other groups came to Canada as servants and labourers and have not suffered the same plight as blacks. I would be more inclined to argue that the racism was there initially. "Race" was identified as the reason because so-called "racial differences" such as skin colour, were readily apparent. I would argue that the real motivation behind the racial classification, however, was and still is the desire to maintain dominance. Whatever the genesis of racism, however, it is firmly entrenched in Canadian society, and must be dealt with as a social reality.

Culture

A concept related and often confused with race is culture. Race and culture are sometimes used interchangeably as though they were synonymous. If "race" is understood as including characteristics beyond the merely physical, then these two concepts come closer together, but in their "pure" sense the two are distinct. Culture is the beliefs, attitudes, behaviours, customs and so on that one acquires as a result of socialization. A black person could conceivably be born to second generation black Canadians (or be raised by white Canadians) and be as culturally "Canadian" as a white person born to second generation

⁶ James St. G. Walker, *Racial Discrimination in Canada: The Black Experience* (Ottawa: Canadian

parents of Scottish descent. Similarly, the Caribbean is heavily populated with people from several races -- black, white, Chinese and South Asian -- and these groups are as culturally similar to each other as white Canadians are to each other, despite their different races. Their cultural character is a result of their socialization in a similar environment, not a result of their "racial" characteristics.

This is not to say, of course, that race plays no role in socialization. The most obvious impact race has on one's socialization is that in some communities, members of certain races tend to -- or may be forced to -- associate closely, and perhaps exclusively, with each other. This leads to a type of group identity. This identity may be manifested in the way the group members speak, the types of music they may prefer, the types of clothing they might wear, and so on. These may be considered external cultural characteristics. Another way in which race may influence one's socialization is through common experience outside of simple association with other members of one's race. If members of a certain group experience similar types of treatment or environmental stresses, they may tend to form similar opinions about their place in the larger society, their group image, their worth, etc. This in turn leads to the formation of a "group psyche" that may manifest itself in various ways as well. The group may exhibit signs of anger, hostility or resentment toward groups outside the racial group or toward their environment in general. They may develop certain types of behaviour in reaction to these environmental

Historical Association, 1985).

stresses. These cultural characteristics, however, in no way inhere in the racial group itself simply because of their "race", whether race is biologically or socially defined. These are extraneous characteristics that are acquired in addition to the "racial" characteristics.

The legitimacy of so-called "cultural characteristics" must also be examined and questioned. The idea that certain defined characteristics can be assigned to different groups is as problematic as so-called racial characteristics. To say that a certain group possesses certain cultural characteristics presumes that the group is homogeneous and static. Critics of this view stress that these "cultural groups" are as dynamic and fluid as mainstream society. Sunera Thobani, for example, questions the prevailing belief both within and outside South Asian "culture" that women are not as highly valued as men in that culture. In an article analysing sex-selection technology, and the assumptions on which it is based, she discusses a sex selection clinic run by a doctor who legitimizes its existence by claiming that

"'East Indian' women are 'terrified' of having more females because 'East Indian families want to be assured of having male babies' Arguing that South Asian culture condones this preference for males, [the doctor] went on to say:

What I have found with [people of East Indian origin] is that they use me to diagnose sex. If it is discovered that it is a female, it is always the girl that they want to select to undergo foeticide...Why should I cut my own financial throat? Why should I have to go out on my own to change their cultural attitudes?⁹

⁹ Sunera Thobani, "From Reproduction to Mal[e] Production: Women and Sex Selection Technology" in Gwynne Basen, Margrit Eichler et al. (eds.), *Misconceptions: The Social Construction of Choice and the New Reproductive Technologies* (Hull, P.Q.: Voyageur, 1993) 138 at 141-2.

Thobani comments that the "implicit notion...that South Asian culture celebrates and condones this particular form of misogyny remained unchallenged in the media", which focused instead on understanding these "cultural" attitudes. Criticism of the clinic was aimed at the backwardness of the South Asian community, who brought their "cultural" ideas to this country. Thobani argues that the focus on the South Asian culture ignored the fact that the devaluation of women is a global phenomenon. She also points out that in defining South

Asian "cultural practices", they are portrayed as being "monolithic and uniformly misogynist"¹⁰

This example illustrates the difficulty with defining "cultural characteristics". Such characteristics sacrifice completeness for simplicity. They reduce what is really a diverse and dynamic group of people into a set of readily available definitions. Those within the group who seek to challenge the status quo are ignored. The group is perceived to consist of one point of view, when in fact it contains many, as many as the dominant group. By characterising South Asian culture as misogynist, feminists within the group are ignored because they do not fit the picture. The experience of every member of the group must concur with the dominant perception of that group, or risk being ignored.

The same danger exists when racial classifications are made. Individuals whose experience does not fit within the group perception are written off as being anomalous. Professor Williams describes the phenomenon of using an individual experience that accords with dominant perceptions to create a generalized theory, and then "recasting the general group experience as a fragmented series of specific, isolated events".¹¹ Other perspectives are admitted only as "your point of view", rather than being indicative of a different group experience, or even as evidence that the notion of a single "group experience" may be too simplistic.

¹⁰ Thobani at 144.

¹¹ Williams at 13.

Part II - What is racism?

Having attempted to shed some light on the concept of race, we may now turn to the subject of racism. Like race, racism may be defined in a variety of ways depending on the purpose and who is doing the defining. In this section, I will examine differing perceptions of racism including how the law has understood racism. I will also look at the different forms in which racism may appear.

Differing Perceptions of Racism

As I mentioned earlier, perceptions of racism differ depending on where one stands. Professor Adeno Addis describes the difference between white and black conceptions of racism:

For most whites, racial incidents (injustices) demonstrate that bigots and institutional failures still exist; however, they do not indicate that racism is a systemic problem. On the other hand for blacks, racism is not simply a problem of bigots and the occasional institutional failure. It is deeply entrenched in this polity and defines the institutions of this country, not so much by being an exception to the general rule of fairness, but rather by being central to the polity's very understanding of fairness, justice, and virtue. Put simply, while most whites see racism as an occasional unfortunate interruption to the institutional and individual commitments to the values of equal opportunity and equal treatment, most blacks see racism as a daily routine by which the lives of black people are systematically and institutionally devalued.¹²

¹² Adeno Addis, "Recycling in Hell" (1993), 67 *Tul. L.R.* 2253 at 2254-5 [hereinafter "Addis"].

Professor Williams uses a story about a four year-old walking with his parents and telling them that he is afraid of big dogs. When asked why, he responds, "Because they are big". His mother responds that there really is no difference between big dogs and little dogs; they are all just dogs. Professor Williams' response to this situation was that the parents must have been lawyers.

Where else do people learn so well the idiocies of High Objectivity? How else do people learn to capitulate so uncritically to a norm that refuses to allow for difference? How else do grown-ups sink so deeply into the authoritarianism of their own world view that they can universalize their relative bigness so completely that they obliterate the subject positioning of their child's relative smallness?¹³

She then goes on to show that the story illustrates "the paradigm of thought by which children are taught not to see what they see", and similarly "by which blacks are reassured that there is no real inequality in the world, just their own bad dreams".¹⁴ She discusses how this type of thinking can subvert a group experience by pointing to an individual experience and holding it up as an example because it accords with the majority's idea of how things are. The general group experience is then recast "as a fragmented series of specific, isolated events rather than a pervasive social phenomenon".¹⁵ This is precisely what happens with racism. Those who do not experience racism, or who at least do not acknowledge the extent of its effects point to a black judge or CEO or some other black who has achieved a high position, and use him or her as

¹³ Williams at 13.

¹⁴ Williams at 13.

¹⁵ Williams at 13.

an example of the "black experience" to show that racism is not as prevalent as most blacks would insist. That individual who apparently contradicts the perception among blacks that racism keeps blacks from achieving equality is used by the majority to confirm their perception that racism is a specific, isolated problem, "an occasional unfortunate interruption to the institutional and individual commitments to the values of equal opportunity and equal treatment".

Legal Understandings of Racism

Legal definitions or understandings of racism are not easy to come by. Firstly, the terms "racism" or "racist" are carefully avoided by judges in written judgments, being substituted by the more polite "racial discrimination". I may be splitting hairs in pointing this out, but I do not think it is accidental that the more moderate term is used by judges. "Racist" is a harsh term, and those who do not experience its harshness may be inclined to lessen its impact by expressing it in milder terms. Secondly, when racial discrimination is discussed, it is rarely defined. References may be made to "stereotypes", "attitudinal prejudice"¹⁶ or "race-based prejudice"¹⁷, but little attempt is made to explicitly define the concept.

Even the more generalized concept of discrimination is still unsettled in the case law. The Supreme Court of Canada has tried to determine what constitutes discrimination so as to warrant intervention through s. 15 of the

¹⁶ *R. v. Griffis*, July 2, 1993, Ontario Court (Gen. Div.) [unreported].

¹⁷ *R. v. Parks* (1993), 84 C.C.C. (3d) 353 (Ont. C.A.); leave to appeal denied [1994] 1 S.C.R. x. [hereinafter *Parks*] at 359.

Charter.¹⁸ In *Egan v. Canada*,¹⁹ L'Heureux-Dubé J., in dissent, attempted to develop a workable approach to s. 15, and in so doing made some useful observations about how discrimination should be approached by the courts. She approached discrimination in terms of discriminatory effects since as she saw it "the essence of discrimination is its impact, not its intention"²⁰. In defining discrimination she said:

A distinction is discriminatory within the meaning of s. 15 where it is capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration.²¹

This definition of discriminatory distinctions goes a long way toward describing what is meant by racial discrimination, but unfortunately, Madam Justice L'Heureux-Dubé's opinions were not concurred in by the rest of the Court, and only time will tell if her approach will be adopted.

One case in which a laudable attempt was made at defining racism was *R. v. Parks*. Doherty J.A. described three different types of racism: "overtly racist views"; "subconscious negative racial stereotyping", and "institutional racism". He quoted from a letter by Stephen Lewis to then-Premier of Ontario, Bob Rae, in which several of the effects of racism were outlined:

First, what we are dealing with, at root, and fundamentally, is anti-Black racism. While it is obviously true that every visible minority

¹⁸ In "Three Models of (In)Equality" (1993), 38 *McGill L.J.* 64, author J. Donald C. Galloway discusses the various approaches that have been taken by the Supreme Court of Canada to s. 15 and issues of equality and discrimination.

¹⁹ [1995] 2 S.C.R. 513 [hereinafter *Egan*].

²⁰ *Egan* at 551

²¹ *Egan* at 552-3

community experiences the indignities and wounds of systemic discrimination throughout Southern Ontario, it is the Black community which is the focus. It is Blacks who are being shot, it is Black youth that is unemployed in excessive numbers, it is Black students who are being inappropriately streamed in schools, it is Black kids who are disproportionately dropping-out, it is housing communities with large concentrations of Black residents where the sense of vulnerability and disadvantage is most acute, it is Black employees, professional and non-professional, on whom the doors of upward equity slam shut. Just as the soothing balm of "multiculturalism" cannot mask racism, so racism cannot mask its primary target.²²

Lewis identified many of the effects of racism, and this letter goes a long way toward describing the extent to which racism affects blacks. Doherty J.A. also identified two aspects of "partiality" -- attitudinal and behavioural -- to distinguish between the type of bias that would be irrelevant in a juror (attitudinal), and that which would cause her to decide based on her racist beliefs (behavioural). Doherty J.A. even referred to the fact that racism may be seen differently through the eyes of the victim:

The perceptions of those who claim to be victims of racial prejudice cannot, necessarily, be equated with the reality of such victimization. However, to reject such perceptions out of hand, especially when they are strong and widespread, is perhaps to demonstrate the very racial bias of which they speak.

Doherty J.A. went much further than most judges in situating his discussion of racism within a social context, and his efforts are an encouraging start.

Doherty J.A. identified three types of racism: overt bigotry, subconscious stereotyping and institutional or systemic racism. While I do not deny that it is a problem in the justice system, I am not particularly concerned with overt racist

²² Parks at 367-8.

feelings in this paper. The problem I intend to focus on in the remaining chapters is one of both subconscious racist stereotyping and systemic racism.

Racist Stereotyping

Racist stereotyping occurs when an individual is characterized based on his membership in a particular "racial" group. The group is collectively categorized according to so-called "racial characteristics", and individual members are seen to possess those same traits. The attribution of "racial characteristics" to a group is part of what I described earlier as racialization. Racist stereotyping is simply another form of racialization.

An inevitable concomitant of stereotyping is stigmatization, which is the process by which the dominant group in society differentiates itself from others by setting them apart, treating them as less than fully human, denying them acceptance by the organized community, and excluding them from participating in that community as equals.²³

Adeno Addis discusses the effect of stereotyping and stigmatization on racialized individuals in "Recycling in Hell" when he refers to Albert Memmi:

One effective way to devalue a group is to use what Albert Memmi called 'the mark of the plural'. Memmi was describing how members of subordinated groups are depersonalized by continually being characterized, not as individuals, but as members of an 'anonymous collectivity'.²⁴

Addis goes on to say that

²³ Charles F. Lawrence III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism" (1987), 39 *Stanford L.R.* 317 at 350.

²⁴ Addis at 2263.

Not only are members of the community depersonalized by the "mark of the plural", but that collectivity is quite often seen as the negation of the normal and moral order...Indeed "crime" has virtually become a metaphor to describe young black men.²⁵

The "mark of the plural" therefore, depersonalizes the racialized individual by making him "one of them"; and the stigmatization that portrays the collectivity as the negation of the normal and moral order makes him "one of *them*".

The problem I will focus on in the remaining chapters is partially a result of racist stereotype. The particular stereotype is that of the black man as criminal and threatening. An individual police officer when confronted by an unknown black man may rely on such a racist stereotype to assess the degree of danger involved, and may react by firing before ascertaining whether the situation was really as he had supposed it to be. This, however, is only part of the problem.

Systemic Racism

The second facet of the problem is systemic. Institutional or systemic racism may be described as "the social production of racial inequality in decisions about people and in the treatment they receive".²⁶ The Commission on Systemic Racism in the Ontario Criminal Justice System identifies three elements of systemic racism: racialization, structure and personnel. I have discussed racialization briefly above. The Commission points out that even where racialization is specifically prohibited by the law it can still "have powerful

²⁵ Addis at 2264.

effects where it is only an implicit and unofficial feature of the system".²⁷ This "systemic" racism manifests itself in the way the system or its institutions function. The subject of police shootings of blacks can be viewed from a systemic, as well as an individual, angle. I will argue that the way the criminal law functions, with its reliance on an unarticulated standard of reasonableness, can result in anti-black racism. On that level the problem is not one of individual racist police officers employing racist stereotypes, but of a system that allows implicit stereotypes to be invoked under the guise of reasonableness.

In approaching police shootings of blacks as a systemic as well as individual problem I expect some resistance. As Professor Addis pointed out, whether you see racism as an individual "bad apple" problem or as a larger systemic issue depends largely on where you are standing in relation to it. Those who believe that "racial incidents" involving police and black men are simply isolated failings of the justice system will see any discussion of a pattern of police abuse as "making a mountain of a molehill". Those who are potentially on the receiving end of such abuse, however, may have a totally different perception. I do not intend to take a "neutral" or "objective" standpoint on this issue for two reasons. Firstly, from a principled standpoint, as I argue later, objectivity is a fiction. We all speak from a point of view. Secondly, I do not see "racial incidents" involving police and black people as isolated aberrations. I view the problem largely as one of a system that refuses to acknowledge the reality of racism by holding fast to a myth that justice is blind.

²⁸ *Systemic Racism Report* at 39.

Part III - Racism and Policing

This paper discusses racism in a particular context. It is about the role racism plays when white police officers shoot black "suspects", and then claim that their actions were reasonably necessary to protect themselves. If charges are even laid, the police can expect to successfully rely on the self-defence or lawful authority provisions of the Criminal Code, which excuse a killing where the killer had a reasonable apprehension of harm. A similar context would be a situation like the Bernhard Goetz case in New York City, which I will discuss in greater detail in the next chapter. Before setting out my argument with regard to that issue, however, it is important to establish a factual foundation. The best way to do this is by giving examples of police conduct involving black suspects in recent years. The shootings have occurred in a variety of situations.

On November 11, 1987 Anthony Griffin was shot and killed by Montreal police constable Allen Gossett. Griffin was picked up by police following a complaint from a cab driver that he would not pay his fare. When police ran Griffin's name through the police computer, they found that he was wanted for a break and enter. Griffin was arrested and taken to the police station. Once at the station, Griffin broke loose and attempted to run away. He was in the plice parking lot, which was surrounded by five metre-high fencing. Gossett shouted for Griffin to stop. Griffin stopped and turned to face Gossett, and was shot in the

²⁷ *Systemic Racism Report* at 41.

forehead. Griffin was unarmed, yet Gossett argued at his trial that although he did not feel threatened by Griffin, he was concerned because Griffin shuffled his feet "like a boxer" in a manner that could be considered dangerous.²⁸

Gossett said that the shooting was accidental as his gun malfunctioned. Montreal Urban Community Police Director Roland Bourget said that a service revolver was only to be used for cases of legitimate defence, and never to stop a suspect from fleeing. Bourget also said, "I am personally convinced this act is not related to racism".²⁹ Further investigation into Gossett's files, however, revealed that he had been involved in beating another black man in 1981 and allegedly calling him a "damn nigger". Gossett was sued by the Quebec Human Rights Commission for \$8,100. The MUC settled the case out of court for \$2,450. Bourget said that the 1981 incident had no bearing on the shooting of Griffin, and that it was probably a coincidence that both incidents involved blacks. Bourget was reported as having said, "I cannot believe -- maybe I'm naive -- that the police will shoot someone because they're black."³⁰ Gossett was charged with manslaughter, and was acquitted. The Crown appealed on the basis of the charge to the jury. The case went to the Supreme Court of Canada on the subject of the jury charge, and was sent back for a new trial³¹. Gossett was again acquitted.

The Griffin-Gossett shooting raises several questions. Why did Gossett draw his gun to stop a fleeing suspect when the force directives clearly

²⁸ Richard Mackie, *Globe and Mail*, April 9, 1994, A4

²⁹ James Mennie, *The Gazette*, November 12, 1987, A1

³⁰ Ingrid Peritz, Peggy Curran, Eloise Morin, *The Gazette*, November 13, 1987, A1.

stipulated that guns were only to be used to defend an officer or citizen? Why did Gossett feel he needed to draw his gun when he was in a police parking lot surrounded by an unscalable fence and all the backup he could want and Griffin was unarmed? Why did the Crown only charge Gossett with manslaughter, thereby requiring no inquiry into whether he intended to kill Griffin at the time of the shooting? Could this prosecutorial decision have been the result of Gossett's claim that his gun fired accidentally? Such a decision ignored the more important initial question of why Gossett's gun was drawn in the first place. Such a decision also made it impossible to open up the inquiry of whether race played a role in the shooting because Gossett's state of mind became less important. All of these questions were asked by members of the black community, but none were answered by the investigation or trial.

On April 9, 1990, Montreal police were again involved in the shooting of a black man. Presley Leslie was a patron at the Thunderdome club in Montreal. Police were called to the club as a result of a brawl that had erupted. Police said they arrived to find a man standing at the top of the stairway firing a pistol at anyone who moved. Officers said the gunman then turned and fired at them. The owner of the club reportedly said that he saw Leslie fire at the police. He said, "I want to be clear: It wasn't a question of racism"³². Other witnesses, however, said that Leslie was not threatening police or any clients before he was killed. One witness said that she was with Leslie shortly before police arrived, and he was not armed at that time. The same witness said that police

³¹ *R. v. Gossett*, [1993] 3 S.C.R. 76

had come into the club about 45 minutes before Leslie was shot and searched him. The media reported that Leslie had a lengthy criminal record, and had been convicted more than a dozen times since 1983 on charges including assault and armed robbery. An inquest was ordered into the shooting, but the officers were not named in the media and were not suspended.³³

A little over a year later, on July 3, 1991, Marcellus Francois was shot and killed by Montreal police sergeant Michel Tremblay in a case of mistaken identity. Tremblay was a member of an MUC SWAT team that was looking for an attempted murder suspect named Kirt Haywood. A police surveillance team stalked Francois for more than four hours, coming within three feet of him at one point. They testified later at an inquiry that they were never more than 75 per cent sure they were following the right man. Police had Haywood's picture on file, but those trying to track him down had poor quality photocopies of the picture. The sergeant in charge of the surveillance ordered over the police radio, "we'll jump them and then we'll find out".³⁴ And that is what Tremblay did. The car in which Francois was driving was cut off by two tactical squad vans and five police cars. Tremblay immediately emerged from one of the vans wearing a bullet-proof vest and carrying an M-16 semi-automatic rifle. Tremblay shouted "Police, freeze", and then fired at Francois. Tremblay said that he saw Francois reaching under the dashboard for what he thought was a gun. Tremblay estimated that five to seven second had elapsed from the time his van

³² Marion Scott, Jeff Heinrich, Albert Noel, *The Gazette*, April 11, 1990, A1.

³³ Patricia Poirier, *Globe and Mail*, April 11, 1990, A12.

³⁴ Sandro Contenta, *The Toronto Star*, October 30, 1991, A23.

stopped to the time he shot Francois. The officer who drove the van estimated that it was about three seconds. Tremblay approached Francois' car after firing the fatal shots, and realized his mistake. Kirt Haywood, the suspect that he was supposed to be following was five-foot eleven inches tall, had a scar above his right eye and wore dreadlocks. Francois, who had been mistaken for Haywood, was five-foot four inches, had no scar and wore short hair. The only resemblance was that both men were black.

No charges were laid, but an inquest was held into the shooting. MUC police chief Alain St-Germain testified at the inquest that he had reviewed the backgrounds of the officers involved and found no record of any being involved in incidents with members of visible minorities. He said that he reviewed every single move they had made to see whether there were any racist overtones, but he found none.³⁵ Harvey Yarosky, the coroner heard during the inquest how police referred to the "suspects" over the radio as darkies and niggers. Yarosky said that although he had no empirical evidence to show that racism played a role in the shooting, he did note racism in the way officers referred to the "suspects" over the police radio, and the way that three black occupants of Francois' car were illegally incarcerated for several hours even though police suspected them of no crime. Officers who used the racist terms in the radio transmissions testified that they saw nothing prejudicial in using the words. Tremblay testified that although he was not sure that he had the right man, identity was not the issue since Francois' alleged gesture in the car convinced

³⁵ Patricia Poirier, *Globe and Mail*, January 30, 1992, A7.

him that he was reaching for a gun. He said that he would have shot anyone if he felt his life was threatened. Chief St-Germain concluded that Tremblay's mistake was "not a disciplinary mistake" as he had not been "careless or negligent"³⁶. Tremblay had simply misjudged the situation, causing him to react too quickly.

The Francois-Tremblay shooting raises several issues. One issue is the very narrow interpretation that was given to "racism" in this case. Coroner Yarosky could only find racism in the use of racial epithets and the wrongful imprisonment of Francois' friends. He was unable to see that the "they all look alike" attitude of SWAT team officers was itself racist. A SWAT team member testified that police were braced for trouble because Haywood was a Rastafarian, and the officers believed Rastafarian suspects to be more dangerous than others. The officer testified that his understanding of Rastafarians was that they are long-haired black people who take drugs. Yarosky found no racism in that stereotype. A more subtle aspect of racism that Yarosky failed to notice, but which forms the basis for this paper, is why Tremblay felt he was threatened. Why when confronted by a black man, did he feel it was necessary to shoot first and ask questions later? Was it perhaps that black men are perceived to be a threat? Did the fact that Tremblay was braced for a confrontation with a Rastafarian contribute to his predetermined apprehension of bodily harm?

³⁶ Patricia Poirier, *Globe and Mail*, Januray 30, 1992, A7.

On November 14, 1991, Osmond Fletcher was shot during a scuffle with Montreal police. Police said that he committed suicide. An autopsy report said that Fletcher had been shot with a 22-calibre handgun. Police do not carry that type of weapon. Police said that, acting on a warrant from the Metropolitan Toronto police, they tried to stop Fletcher, but he ran. They said that he tried to commandeer moving cars at gunpoint, but was unsuccessful. As police closed in on him, Fletcher pointed the gun at himself. When one of the officers tried to subdue him, he and Fletcher fell to the ground, and Fletcher allegedly shot himself. Fletcher's neighbours found it difficult to accept the police version of events. They said that Fletcher would not have killed himself. Shortly prior to the shooting, Fletcher had complained to a CBC television reporter of police harassment. While the shooting was officially ruled a suicide, many blacks still question the accuracy of that decision.

On January 1, 1993 Trevor Kelly was shot and killed by two MUC officers. The police alleged that they were on patrol when Kelly walked up to their cruiser and began making threats. The officers left their car, and Kelly began waving a knife at one of the officers. The other officer said that as Kelly advanced toward his partner, he fired and shot Kelly in the back. One of Kelly's friends said that he had been in Kelly's apartment earlier in the evening when the officers had visited. Apparently, one officer was giving his rookie partner a tour of neighbourhood trouble spots, which led them to Kelly's apartment. Kelly's friend said that the two officers were simply harassing Kelly and that he was angry. Neighbourhood residents who witnessed the interaction between

Kelly and the officers on that evening said that the officers left the apartment and began cruising around the neighbourhood. When Kelly left his apartment some time later, he saw the officers, and turned around to walk the other way. They followed him down the street, driving slowly beside him and saying something to him. He told them to get lost. No one appears to have seen the actual shooting except the police officers. People who knew Kelly said that although he was somewhat disturbed, he was not dangerous, and he did not carry knives. Kelly had a history of mental problems dating back about ten years before the date of the shooting. He also had a criminal record for about the same period. Kelly was to appear for a preliminary hearing on charges of assaulting a peace officer, resisting arrest and making death threats. The officers' names were not made public, and no disciplinary action was taken, nor were charges laid.

Many media reports made a point of stressing Kelly's criminal record and the fact that he was facing charges of assaulting a peace officer, but little details were given about the circumstances of the charge or any of his previous convictions. Kelly was obviously known to police, and his outstanding charges would have been known to the officers who were involved in his shooting. It would not have been difficult to concoct the story they did, which bore striking similarity to the charges that Kelly was facing at the time. One issue the Kelly shooting raises is to what extent a "suspect's" criminal record should play in the determination of an officer's culpability. In this case, Kelly's criminal record was well known to police, but what about the case where the suspect or his record

is not known to police? Should the police be able to rely on their after-acquired knowledge of that record to justify *post facto* their reasonable apprehension of harm?

Montreal police are not the only ones to be involved in shootings of black men. In August, 1978, Andrew "Buddy" Evans was shot by Constable Clark of

the Metropolitan Toronto Police at the Flying Discotheque.³⁷ Buddy Evans and his younger brother went to the disco to settle a score with the owner of the club. Evans was thrown out of the club, but threatened to come back and kill one of the bouncers. This threat was reported to police. On the night in question, Constable Clark was called to the club. He had been alerted to the fact that Evans was there with a machete in a garbage bag. When the police arrived at the club, there was a crowd assembled outside. Somebody ran into the club carrying the machete. Clark pursued and arrested Evans' younger brother. Buddy Evans tried to free his brother and a scuffle ensued. Evans was cornered and surrounded by at least six officers. The police officers later claimed that they could not subdue Evans, and began to use billy clubs on him. Evans grabbed Clark's billy club and hit him on the head with it. Evans was about to hit Clark again when Clark drew his gun and threatened to shoot unless Evans dropped the club. Clark then shot Evans dead with one shot through the heart. Witnesses differed as to Evans' reaction to Clark's threat. One witness said that Evans had dropped the billy club; another said that he had his hands up in a gesture of surrender; another said that Evans was ready to swing at Clark. The coroner's inquest jury appeared to have accepted the last version of events.

When the lawyer for Evans family requested that the OPP investigate the shooting for the inquest, the Chief Coroner said that he would not appoint the OPP because he had full faith in the Metropolitan Police. The Chief of the Metro

³⁷ The descriptions of the remaining shootings are taken from a report prepared by Professor Harry

Unit said that there was nothing exceptional in the Evans case requiring a departure from normal practice, and the appointment of the OPP might undermine the integrity of the Metro Unit. At the inquest, the coroner admitted evidence of Evans' prior record for violence. These included offences committed by Evans when he was a young boy living in Halifax, and also some serious offences that had allegedly occurred just prior to the shooting. The argument for letting this evidence in was to explain his behaviour and attitude toward the police. This evidence suggested that Evans was aggressive and violent, and therefore, Clark had reason to fear for his life. The evidence was admitted on the basis that it revealed a pattern of conduct and attitude and also because a person's history was necessary to understand how that person would react under stress. While the coroner admitted evidence of a complaint laid against Clark when he made a wrongful arrest, she excluded evidence that Clark had also been charged with using violence against the public in other arrest situations. Criminal charges had been laid, but Clark was acquitted. The coroner held that the charges had nothing to do with being threatened by an armed person or with being confronted by a black person.

The shooting of Buddy Evans again raises the issue of when a "suspect's" criminal history is relevant. It would appear that Constable Clark knew nothing of Evans' past, but Evans' violent past was nonetheless relevant at the inquest to show how he would have reacted in the situation. The mere fact that he had engaged in violent behaviour in the past was sufficient to brand

him as a violent person who posed a threat in this particular case, despite the fact that he was greatly outnumbered by police. Was Clark particularly sensitive to the "danger" he faced in Evans by the fact that Evans was a black man? Did Evans' race weigh more heavily in favour of his perceived dangerousness?

On August 26, 1979, Albert Johnson was shot and killed by police officers Inglis and Cargnelli. Police had been called to Johnson's home by an anonymous caller who said that Johnson was causing a disturbance. Johnson was known to police as a mentally ill person, and as such the officers were warned that Johnson was unbalanced and potentially dangerous. The officers arrived at Johnson's home to find no disturbance. Johnson then rode up on his bicycle. Upon seeing the police he dumped his bicycle and asked police what they wanted and whether they had a warrant. When told that they did not, Johnson went to his back door by way of the garage and closed the garage door on the officers. Inglis and Cargnelli went to the front door where they met Officer Dicks, a third officer who had responded to the call. Johnson then came to the front door to call his children in. He then yelled at the officers and closed the door. The officers decided to leave. Inglis and Cargnelli walked along the side of the house. They claimed that they then heard shouts coming from within the house, and Johnson appeared at an upstairs window shouting insults and spitting at officers through the screen. Neighbours said they heard no shouting. The police, allegedly believing that Johnson might harm the people in the house, broke into the house through the back door. The officers told Johnson they were arresting him for causing a disturbance. He told them that he would

not go with them as he had done nothing wrong. The officers claim that Johnson then threw a pot of peas that was cooking on the stove at them. One of the officers hit Johnson over the head with a metal flashlight. Johnson's head was cut. The struggle moved into the living room where Johnson was again hit with the flashlight. He ran upstairs. Cargnelli radioed for help. Johnson then appeared at the top of the stairs holding his daughter. The officers claimed that he looked as though he were going to throw her at them. Johnson's wife intervened and took her daughter away from Johnson. Johnson then threw a bottle of disinfectant at one of the officers. The officers then claimed that Johnson came down the stairs carrying an axe (it turned out to be a lawnmower). They said that he looked as if he were going to throw it at them. They said that Inglis then shot at Johnson and missed. Johnson then jumped down the stairs and Inglis shot him. The occupants of the house had a different version of events. They said that Johnson was coming down the stairs calmly, and one daughter said that her father was in a kneeling position when the officer shot him.

Charges of involuntary manslaughter were laid against Inglis and Cargnelli. The lawyer who acted on behalf of Mrs. Johnson argued that charges of second degree murder should be laid against Cargnelli and Dicks, and a charge of first degree murder laid against Inglis. He argued that there was some evidence of a decision by the officers to kill Johnson prior to the shooting. Constable Dicks had allegedly shouted out to the other two to kill Johnson, and there was evidence that the officers had engaged in a break and

enter and/or a forcible confinement of Johnson and had caused bodily harm to further these unlawful acts. The Attorney General did not support Mrs. Johnson's application arguing that the court should only exercise its discretion where there was evidence of bad faith by the police or the Crown. The court accepted the Attorney General's arguments and the requested charges were not laid.

The theory of the Crown's case was that the police unjustifiably entered Johnson's home, and then used excessive force, leading to the struggle. When Johnson tried to escape, the persistence of the officers worsened the situation created by their unlawful entry causing Johnson to react the way he did. The shooting of Johnson was a continuation of the original unlawful act and/or the consequence of criminal negligence since the officers should have broken off the encounter. The Crown, therefore, had to prove that the officers' behaviour was unlawful or that their continuation of the confrontation was unreasonable. The officers relied on self-defence. Johnson's prior violent confrontations with police and the number of times that police were called to the Johnson residence then became relevant to show that the police officers' apprehension of bodily harm was reasonable. Professor Glasbeek uncovered several details about Johnson's prior confrontations with police such as the incident in which Johnson was chased to his house by several squad cars for having driven his bike through a red light. The police had broken his door and ripped his arm through the door opening causing him serious injury, yet it was Johnson who was charged with assaulting the police. On another occasion, Johnson was

charged with reading his Bible aloud in a public park. He was acquitted of the charge. On yet another occasion he was charged with having a dangerous weapon in his possession. The "weapon" turned out to be a six-inch stick that he was using to exercise the arm that police had injured on the prior occasion. He was acquitted of this charge as well. Johnson's anti-police attitude began after these incidents began. The anonymous neighbour who called the police on the day Johnson was killed was at odds with Johnson because his son was a police officer. None of this evidence was presented at trial because it was "not relevant". The officers were acquitted.

Professor Glasbeek argues that the decision to lay charges of involuntary manslaughter rather than second degree murder charges may have had a greater impact on the outcome in this case than any other exercise of judgment. The fact that the Crown did not need to prove intent prevented any evidence of police *animus* toward Johnson from being relevant. This in turn allowed the evidence of Johnson's past police confrontations to be admitted without context for the purpose of showing Johnson to have been a threat to police. The result was that the trial was very much skewed in favour of the officers.

On August 9, 1988, Lester Donaldson, another mentally ill black person, was shot and killed by Metropolitan Toronto police. He too was a victim of police harassment. A community service report had been compiled in respect of Donaldson as a result of an incident that occurred at Donaldson's home on August 7, 1988. On that evening, police were called to a tenant dispute at Donaldson's residence. The officers were told that Donaldson was carrying a

knife in his pants and that he had removed fuses from the electrical boxes and cut telephone wires. The telephones were in fact working. The officers went to Donaldson's room to talk to him. He did not respond to the officers' requests to open the door, and the officers left. The complainants were told to call police whenever they felt they needed to. The report was prepared to allow a community service officer to follow up on the complaint. The report also listed other confrontations between Donaldson and police. For example, on April 11, 1988, police investigated a complaint that Donaldson had broken into an apartment building and turned the power off. Police came to the building but did not find Donaldson. He was later seen walking on the street carrying a stick. Several officers walked beside and in front of him. Donaldson would not stop, and swung his stick at the officers. Donaldson then picked up a shovel and swung it at an officer who was attempting to grab him and who had fallen down. Another officer then shot Donaldson in the leg to protect his fallen comrade. Donaldson was charged with break and entry and assault. The report also detailed an incident that occurred in August 1983 in which two police officers went to speak to Donaldson about an alleged assault on a four year-old girl. The officers intended to arrest Donaldson. The officers had left their guns in the car, despite being told that Donaldson was violent and mentally unstable. When the officers encountered Donaldson, they found him to be non-responsive. When he understood that he was being arrested, he lunged at the officer holding a big knife. He was subdued without any wounds being inflicted and charged with attempted murder and assault. He pleaded guilty to attempted

aggravated assault. The knife was never produced by police. The community service report warned that officers should use caution in their dealings with him, and at least two cars should respond to any call involving Lester Donaldson.

On the evening of August 9, 1988 police received a call from Donaldson's rooming house. Two tenants complained that Donaldson had cut the telephone wires and threatened one of them. Some of the officers went to see Donaldson. They had no grounds to arrest him yet as nothing about the complaint had been verified, and there was no evidence of any disturbance in the building. The door to Donaldson's room was open. The police entered and began chatting with Donaldson. Donaldson asked them why they were there, and when they did not respond, Donaldson began saying things the officers did not understand. After about ten minutes, the police sergeant came into Donaldson's room to tell the officers that he was getting a written complaint from one of the complainants. She claimed that Donaldson had threatened to throw her out of a window. Police then said Donaldson suddenly stood up with a seven-inch paring knife in his hand. He was speaking patois, and apparently told the officers to get out of his room. Police told Donaldson he was being arrested for possession of a weapon dangerous to the public peace. Officers said they then attempted to calm Donaldson down by cornering him with an upturned mattress. An expert witness testified at trial that Donaldson had been on the bed, was thrown off it, and then pushed up against the wall with the mattress. Donaldson had a paring knife in one hand and a lighter in the other. He brandished the knife and flicked the lighter. Two of the four officers in the

room had drawn their guns and the other two had their night sticks out and were using them to get the knife away from Donaldson. The officers said that one of them had lost his balance and was exposed to Donaldson's knife. Constable Deviney shot Donaldson in the chest.

Officer Deviney was charged with manslaughter. Deviney's defence was that the shooting occurred while he was carrying out his lawful duty, and that Donaldson's actions caused him to have a reasonable apprehension of grievous bodily harm to his fallen comrade. This apprehension was caused in part by Deviney's knowledge of Donaldson's propensity for violent behaviour, and once again the victim's past conduct became relevant. Not only were the above-mentioned encounters with police introduced as evidence, but also several others. For instance, on October 25, 1978, Donaldson had been stopped by police for an alleged traffic violation. Donaldson, after refusing to identify himself, allegedly struck the officer in the face, and then walked into a nearby pool hall to make a phone call. The officer and another officer tried to arrest Donaldson. It took five people to subdue Donaldson, and he was then charged with failure to identify himself, assault and resisting arrest. In January 1981, officers were executing a warrant at Donaldson's home. They forced their way into the house. A struggle ensued. In March 1983, police were called to a medical building because a nurse there was frightened by Donaldson's apparently unusual behaviour. When police arrived, he was incapable of identifying himself. He had two knives in his pocket. He was taken to hospital for psychiatric observation but released because it was not felt that he posed a

threat to anyone. All of these incidents were introduced at Deviney's trial despite the fact that he appears not to have been aware of them at the time he shot Donaldson. Deviney was acquitted.

This case again raises the issue of when a victim's violent antecedents should be considered relevant. Was it Lester Donaldson's violent past alone that made Officer Deviney fear for his partner's safety, or was it also the fact that Lester Donaldson was a black man that made Deviney perceive danger in the situation? No doubt Donaldson's mental illness contributed to the perception of him as being dangerous, and that cannot be too lightly discounted. The other issue that arises is to what extent police had helped to create Donaldson's violent past through their harassment. The fact that Donaldson was black and mentally ill could have caused them to create more violent confrontations with him than were necessitated by the circumstances. For example, why were several police officers needed to confront him as he walked down the street on the day of the shovel incident when there was no evidence to show that he had done anything wrong? Perhaps Lester Donaldson felt he needed to swing the shovel at the officers who surrounded him to protect himself. Why was a sergeant present to investigate a disturbance on the day Donaldson was shot? Perhaps police routinely over-reacted to this mentally ill black man.

On December 8, 1988, Peel Regional Police constables Darren Longpre and Anthony Melaragni shot and killed Wade Lawson. Lawson and some friends had been involved in stealing cars from a Nissan dealership on December 7, 1988. Officers Melaragni and Longpre were advised of the thefts

when they came on duty on December 8. They were advised during their shift to wait at an address in Mississauga where it was believed the thieves would return. Officers Melaragni and Longpre waited at the address. Lawson and two friends drove up in one of the stolen cars. One of the occupants of the car got out and ran. Lawson, who was driving, turned the car around. Melaragni and Longpre put their car in motion and in doing so skidded. They pulled up beside Lawson's car and got out with their guns drawn. They circled around the car. They claim that they shouted to the occupants of the car that they were police and that the occupants should come out, but got no response. The passenger in the car later said that the radio in the car was very loud, and they heard nothing. When Melaragni and Longpre got toward the front of the car, Lawson put the car in motion. The officers said that they had to jump out of the way. The officers, on opposite sides of the car, each believed the other to have been hit by the car, and began firing, allegedly at the tires. One of the bullets struck Lawson in the head killing him. None of the bullets hit the tires.

The officers were charged with manslaughter, but at the preliminary inquiry the judge committed Melaragni to trial on second degree murder. At trial, evidence was admitted of Lawson's prior criminal activities, which included three or four car thefts and break and enters at shoe and leather stores. Evidence of Melaragni's past violent encounters with citizens was not admitted. Both officers were acquitted.

On May 14, 1990, Marlon Neal was shot and injured by Metro constable Brian Rapson after allegedly speeding through a radar trap. Neal was allegedly

travelling 54 km/h in a 40 km/h zone. When constable Rapson attempted to stop Neal's car, Neal sped up. Neal later said that he sped off because he was an unlicensed driver and he did not have his bail papers on him. Rapson claims that Neal swerved the car at him and then sped off. Neal said he did not swerve to hit Rapson. Rapson gave chase. Neal took a turn too sharply and spun around and stalled the car. Rapson caught up to him. Rapson saw Neal roll up the windows and lock both front doors. Rapson told Neal to get out. Neal allegedly shouted back at Rapson, telling him to "Back off", and that he was "dead meat". Neal later denied that saying that he would never use such "square" language. Rapson said that he saw Neal turn as if to pick up a black object that Rapson believed to be a gun. Rapson drew his gun and fired into the car door. Neal began revving the car and backing up slowly. Rapson fired twice more, one shot going through Neal's neck wounding him seriously. No gun was ever found in the car.

Charges of attempted murder, aggravated assault and criminal negligence were laid against constable Rapson. At trial, Rapson's counsel cross-examined Neal on his propensity for wrongdoing and his willingness to lie. Counsel relied on Neal's several convictions for theft and his questionable role in a brawl in which he had been stabbed. The preliminary inquiry judge held that the charge of attempted murder should be dropped. The Attorney General preferred an indictment against Rapson on the charge of attempted murder. Rapson was acquitted of all charges.

This case raises the question of why constable Rapson felt that he should draw his gun on someone for speeding through a radar trap. Admittedly, he believed that Neal was reaching for a gun, but what caused him to think that? Were his sensitivities heightened by the fact that he was confronting a young black man? Was he more attuned to the potential danger in the situation because of Neal's race? Of course these questions were never raised, and hence, left unanswered at Rapson's trial.

On September 26, 1991, Vincent Gardner was shot by Nepean constable John Monette in Ottawa and subsequently died. The officer was charged with manslaughter, criminal negligence causing death and aggravated assault. He was acquitted on all charges. I will discuss the Gardner-Monette shooting in more detail in the next chapter.

On May 2, 1992 Raymond Lawrence was shot and killed by Metropolitan Toronto police constable Robert Rice. On the night in question, six officers were cruising to look for drug dealers and prostitutes. The officers were told by an informant that there were three or four black males selling drugs in a backyard. The officers went to the address and saw three or four black males in the backyard. When the men realized the police were there, they ran. Officer Rice drove his vehicle to the next block and saw Raymond Lawrence in the backyard of a house. Rice and a couple of officers cornered Lawrence in a carport. They said that Lawrence then pulled out a knife. Rice drew his gun and another officer took out his baton. Lawrence then allegedly broke through the wall of the carport and ran away, scaling fences as he ran. Rice followed. Eventually,

Lawrence turned around to face Rice. According to Rice, Lawrence then came at him with a knife. Rice said that he fired one warning shot and then fired two shots at Lawrence killing him.

There were no witnesses to the shooting except Rice and Lawrence, but a few contradictions arose. When Lawrence was surrounded by the officers in the carport, one of the officers heard Rice shout, "He's got a knife". That officer, however, also heard Lawrence say, "I don't got no knife". A friend of Lawrence's said that Lawrence was low on money on May 2 when he left a house party, but the Special Investigations Unit report said that Lawrence was in possession of crack cocaine and three wallets containing large sums of money. Police alleged that Lawrence was a drug dealer, but Lawrence had no criminal record in Canada or in his native Jamaica. Neighbourhood residents said they did not know Lawrence as a drug dealer. A private investigator hired by Lawrence's family failed to come up with any evidence that Lawrence was involved with drugs. The SIU concluded that constable Rice was engaged in "legitimate pursuit" of a suspected criminal and "had no choice" but to shoot him.³⁸ The senior investigator in the case said that Rice was justified in using all the force he used, and that there were no reasonable grounds for laying charges. The SIU concluded that Lawrence went after Rice with the knife, but since there were no witnesses, they could only base their conclusion on Rice's perhaps self-serving evidence. The media made much of the fact that Lawrence was Jamaican born and that he was an illegal immigrant. The lawyer

³⁸ Toronto Star, June 23, 1992, A4.

for Lawrence's family said that Lawrence ran from police because he was in Canada illegally.

At the inquest that was held into the shooting, Rice was asked if he shot Lawrence because he was black. Rice responded that he would have reacted the same regardless of the suspect's race. He said that he was justified in firing his gun given the regulations that permit such action only if the officer believes his life is in danger. Rice said, "There's no doubt in my mind if I didn't, I would have suffered harm or been killed."³⁹ Rice was questioned about the warning shot he allegedly fired. Rice testified that even after the warning shot Lawrence continued to advance toward him allegedly carrying a knife. The lawyer for the Black Action Defence Committee asked Rice if he thought Lawrence was planning to die since he refused to stop threatening Rice even after the warning shot. Rice's response was that he did not know what Lawrence was thinking. It is interesting that Rice's notes of the incident did not mention the knife. The inquest heard that Lawrence was a drug dealer, but the evidence of Lawrence's drug involvement came down to four pieces of crack cocaine worth about \$80, cocaine traces in his system and on his clothing and testimony of an anonymous police informant that he had purchased crack from Lawrence. The thrust of police testimony at the inquiry was that they had chased a drug dealer who was in Canada illegally, who ran from them and who threatened them with a knife. The coroner's jury concluded that there was no evidence that race was a factor in the shooting, but strangely, they recommended that police hire

³⁹ Paul Maloney, Toronto Star, May 4, 1993, A6.

outsiders to assist with race relations training. If race played no role, why would they have recommended race relations training?

The police tried to criminalize Lawrence, even though the evidence of his drug dealing was tenuous at best. They also used the fact that he was an illegal immigrant, from Jamaica, no less, as a means of criminalizing him. Jamaicans are perceived to be dangerous people, and the emphasis on Lawrence's nationality could have convinced the SIU and the coroner's jury that Rice was justified in the force he used. Even though the jury concluded that race played no role in the shooting, they were blind to the subtle use that was made of race in justifying Rice's conduct.

Several recognizable themes run through these cases. In many of them, attempts were made to criminalize the victim as a means of justifying the shooting *post facto* even where the victim's criminality could not have been known to the officer at the time he fired his gun. Another theme is the failure of those involved in analysing the shooting, such as the coroner or her jury, to recognize subtle forms of racism. Racism may be recognized when it takes the form of racial epithets, but not in its more subtle forms, such as when it causes an officer to assume criminality when he has no evidence to substantiate that assumption. In many cases, questions were raised, but were left unanswered, such as why an officer felt compelled to draw his gun on an unarmed suspect in a fenced-in police parking lot. The approach I will propose in the final chapter will, I hope, allow the kind of inquiry that will address these questions, and deal with some of the common threads running through this litany of cases.

The collection of cases I have described may be dismissed by the skeptical as anecdotal and not indicative of a pattern ("occasional unfortunate interruption[s] to the institutional and individual commitments to the values of equal opportunity and equal treatment"). Regardless of whether these incidents are indicative of a pattern, however, the way they have been handled is indicative of a problem, and that will be the focus of this paper. While all of the cases I have cited are not examples of self-defence being used at trial to exonerate a police officer, they all show that police officers often do get exonerated when they shoot black men. My argument is that the popular stereotype of black men as a threat is responsible in some way for this result. Police officers are often not even charged because the decision that they faced a threat is made at the prosecutorial level. My list is meant to show that police officers often react to black men with extreme violence⁴⁰, and this I believe is because black men are popularly believed to pose a threat to public safety. This stereotype is relied upon implicitly in those cases that do go to trial, and most obviously where self-defence is relied upon by the officer. I have chosen to use the Gardner/Monette shooting as a paradigm to illustrate how this can happen.

⁴⁰ *R. v. R.D.S.* (1994), 136 N.S.R. (2d) 299. In this case, a black Nova Scotia judge took judicial notice of the fact that police officers often over-react when dealing with young black men. Her verdict was overturned on appeal. Leave to appeal was granted by the Supreme Court of Canada on May 6, 1996.

Conclusion

Critical race scholars, such as Professors Addis and Professor Williams have pointed out that definitions of racism differ depending on which point of view one assumes. Also, different forms of racism exist; it may be overt, subconscious or systemic. For the criminal law to make an honest effort at not perpetuating racism in the criminal justice system these differences in perception and form must be understood. The mechanisms by which racism infiltrates the justice system must also be examined. In the next chapter, I will consider the reasonableness standard as one such mechanism.

CHAPTER 2

INTRODUCTION

As I stated in the introduction to this paper, I see the concept of the Reasonable Man as a legal mechanism by which unarticulated biases are imported into the criminal law. In this chapter I will discuss the Reasonable Man in more detail in an attempt to show how this is accomplished. The notion of reasonableness, personified through the Reasonable Man, lies at the heart of the justice system's claim to neutrality. I will argue that embedded within these notions of neutrality, objectivity and reasonableness are the court's¹ own normative values.² Judges rest their legitimacy on their alleged neutrality, and as such they have devised many means to maintain the perception. One method has been to hide their politics in unarticulated concepts, such as the Reasonable Man, thereby concealing the actual, moral nature of the decision-making process in which they are engaged. In the case of police shootings of blacks, judges' normative values may be racist: on an individual level they rely

¹ Throughout the next two chapters I have used the words "judge" and "court" interchangeably. In some sense, this affirms judges' practice of depersonalizing themselves so as not to have to take responsibility for their points of view, and as such appearing neutral, but in another sense it is meant to show the systemic side of the discussion because views represented by individual judges are adopted as being those of the "court" or the institution, thereby rolling the individual and the systemic into one.

² Much has been written by Critical Legal Scholars and Feminist Legal Scholars about law as politics. A few good samplings of such works can be found in Sheila L. Martin and Kathleen E. Mahoney, eds. *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) and David Kairys, ed. *The Politics of Law: A Progressive Critique* (New York: Pantheon Books, 1990). An interesting work on *Charter* interpretation is Leon Trakman's *Reasoning with the Charter* (Toronto: Butterworths, 1991).

on stereotypes of black men as a danger or threat, and on a systemic level they perpetuate those same stereotypes.

I do not mean to suggest that judges have been intentionally deceptive or that a group of judges sat down one day and decided to be racist (or sexist or homophobic). The problem of racism in the context of police shootings is largely systemic. It emanates from the structures of the legal system itself, rather than from any one judge. This makes the problem more difficult to address. If the problem were individual racist (or sexist or homophobic) judges, the solution might lie in devising disciplinary structures to address the problem. When the problem exists within the structures of the system itself, however, individual solutions will not work. The first step in any attempt to address bias in the law is to recognize it. Through an examination of an individual case study, I will attempt to reveal how racist stereotypes are perpetuated through the concept of reasonableness. Judges participate in this perpetuation of racist stereotypes by failing to articulate for juries just what they should be looking for when they come to decide if a conduct is reasonable. I should make it clear at this point that I do not take issue with the *Criminal Code* provisions that create the defences of self-defence, but rather with the way in which those sections can be manipulated to allow racist elements to influence their application.

As I attempted to discuss in the first chapter, systemic issues are not always apparent to those standing in the dominant position because they may be dismissed as anomalous, as minor deviations from the "norm". This problem is not so easy to address. I can only hope that by providing concrete examples

and discussing the theoretical framework in which those examples occur, the problem will be made clear to at least some.

In this chapter I will discuss the Reasonable Man in general terms, giving some of the history of the concept and its various purposes. I will then turn to a specific review of the Gardner/ Monette police shooting trial to show how Monette's plea that he acted in self-defence was really an attempt to invoke prevalent racist stereotypes about black men. In the final section, I will suggest a different approach to the concept of reasonableness.

Judges and Juries

By way of clarification, I need to point out that in the context of police shootings, juries make the ultimate determination as to guilt. This does not alter my thesis that the unarticulated biases of judges are problematic. As I will attempt to show, there is a popular belief that black men are dangerous, that they pose a threat to society's order, and hence, to police officers, who represent that order. When racist elements are not articulated for the jury, the unconscious racist stereotypes of black men as threat are allowed to creep into the fact-finding process through the reasonableness standard. Secondly, by leaving an unarticulated reasonableness standard with the jury without allowing consideration of possible racist factors, the judge can manipulate the jury deliberations because at some level she is aware of the stereotypes herself and is implicitly allowing them to be invoked.

PART I - The Reasonable Man

The concept of reasonableness has been anthropomorphized in the person of the Reasonable Man. The term "Reasonable Man" will be used generally because until very recently this was the term most used by the courts and legal scholars. The Reasonable Person has only recently made an appearance in legal discourse. Despite the change in expression, however, the concept remains largely male-based.³

The Reasonable Man has been a prominent figure in the common law for centuries, but little has been done to determine who exactly he is. He is sometimes the "reasonable and prudent man", or he may occasionally be substituted by the "ordinary man"⁴. He has been more picturesquely described as "the man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves"⁵. Despite his prominence, however, few judges (if any) have been able to get beyond the fact that he is "reasonable" and "prudent".

³ For further discussion of the "maleness" of the reasonable person, see for example, Isabel Grant, Dorothy Chunn and Christine Boyle, *The Law of Homicide* (Toronto: Carswell, 1994) [hereinafter "Grant, Chunn and Boyle"] at 6-11; Toni Pickard and Phil Goldman *Dimensions of Criminal Law* (Toronto: Emond Montgomery, 1992) [hereinafter "Pickard and Goldman"] at 963ff.

⁴ One such substitution occurs in the *Criminal Code*, definition of the defence of provocation R.S.C. 1985, c. C-46 [hereinafter "*Criminal Code*"] s. 232.

⁵ *Hall v. Brooklands Auto Racing Club*, [1933] 1 K.B. 205 at 224.

PART II - Historical Background of the Reasonable Man

The standard of the Reasonable Man has been invoked for various purposes depending on the context, be it the various criminal defences or proof of substantive fault. Its purposes can be reduced to a few fundamental principles, however, particularly in the context of defences.

The primary function of the standard is as a limitation to the availability of defences, or to set a minimum standard of conduct. This function is obvious in the defence of provocation. Section 232(2) of the *Criminal Code* defines provocation:

232(2) A wrongful act or 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 upon it on the sudden and before there was time for his passion to cool.

The requirement that the act or insult be sufficient to deprive an "ordinary person" of self-control imposes a standard of reasonable behaviour. The putative purpose behind this requirement is that it limits the availability of the defence to certain circumstances. While the law will make concessions to "human frailty", it will do so sparingly, and the insertion of the reasonableness standard assures that wholesale acquittals for murder will not occur. Lord Simon of Glaisdale explained in *Camplin v. D.P.P.*⁶:

[T]he reason for importing into this branch of the law the concept of the reasonable man [was]...to avoid the injustice of a man being

⁶ [1978] A.C. 705 (H.L.) [hereinafter *Camplin*].

entitled to rely on his exceptional excitability, pugnacity or ill-temper or on his drunkenness.⁷

Dickson C.J.C. in *R. v. Hill*⁸ explained further that "[i]t is society's concern that reasonable and non-violent behaviour be encouraged that prompts the law to endorse the objective standard".⁹

Pickard and Goldman explain the rationale behind the reasonableness standard in this way:

The requirement that the provocation be sufficient to deprive *an ordinary person* of self-control suggests a different rationale: that "we" understand the act of the defendant and might have done it ourselves and *therefore* the defence of provocation mitigates. After all, if an ordinary person could have reacted the same way, there is something "normal" or at least not entirely deviant about the defendant's action, and it ought not to render the actor guilty of the law's most serious offence.¹⁰ [emphasis in original]

This explanation makes clear the normative basis for the reasonableness standard, and applies equally to self-defence, necessity, duress, and other defences adopting the standard. The application of those defences is limited to those who "deserve" to be excused because they fall within the "norm" in society. They do not deviate from the standard of behaviour we expect of "ordinary" ("normal") people.

As well as having a normative function, the reasonableness standard allows judges to more readily make and apply rules. George Fletcher commented that "[j]udicial decisions must either follow rules or make new

⁷ *Camplin* at 726.

⁸ [1986] 1 S.C.R. 313, 25 C.C.C. (3d) 322 [hereinafter *Hill*, cited to C.C.C.]

⁹ *Hill* at 330.

¹⁰ Pickard and Goldman at 899. I will return to this notion that the law only punishes the "statistically deviant" in the next chapter when I discuss the "reasonableness" of racism.

rules".¹¹ Rules are general by nature because they must be amenable to broad application. The appeal of the Reasonable Man is that he allegedly has few peculiarities, and is, therefore, more amenable to the application of rules. By employing the standard of the Reasonable Man, the court can impose general rules because they do not have to take into account the individual's peculiarities. Similar rules can be applied in similar cases because the same standard is used throughout. The complexities of individual cases need not be considered.

As I will attempt to show later, despite judges' insistence that the Reasonable Man is "neutral", he is not free of peculiarities. He is endowed with those "peculiarities" that judges consider "normal" or "ordinary". His idiosyncrasies are the idiosyncrasies of those who have created him in their image, that is, judges. Since these peculiarities and idiosyncrasies are unexpressed, there is an implicit assumption that they are "normal"; that is, only those characteristics that are "abnormal" or "extraordinary" need be expressed. An everyday example of how this works can be seen when one person asks another to describe a third person. If this third person is white, usually that fact will be left out of the description on the assumption that because it is unexpressed it will be understood that the person is white. White is the norm and need not be expressed. If the third person is black, however, the description will generally begin with that fact. Black needs to be expressed because it is a deviation from the norm.

¹¹ George P. Fletcher, "The Individualization of Excusing Conditions" (1974), 47 *S. Cal. L.R.* 1269

I am concerned here with reasonableness as an embodiment of unexpressed bias. The reasonableness standard, by leaving bias unexpressed creates an illusion of neutrality so as to allow judges to make moral judgments while at the same time distancing themselves from those moral judgments. Fletcher compares the common law use of the Reasonable Man with the German civil law system, which uses no such "rhetorical figure", and concludes:

the standard of the reasonable person provides a substitute for inquiries about the actor's character and culpability. This means that a system willing to assess character and culpability has no need of reasonable men; and a system afraid to look squarely at the character and culpability of the defendant must do so indirectly by relying on standards like "the person of reasonable firmness".¹²

Judges can safely rely on the Reasonable Man to avoid the appearance that they are actually inquiring into an individual accused person's character. This also allows them to avoid having to take responsibility for their judgments because it is the accused's failure to live up to the standard of the "neutral" Reasonable Man that has generated the decision rather than the judge's "subjective" opinion about the culpability of that accused.

Professor Williams also discusses how "objectivity" can be used to avoid taking responsibility:

I think, though, that one of the most important results of reconceptualizing from "objective truth" to rhetorical event will be a more nuanced sense of legal and social responsibility. This will be so because much of what is spoken in so-called objective, unmediated voices is in fact mired in hidden subjectivities and

at 1299 [hereinafter Fletcher, *Excusing Conditions*].

¹² Fletcher, *Excusing Conditions* at 1290. See also Dolores A. Donovan and Stephanie M. Wildman, "Is the Reasonable Man obsolete? A Critical Perspective on Self-Defense and Provocation" (1980-81), 14 *Loyola of Los Angeles L.R.* 435 [hereinafter Donovan and Wildman] at 447-8; and Grant, Chunn and Boyle at 6-11.

unexamined claims that make property of others beyond the self, all the while denying such connections. I remember A., a colleague, once stating that he didn't like a book he had just read because he had another friend who was a literary critic and he *imagined* that this critical friend would say a host of negative things about the book. A. disclaimed his own subjectivity, displacing it onto a larger-than-life literary critic; he created an authority who was imaginary but whose rhetorical objectivity was as smooth and convincing as the slice of a knife. In psychobabble, this is known as "not taking responsibility." In racial contexts, it is related to the familiar offensiveness of people who will say, "Our maid is black and *she* says that blacks want..."; such statements both universalize the lone black voice and disguise, enhance, and "objectify" the authority of the individual white speaker. As a legal tool, however, it is an extremely common device by which not just subject positioning is obscured, but by which agency and responsibility are hopelessly befuddled...The propagated mask of the imagined literary critic, the language club of hyperauthenticity, the myth of a purely objective perspective, the godlike image of generalized, legitimating others -- these are too often reified in law as "impersonal" rules and "neutral" principles, presumed to be inanimate, unemotional, unbiased, unmanipulated, and higher than ourselves. Laws like masks frozen against the vicissitudes of life; rights as solid as rocks...¹³

The Reasonable Man "objectifies" the authority of judges by acting as the ruler against which an accused is measured, instead of a judge's own "subjective" opinion as to the accused's guilt or innocence. The judge can avoid taking personal responsibility by claiming that she is only relying on a neutral standard, separate from her own judgment to pronounce on another person's character. As I hope to illustrate in the balance of this chapter, however, the presumed neutrality of the reasonableness standard is a fiction.

¹³ Williams at 11-12. See also Mary Jane Mossman, "Feminism and Legal Method: The Difference It Makes" (1986), 3 *Austr. J. of Law and Soc.* 30 for further discussion of how legal method in general and the myth of neutrality relieve judges of accountability for their moral judgments.

PART III - An Example of How Reasonableness is Defined by the Courts - The Defence of Self-Defence

In this section, rather than discuss leading decisions on the law of self-defence, I wish to use examples of how self-defence is relied on in the context of police shootings of blacks to argue that underlying the claim of reasonableness are racist assumptions about black men. Section 34 of the *Criminal Code* sets out part of the defence, including its reasonableness component.

34.(1) Everyone who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

(2) Everyone who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

(a) he causes it under *reasonable* apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes, and

(b) he believes on *reasonable* and probable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

[emphasis added]

One of the keys to a successful claim of self-defence is the "reasonableness" of the accused's belief that his or her life or safety was in danger. Since there is no such thing as inherent reasonableness, the conduct must be contextualized to determine what was reasonable in the situation. The reasonableness of one's belief depends on where one is situated and how one

views the world. Given the scenario where a white police officer shoots an unarmed black man in a private home, and then claims that the bass guitar he was carrying looked like an assault rifle,¹⁴ the police officer's claim that he acted in self-defence will rest entirely on whether the jury finds it reasonable that he feared for his safety. Similarly, a frail, soft-spoken white man on a New York City subway train who is approached by four young black men for money will have to rely on the jury perceiving the threat as he did when he insists that his life was in danger and that was why he shot the men.¹⁵

But what exactly is the white police officer alleging when he says that he reasonably believed his life to have been in danger? Absent any other evidence as to the black victim/aggressor's¹⁶ dangerousness, such as a weapon or an opportunity to use it, the white aggressor/victim is sufficiently

¹⁴ This is the fact situation in the Gardner/Monette shooting in Ottawa in 1991.

¹⁵ See *People v. Goetz* 68 N.Y. 2d 96, 497 N.E. 2d 41 506 N.Y.S.2d 118 (1986). Bernhard Goetz was the famed "subway vigilante" who gunned down four black youths in a New York subway car after being approached for five dollars. Mr. Goetz was eventually acquitted of charges of attempted murder because of a successful claim that he acted in self-defence.

¹⁶ The dichotomous terms "aggressor/victim" and "victim/aggressor" are used not merely to confuse, but to confuse for the purpose of illustrating how the lines become blurred as to who is the victim and who is the aggressor when a racially motivated killing occurs. Although the white police officer is in one sense the "aggressor", because he has pulled the trigger, he must rely on the jury's perception of him as the victim too or his claim of self-defence will fail. Similarly, while the black "victim" is clearly a victim for having been shot, he must be made out to be the aggressor or "transgressor" for having caused the reasonable apprehension of bodily harm. For an excellent discussion of victims and transgressors see Stephen L. Carter, "When Victims Happen to be Black" (1988), 97 *Yale L.J.* 420 [hereinafter "Carter"]. Consider also how we refer to cases of police violence against blacks. We refer to the "Rodney King trial" or the Lester Donaldson shooting. Usually, however, when we think of heinous crimes, we think of the perpetrators' names: Paul Bernardo, Clifford Olsen, Jeffrey Dahmer. Why then do we think of the victim in police brutality cases while struggling to remember the officers who perpetrated the crime? Perhaps it is because in some way we see the "victims" of the crime as perpetrators. They are somehow responsible for the offence, and the officers are really the "innocent" ones. A related reason is that during the trials of these officers more is made of the victims than of the officer. The character of the "victim" is called into play as being relevant to whether he deserved it or not. The "victim" is put on trial. After the entire affair is over, we are left with the names of the "victims" still

justified simply by virtue of the black victim/aggressor's race. In the Bernhard Goetz trial, a parade of experts was led by both sides "discussing angles of entry wounds and distance from target and positions of fall, to try to prove who was standing or sitting or lying where as the shots were fired".¹⁷ Realistically speaking, however, when the expert testimony is compared with the highly evocative images of the personalities involved, which would have the greater impact?

Look at "victim" James Ramseur, possessed of explosive anger and open contempt for authority, for justice, for order, who verbally abused judge, prosecutor, and defense attorney in open court. Look at the angry primitive set of his features, his bulky aggressiveness, listen to his snarl; then look at Bernhard Goetz, pale, slight, unassuming, and imagine the confrontation. How much more threatening must James Ramseur and his colleagues have appeared in the subway train? How much, indeed? Leather jackets, dark trousers, and scowls on their dark, angry faces--who could fail to see the threat? Imagine Bernhard Goetz's apprehension. Then his terror.¹⁸

One word used twice in this passage betrays the reality of what was likely going on in the courtroom during the Goetz trial: "imagine". Despite the experts and the legal argument and the vociferous pronouncements that race was not an issue, the jury was very likely imagining the scene in the subway car just prior to the shooting. Defence counsel was astutely aware of this dynamic when he sought to re-create the scene by hiring four black Guardian Angels to

clear in our minds, but the officers are free to continue with their lives without the scrutiny that comes with being household names.

¹⁷ Carter at 424.

¹⁸ Carter at 425. James Ramseur, one of the four young men shot by Goetz was a difficult witness to say the least. When first called as a witness, he refused to place his hand on the Bible or be sworn. When he did eventually testify, he swore at the judge and lawyers and was cited in contempt: N.Y. Times, May 6, 20 and 21, 1987 as cited in Carter *ibid*.

act as "props" in setting the stage so the jurors could appreciate the atmosphere in the subway car.

Thus when Mr. Slotnick, the defense attorney, kept inviting the jury (and, by extension, the public) to imagine the atmosphere in the subway car, he conjured, whether he planned to or not, an image of innocent whiteness surrounded by threatening blackness.¹⁹

Professor Carter is either too generous or not giving the defence attorney his due when he suggests that the defence attorney may have unconsciously conjured the image. Were this truly the case, then Mr. Slotnick was luckier than he was bright because his most powerful tool was the evocative image of "innocent whiteness surrounded by threatening blackness". The image was effective precisely because it could not have worked the other way around.

These tactics are not peculiar to American trials. In the Gardner/Monette case, the defence used a similar strategy, although perhaps a bit more subtly. Vincent Gardner was a 49 year-old black man shot in an alleged drug raid on a private home in Ottawa. The house in which the raid took place was a kind of drop-in centre for black men in Ottawa, and a local reggae band used the place to practice. These types of gathering places are common in Jamaica, where many of the men were from. Neighbours on the street began to complain to the police about the number of cars parked on the street, and the noise coming from the house. An allegation was made that the house was being used as a "crack house", although when a police agent tried to buy drugs from the place the day before the raid, he was turned away. It does not appear from media accounts

¹⁹ Carter at 428.

that there had ever been any trouble in connection with the place before, no fights or conduct of any kind requiring police intervention. In fact many of the visitors to the house were Rastafarians whose religious beliefs are based on peace and brotherhood. On the day of the raid, Monette and his fellow officers were told to expect a "high-risk takedown".²⁰ The officers were given bulletproof vests, but whether this is standard operating procedure or not is unclear. Suffice to say, they were prepared for a violent encounter. When they entered the house they found it dimly lit. Monette says he saw a silhouette of a man carrying a shotgun and yelled "Stop, police", but the man kept coming, and Monette pulled the trigger. He said it was only then that he saw the guitar lying beside the fallen man, and realized the mistake he had made. Evidence was led at the trial that Gardner did not play the guitar, and in fact had never touched the guitar in all the years he had been going to the house. It strains credulity to think that after hearing "Stop, police" that Vincent Gardner would have continued to advance on the officer armed with only a bass guitar. Witnesses said that, in fact, Gardner did not even have the guitar in his hand, but had stood up and put his hands up when the police yelled. This seems more plausible in the circumstances. Monette insisted at the trial, however, that "I was looking down the barrel of a gun, sir".²¹ Defence counsel ridiculed the prosecution's

²⁰ Bruce Ward, *Ottawa Citizen*, October 9, 1993, C1. Most of the facts in this account are taken from reports of the trial in the *Ottawa Citizen*.

²¹ Mike Blanchfield, *Ottawa Citizen*, October 2, 1993, C2.

evidence that Gardner had not been carrying the guitar, but that it had been kicked by naming it the "crazy story about a flying guitar".²²

At the trial the defence tried to reconstruct the frightening scene that confronted the police when they arrived at the house. Monette told the jury that when he shouted "Stop, police", the silhouette with the shotgun kept coming. He yelled again, but the silhouette kept coming. He was caught in a darkened hallway with nowhere to run. "He could have shot me through the wall," Monette testified.²³ Since his partner was heading up the stairs exposed and vulnerable, Monette had to think fast. According to defence counsel, he made the "most dreadful decision of his career",²⁴ and fired at the silhouette to save his life and the lives of his fellow officers.

The threatening image of the "advancing silhouette" is compared with images of safety and peace in connection with Monette. John Monette testified on his own behalf, and others testified to his character. He was a devoted husband, father and son. He turned down offers to attend graduate school in Toronto and Vancouver to stay with his family in Ottawa. He married his high school sweetheart. Officers described him as "peaceful" and the "least likely person you would expect to find in this situation".²⁵ He even had a black friend who had lived with him in his first year of college to testify to his "honesty" and "integrity". The occupants of the house, on the other hand, spent their days

²² Bruce Ward, *Ottawa Citizen*, October 8, 1993, B1.

²³ Bruce Ward, *Ottawa Citizen*, October 1, 1993, B1.

²⁴ Bruce Ward, *Ottawa Citizen*, October 9, 1993, C1.

²⁵ Bruce Ward, *Ottawa Citizen*, October 9, 1993, C1.

"zoned on Acapulco Gold", as defence counsel described it.²⁶ Defence counsel employed a very powerful strategy in summing up his case. He told jurors that Monette "is a good person...He isn't a tough guy. He's you, he's me, and he's all of us".²⁷ The dichotomy between us and them may be very subtle, but it was likely extremely effective. It evokes images of us (good guys) against them (bad guys). It creates a feeling of solidarity in the war against the threatening "other". If "we" don't stick together, "they" will take over. This can be extremely effective when used against members of groups who are already marginalized "others", such as blacks. Obviously, the jury agreed with the defence characterization of the threat posed by "them" because they acquitted Monette of all charges.

Why were these tactics so effective in the Monette and Goetz cases? Why have essentially the same tactics been effective in other cases?²⁸ The strategy works because the public, and therefore jurors, believe black men to be victimizers regardless of the circumstances. Black men are threatening, violent, aggressive. The dangerous "other". In short, they cannot be victims. When a situation arises, therefore, in which a black man would appear initially to be the victim, a conversion takes place in the public consciousness to make the

²⁶ Bruce Ward, *Ottawa Citizen*, October 8, 1993, B1.

²⁷ Bruce Ward, *Ottawa Citizen*, October 8, 1993, B1.

²⁸ For example the "Rodney King case in which several L.A.P.D. officers viciously beat Mr. King and then successfully claimed that King was actually the one in control of the "altercation" and was in fact a threat to them. Racist imagery was used in that case by defence counsel to paint Mr. King in animalistic terms. He was described as having given out a "bear-like yell" and groaning "like a wounded animal". Animal imagery is commonly used to describe blacks as it conjures up their supposedly primitive African history. See Sheri Lynn Johnson, "Racial Imagery in Criminal Cases"(1993), 67 *Tul. L.R.* 1739 for a thorough discussion of how racial imagery is used by counsel in criminal trials.

situation more consistent with its notions of who the aggressors are and who the victims are in society . The result is that the black victim is converted into an aggressor and the white aggressor is converted into the victim, and once again all is right with the world.

Reasonableness was used in the Monette and Goetz cases as a way of covertly appealing to the jurors' own fear of the threatening "other". Defence counsel did not have to express the threat posed by the black victim/aggressor; all they had to do was use innuendo to set up a dichotomy between the "good guys" and the "bad guys". The victims were criminalized in order that the accused on trial could be excused. None of this was made explicit of course, and that is the catch with the unarticulated, "objective" reasonableness standard. It gives the appearance of objectivity by concealment. At the end of the day, the people who wish to do so can go home and say that race did not get in the way of "justice". The decision was based on a purely "objective", "neutral" assessment of the facts. If we look behind the "objectivity" however, we can see the bias that lies unexpressed. Rather than being simply the "objective" result of "reason", the decisions are forcefully driven by racist stereotypes of who the victims are and who the aggressors are in this society.

Reasonable Fear

It is important to discuss briefly the nature of reasonable fear. I have attempted to show how whites can rely on a stereotypically driven fear of blacks to show that they react reasonably when confronted by a "threatening" black

person. But there is another side to the issue. Blacks too feel fear when confronted by whites. This fear, however, is not as readily acceptable to the dominant society as white fear is because whites have a hard time seeing themselves as a threat; they are the "good guys". Professor Williams creates a scenario to illustrate the difficulty one would have accepting as reasonable a black man's fear of unknown white people:

A lone black man was riding in an elevator in a busy downtown department store. The elevator stopped on the third floor, and a crowd of noisy white high school students got on. The black man took out a gun, shot as many of them as he could, before the doors opened on the first floor and the rest fled for their lives. The black man later explained to the police that he could tell from the "body language" of the students, from their "shiny eyes and big smiles", that they wanted to "play with him, like a cat plays with a mouse." Furthermore, the black man explained, one of the youths had tried to panhandle money from him and another asked him "how are you?"

"That's a meaningless thing," he said in his confession, but "in certain circumstances, that can be a real threat." He added that a similar greeting had preceded the vicious beating of his father, a black civil rights lawyer in Mississippi, some time before. His intention, he confessed, was to murder the high school students.²⁹

Professor Williams points out that most white Americans would not hesitate to "pronounce the severe contextual misapprehensions of the black gunman as a form of insanity".³⁰ Ironically, however, this is a very similar account to that given by Bernhard Goetz after he shot the young black men in the subway car. The same "contextual misapprehensions" were vindicated as "reasonable" in Mr. Goetz' case because it is far easier for whites to see themselves in the role of innocents than in the role of the threat.

²⁹ Williams at 76.

But blacks do fear whites. Bell hooks has written about blacks' fear of whites:

Collectively black people remain rather silent about representations of whiteness in the black imagination. As in the old days of racial segregation where black folks learned to "wear the mask," many of us pretend to be comfortable in the face of whiteness only to turn our backs and give expression to intense levels of discomfort. Especially talked about is the representation of whiteness as terrorizing. Without evoking a simplistic essentialist "us and them" dichotomy that suggests black folks merely invert stereotypical racist interpretations so that black becomes synonymous with goodness and white with evil, I want to focus on that representation of whiteness that is not formed in reaction to stereotypes but emerges as a response to the traumatic pain and anguish that remains a consequence of white racist domination, a psychic state that informs and shapes the way black folks "see" whiteness.³¹

Hooks goes on to describe how a history of white domination over blacks combines with "contemporary expressions of white supremacy"³² to create terror in blacks.

I do not mean to argue that fear of an unknown person is ever "reasonable" whether it is white fear of blacks or the other way around, but black fear is well recognized in the "black community", but is given no recognition by whites who cannot perceive of themselves as threats despite their long history of domination and persecution of blacks.³³

³⁰ Williams at 76.

³¹ bell hooks. *Black Looks: race and representation* (Toronto: Between the Lines, 1992) at 169.

³² hooks at 177.

³³ Several newspaper accounts have documented the fear blacks must feel when confronted by white police officers. See for example, Jack Todd, *Montreal Gazette*, January 4, 1993, A3 after 43 year-old Trevor Kelly was shot and killed by Montreal police, making him the fifth black man killed by Montreal police in five years: "You want to give police officers who are doing a difficult and thankless job the benefit of the doubt. But if I was a black man in Montreal and I saw a Montreal cop approach, I would feel one thing. Sheer terror." Similarly, an account given by a witness in the Vincent Gardner shooting noted the terror felt by the occupants of the house when the police

The Myths Behind the Big Black Man Syndrome³⁴

In an article written by Jody Armour, "Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes",³⁵ the author identifies three bases for fear of young black men. The first, that which would be advanced by the "reasonable racist", is based on the notion that it is "reasonable to consider the victim's race in assessing the danger he posed because most people would do so."³⁶ The second type of reasoning comes from the "intelligent Bayesian" who "could claim that, independent of typical American beliefs, her consideration of the victim's race was reasonable because blacks commit a disproportionate number of violent crimes and therefore pose a greater statistical threat".³⁷ The third ground for fear of black people would come from someone who had previously been attacked by a black person and had, as a result, developed a type of post-traumatic stress disorder causing her to fear all black people.³⁸ I will focus on the first two types

entered: " A hammering at the back door, the sound of charging feet, and then the shouted command: "Nobody move, everybody freeze..." I was in total fear of my life...I was totally paranoid"; Bruce Ward, *Ottawa Citizen*, September 24, 1993, B1.

³⁴ This term is taken from an article by Lawrence Vogelstein in "The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom" (1993), 20 *Fordham Urb. L.J.* 571.

³⁵ (1994), 46 *Stanford L.R.* 781 [hereinafter "Armour"].

³⁶ Armour at 782.

³⁷ Armour at 782.

³⁸ A Florida court recognized such "negrophobia" in a recent case in which a white woman who had been assaulted by a black man claimed to have developed a pathological fear of all black persons. The court found that she was, therefore, entitled to disability benefits: *Jandrucko v. Colourcraft/Fuqua Corp.* (Fla. Dept. of Lab. & Empl. Sec., Apr. 26, 1990).

of racism in the following discussion as they are the most prevalent in the context I am discussing.

The "reasonable racist" bases her claim on the ostensible "fact" that "everyone" would react the way she did in fearing an unknown black person.³⁹ The reasonable racist's assumption finds a corollary in the criminal law view that the criminal law punishes only those who deviate from the "norm".⁴⁰ An individual racist, therefore, cannot be punished if her beliefs are "normal". While it may go without saying that racism is ubiquitous, and therefore, "normal", it should not be conceded that this is acceptable.

The critique of reasonableness in this context may seem to conflict with battered woman's defence, and should perhaps be addressed here. In *R. v. Lavallee*⁴¹, Wilson J. attempted to expand the prevailing notions of reasonableness to include the reality of the battered woman. The battered woman's response was reasonable given her particular psychological state. While this argument may seem directly opposed to the argument suggested here, it is not. The reconciliation between the two positions lies in the way in which battered woman's syndrome should be conceptualized. The battered woman's response is reasonable because of her intimate knowledge of her

³⁹ A very poignant example of the pervasiveness of this type of "negrophobia" is given by Patricia Williams in several of her essays, including "Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism" (1987), 42 *U. Miami L.R.* 127, and in her book, *The Alchemy of Race and Rights*. Professor Williams recounts an incident where she tried to enter a store in New York City in an attempt to do some Christmas shopping. She observed several white patrons shopping in the store, but upon ringing the buzzer to be let in, the store clerk mouthed the words, "We're closed". Clearly Professor Williams was a threat to the store's cash register.

⁴⁰ see Armour at 787, citing Mark Kelman, "Reasonable Evidence of Reasonableness" (1991), 17 *Critical Inquiry* 797 at 801: "blame is reserved for the (statistically) deviant."

attacker. She has been a victim of this same man's attacks on previous occasions; she has watched as the cycle of violence is perpetuated; she knows the signs of an impending attack. When she acts pre-emptively, it is because she is acutely aware of the very real danger that his current behaviour portends. She is reacting to his present behaviour as an indication of what is to come. In her experience the threat is very real. The racist, on the other hand, is not acquainted with his "attacker". His only knowledge of the would-be assailant is his racist beliefs about members of the racial or ethnic group to which the individual "assailant" belongs. His "reasonable" apprehension of harm is based not on reality, but on his perception of reality informed by his racist notions. But racism is not reasonable. A court that allows an accused to say that he had a reasonable apprehension of harm is allowing him to sneak his racist stereotypes in under the guise of reasonableness. The battered woman is not disguising anything. Her apprehension is "reasonable" because it is based on knowledge of the individual attacker, not on her assumptions about men in general or even men who batter women.⁴² Of course s. 34 of the *Criminal Code* does not even give us the opportunity to argue whether racism is reasonable because the reasonableness standard does not allow open discussion of what we mean by "reasonable", and racism is imported by implication rather than through clear expression. In the next chapter, I will argue that racism should not

⁴¹ [1990] 1 S.C.R. 852

⁴² see however *R. v. Eyapaise* (1993), 20 C.R. (4th) 246 where a woman who had suffered abuse in several relationships stabbed a stranger who had been touching her. The accused sought to rely on battered woman's syndrome, but the defence was rejected and she was found guilty.

be implied into the standard in this way because, among other things, the *Charter* mandates that it should not.

The second type of racist, the "intelligent Bayesian"⁴³, rests her claim on the "fact" that blacks commit a disproportionate number of violent crimes, and therefore, when she is approached by an unknown black person, the chance that that person is dangerous is statistically greater. The intelligent Bayesian relies on the "'objectivity' of numbers"⁴⁴ to escape moral blameworthiness. While the reasonable racist is not blameworthy because she is "normal", the intelligent Bayesian can turn to "the stats" to absolve her of any blame.

One incorrect logical leap that the intelligent Bayesian makes is that she assumes that because most violent crimes are committed by blacks, that necessarily most blacks commit violent crime. This is not necessarily so. Even if most violent crimes were committed by blacks⁴⁵, those crimes are committed by a small fraction of the entire black population, so to say that most blacks commit violent crimes would be erroneous. An analogy could make this argument clearer. While it may be assumed that most violent crimes against women are committed by men, one could not say that most men commit violent crimes against women.

⁴³ This phrase was coined by Professor Walter Williams after Sir Thomas Bayes, the father of statistics, in "The Intelligent Bayesian, The Jeweller's Dilemma" *New Republic* (Nov. 10, 1986) at 18, cited in Armour at 790.

⁴⁴ Armour at 790.

⁴⁵ Crime statistics by race are not generally kept in Canada. Even if they were however, they would have to account for such factors as police decisions about what types of crime to investigate, what types of people they generally arrest and charge, and the effectiveness of prosecution against blacks as opposed to whites. My argument here, however, is not that blacks do not commit a disproportionate number of violent crimes, but that a the proportion of blacks who commit violent crimes is low.

Another problem with the intelligent Bayesian's theory is that using statistical probability to predict dangerousness is likely to prove the opposite. Only a small percentage of people commit violent crime. This means that the majority of people, of whatever race, are law-abiding citizens. For example, if 5% of black people committed violent crimes as compared to 2% of white people, then that would mean that 95% of black people do not commit violent crimes. When a police officer approaches a black person, there would be a 95% chance that that person would be law abiding. The Intelligent Bayesian, therefore, uses stereotype as a means of creating statistics: the stereotypical black man is a criminal so most black men must be criminals.

The unarticulated reasonableness standard in the defence of self-defence would allow the myths about black men to be substituted for an inquiry into what actually occurred when a white police officer confronted a black "suspect". The inquiry is abbreviated by suggestion and innuendo informed by popular stereotypes. The only way to avoid that result is to articulate exactly what we mean when we say that someone's reaction was "reasonable" in the circumstances.

PART IV - What is Reasonableness

I have tried to show how bias can infiltrate the criminal law through the standard of reasonableness by using the anecdotal approach of case study in my discussion of self-defence to show how reasonableness can be

manipulated to allow racist assumptions and stereotypes to sneak in. In this part, I will look more generally at what reasonableness is, and propose perhaps a different approach to it.

(a) Reasonableness and Context

Some critics have accused the courts of taking a decontextualized approach to the Reasonable Man.⁴⁶ They do not. True decontextualization is not possible. It is not possible to conceive of a pure abstraction. By nature, we are forced to colour any notion, no matter how abstract, with our own perceptions. The Ontario Court of Appeal recognized this tendency in *Parks* when it stated:

Bias shapes the information received to conform with those biases. In doing so, it gives the decision reached, at least in the eyes of the decider, an air of logic and rationality.⁴⁷

My criticism of the judicial approach is that the context used is the judges' own context,⁴⁸ that is, the context of the dominant majority. The difficulty with this, however, is that the context of the judiciary, being representative of the dominant and therefore "normal", is largely unarticulated, and as such, often unassailable. This problem will be addressed below.

⁴⁶ see for example *Donovan and Wildman* at 462 and Timothy Macklem, "Provocation and the Ordinary Person" (1987), 11 *Dalhousie L.J.* 126 at 142:

The most extreme form of objective standard is, of course, that set out in *Bedder*. that standard ignores all features of the accused, physical or mental, even for the purpose of assessing the gravity of the insult. In their place it posits a hypothetical ordinary or reasonable person, *deprived of any element of context*. [emphasis added]

⁴⁷ *Parks* at 372.

⁴⁸ *Donovan and Wildman* express a similar concern: "The reasonable man standard is an example of the legal system's imposing a false legal reality onto a situation." (at 466).

(b) A Different Approach to Reasonableness

As I discussed earlier the reasonableness standard is used by judges to lend legitimacy to their decisions. They use the Reasonable Man as a metre stick against which accused persons are to be judged. While they distance themselves from their decisions by claiming "objectivity", they are really involved in making moral decisions. Fletcher argues that the Reasonable Man, rather than being a "neutral" standard, is in fact a highly result-oriented tool used by judges to retroactively justify their decisions:

There is only one sound way to determine the traits attributed to the reasonable man, and that is with an eye to the justice of blaming the accused for having displayed weakness of character...There is no doubt that the reasonable man standard can be adjusted and manipulated to encourage the right kind of jury deliberations. But the only way to make these adjustments in the standard is to decide...whether the personality disposition accounting for the act is one that the accused should be able to control. If the accused should be able to overcome his dispositions...these dispositions should not be attributed to the reasonable man; if the accused could not control the relevant disposition...the disposition must be included in the standard used to assess the defendant's conduct.⁴⁹

In other words, the judge decides whether the accused should be punished for her conduct, and then decides whether the particular frailties that led to the conduct should be attributed to the Reasonable Man. The implication is that

⁴⁹ Fletcher, Excusing Conditions at 1292-3.

the justice of assigning blame is the first step in the analysis, and then the justification for not laying blame is framed in terms of "reasonable" conduct.

Since judges are in fact making moral judgments, it would be infinitely more honest for them to acknowledge the first step of the analysis and dispense with the second. It is not improper to attempt to justify one's position, but it is improper to conceal the real basis for that position by representing it as something totally removed from the decision-maker. Judges' reliance on the fiction of the Reasonable Man allows them to avoid taking responsibility for their decisions, and at the same time lends legitimacy to those decisions by allowing them to appear as though they emanated from a sacred fountain of universal, transcendent truth, rather than simply from the mind of a merely mortal judge.

This criticism of the "unreasonableness" of the criminal judicial process is not meant to suggest that the exercise of the courts is itself invalid or illegitimate. To accept what judges do as "objective", however, is naive. A complete overhaul of the criminal law and judicial process is not suggested. Judges' decision-making processes should simply be recognized for what they are: moral judgments about the culpability of accused persons.

Once judges admit that what they are actually engaged in is making moral decisions, then they can take the next step of articulating the basis for those decisions. If the judge is prepared to excuse an accused on the basis that her behaviour was reasonable, the judge should be able to articulate why she found that behaviour excusable. For example, if the reason is that the

accused's behaviour was understandable because others might have reacted similarly given the circumstances, then the judge should articulate that.

I quoted George Fletcher earlier as arguing that the Reasonable Man provides a substitute for inquiries about the accused's character. I would alter Fletcher's point slightly, and suggest that the standard of the Reasonable Man does not provide a substitute for inquiries about the actor's character so much as it provides a smokescreen behind which such inquiries can take place.⁵⁰ Judges are still involved in assessing an accused's character, but they do it covertly and then rely on the Reasonable Man to justify or "objectify" their decisions. Instead, judges should be required to make the bases for their decisions known; like good math students, they should be forced to "show their work".

This will not be an easy task since one of the reasons for devising the Reasonable Man is to allow judges, and by extension, the justice system, a roundabout method of approaching determinations of culpability. Judges' legitimacy lies in their ability to appear neutral. Justice, after all, is supposed to be blind. It would be far more difficult to uphold the legitimacy of the system if we were to see judges as holding prejudices and politics like every one of us. On what basis would they be able to claim lawful authority? They would be vulnerable to accusations of caprice and whimsy. Unfortunately, those members of society disenfranchised by the justice system already see judges

⁵⁰ Fletcher does seem to make this point later when he states:

that way.⁵¹ They do not perceive judges or the justice system as operating in a neutral fashion. They are acutely aware of the biases that judges employ in making decisions. To shed the camouflage of the Reasonable Man, and force judges to carefully articulate their reasoning would, therefore, not rob them of anything they legitimately possess. Instead, it would allow those who now feel alienated from the justice system to participate meaningfully in its administration by enabling them to fairly criticize how decisions are made. The benefit of a more open approach to reasonableness will lie in the possibility that once value judgments are articulated, they will be more open to challenge and criticism. We cannot challenge an enemy that we do not see. If judges hide their biases in legal mechanisms such as the Reasonable Man, we cannot challenge them even if we do know they are there because we first have to overcome the hurdle of making the judges realize that they are there. By forcing judges to take us through the steps of their reasoning, we can more readily stop them along the way and question why, for example, they made certain assumptions rather than others. For instance, we may be able to ask them in a case where a police officer shot a black suspect, on what basis they decided that the officer's actions were reasonable enough to put the defence of self-defence to the jury. What

Indeed, the appeal of the reasonable man is precisely that he permits one, covertly, to make the same judgment that one would make in openly discussing the defendant's moral responsibility for his conduct.

Excusing Conditions at 1293.

⁵¹ A major survey conducted in Metropolitan Toronto found that 58% of black residents believe that judges do not treat black people the same as white people, and more than 80% of those people who perceive differential treatment believe judges treat black people worse than white people: *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*.

indicia of dangerousness existed for them to make that determination? In the next chapter I will discuss why such inquiries are important.

CHAPTER 3

INTRODUCTION

In the last chapter I advocated an approach to judicial reasoning in which judges articulated the bases for their decisions and the assumptions they made along the way. In this chapter I will argue that the *Charter* mandates an approach to reasonableness that addresses the racist undertones of a police shooting. In the last chapter, I tried to show that the concept of reasonableness creates a smokescreen behind which unarticulated biases can be hidden. As I also argued in the last chapter, in the context of a police shooting of a black suspect, there may often be racist elements that go unaddressed at the trial of the officer (if the case even reaches the trial stage), but pervade the trial as underlying assumptions. These assumptions run as an undercurrent but are never challenged openly because they are never acknowledged openly. I would not be so naive as to think that judges and juries would come right out and admit to being racist. I would not even go so far as to say that judges and juries are intentionally racist. As I said in the first chapter, the problem is systemic as much as it is individual. Much of the problem lies in the way the system operates, in the assumptions we accept without ever realizing they exist. The reasonableness standard allows us to cloak those assumptions under the guise of neutrality and prevents us from challenging them. Revealing what exactly we mean when we say that conduct is "reasonable" may allow us to question the assumptions on which our conclusions are based.

In the first part of this chapter I will embark on a *Charter* analysis to show how "reasonable" racism denies victims their rights. In the second part, I will suggest an approach to the concept of reasonableness in the context of trials of police officers who have shot blacks. I will then discuss the problems associated with this revised approach and attempt to propose possible solutions to those difficulties.

Part I - The *Charter* and Victims Who Matter

In this part I will argue that, while being cognizant of the rights of individual accused persons when approaching the subject of police shootings of blacks, we must also recognize that the victims too have rights, and those rights are mandated by the *Charter* in the same way as those of the accused police officer are. In the previous chapter I used police shootings of blacks as an example to illustrate how bias, particularly racial bias, seeps into the decision-making process unacknowledged by judges and juries. Racial bias appears primarily in the guise of implicit stereotypes about the alleged criminality and dangerousness of black men. In this part, I will argue that the unarticulated standard of reasonableness that allows for the implicit stereotyping of victims deprives those victims of fundamental *Charter* rights such as the right to dignity and the right to equality. The protection of these rights is as important as the protection of the rights of accused persons.

The idea that an accused person should be tried based on her membership in a group defined by irrelevant characteristics, say people who live on a particular street or drive BMW's or wear leather jackets, is insupportable. The accused is tried based on her individual moral culpability and any factors relevant to determining that culpability. Similarly, a victim should not be discounted simply because he belongs to a group defined by irrelevant characteristics. The victim's individuality is as important as the accused's.

The idea that the victim's identity is significant comes instinctively from our notions of justice and fairness, but also, in a more formal way, from the *Charter*. At the personal, instinctual, level, when we hear about a particularly heinous crime, we think about the victim or the victim's family. The punishment that we would personally mete out to the offender is based less on his character than on what he has done to an innocent victim and her family. Why else do we revive debates about the death penalty when 14 year-old schoolgirls are slain and not when 14 year-old prostitutes are murdered? The identity of the victim plays a very large part in the public's perception of the severity of the crime, and the accused's culpability. When the victim is perceived only as a member of a group, however, he loses his identity and ceases to be a real person. His death, therefore, loses much of its emotive quality. He was just some young black kid in a hooded sweatshirt and expensive basketball shoes.

Stephen Carter addresses the issue of "When Victims Happen to be Black" by looking at three ways in which black victims are discounted so as not

to really matter.¹ The first example is the one already discussed, that is, when a black male is the "victim" of vigilante action, such as that of Bernhard Goetz. Professor Carter explains how the concept of individual transgressors and individual victims forces us to look at black "victims" as transgressors because of common beliefs regarding "blackness" and "whiteness". In the second part of his essay, he considers what happens when race is used for its alleged predictive value as a way of criticizing affirmative action initiatives. His argument is that blacks as a group have been victimized by "the system", but because we recognize only individual victims and individual transgressors, affirmative action is viewed as individual black people depriving individual white people of jobs or places in law school. Ironically, as Professor Carter points out, while society cannot recognize blacks as a victimized group, they have no difficulty "concluding that white males as a group are victimized by racially conscious affirmative action programs".² As I said earlier, whites have a harder time perceiving themselves as perpetrators than they do as victims.

This argument also echoes my earlier comments about racism meaning something different depending on where one is standing. As Professor Addis pointed out, while whites see racism as individual "incidents" of bigotry, blacks see it as a larger systemic problem. It is interesting, however, that when the shoe is on the other foot (or so whites may think), the problem is more generalized. It may not be elevated to the level of a systemic issue, but it is

¹ Stephen Carter, "When Victims Happen to be Black" (1988), 97 *Yale L.J.* 420.

² Carter at 435.

definitely a group "conspiracy" waged by "them" against "us". The problem is no longer one of individual actions.

In Professor Carter's third example, he examines the issue of the disparate use of the death penalty. He discusses the case of *McClesky v. Kemp*,³ which raised the issue of the constitutionality of the death penalty given that it was used more frequently against Black defendants. A study was introduced at the trial, the Baldus study,⁴ which, among other findings, showed that defendants who have killed white people are much more likely to receive the death penalty than those who have killed black people; in fact, a black defendant whose victim is white is 22 times more likely to receive the death penalty than is a black defendant whose victim is also black.⁵ One logical conclusion to be drawn from those statistics is that the lives of black people are valued less highly than those of white people. Professor Carter's essay is a compelling argument for the proposition that black victims do not matter. Identification with the marginalized group robs the individual black victim of his "victimhood", and as a result, his victimizer acquires the status of victim in his place. Further contributing to the victimization of the victimizer is the criminalization of the victim. As I discussed in the last chapter, black victims of police violence are often criminalized as a way of portraying the police in a kinder light. Blacks, widely perceived as dangerous, are easily transformed into

³ 107 S.Ct. 1756 (1987).

⁴ David C. Baldus et al., "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience" (1983), 74 *J. Crim. L. and Criminology* 661.

⁵ Carter at 444.

criminals for the purpose of restoring popular perceptions of the good guys and the bad guys.

Many *Charter* protections are in place to protect accused persons from the strong arm of the state, but the *Charter* must also give rights to victims and guarantee them the right to matter. The *Charter* as a whole can be seen to protect individual human dignity. Each section in some way protects our right to dignity, but none more than s. 15. The guarantee of equality ensures that each of us is entitled to participate fully in society. This full and equal participation is expected to lead to a sense of self-worth and fulfilment, two necessary components of human dignity. Wilson J. said plainly in *McKinney v. University of Guelph*⁶ that "[t]he purpose of the equality guarantee is the promotion of human dignity"⁷. In *Egan v. Canada*, L'Heureux-Dubé J., in dissent, also discussed the dignity component of s. 15. She said:

This Court has recognized that inherent human dignity is at the heart of individual rights in a free and democratic society [*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 336]. More than any other right in the *Charter*, s. 15 gives effect to this notion.⁸

L'Heureux-Dubé J. then quoted from McIntyre J. in *Andrews v. Law Society of British Columbia*:⁹

It is clear that the purpose of s. 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized as human

⁶ [1990] 3 S.C.R. 229

⁷ *McKinney* at 391.

⁸ per L'Heureux-Dubé at para. 36.

⁹ [1989] 1 S.C.R. 143.

beings equally deserving of concern, respect and consideration.¹⁰ [emphasis deleted]

Part and parcel of the right to dignity is the right to be treated as an individual with innate worth, or as McIntyre J. expressed it, "equally deserving of concern, respect and consideration". As I discussed earlier, stereotyping robs individuals of their individuality by subsuming them within the larger category of the group, the group itself characterized by broad definition. Stereotyping is incompatible with the values enshrined in s. 15 because rather than treat people as individuals all of whom deserve "concern, respect and consideration", it reduces them to a set of definable characteristics. Wilson J. spoke of the incompatibility of stereotyping with s. 15 in *Stoffman v. Vancouver General Hospital*¹¹:

[I]f the guarantee of equality is to mean anything, it must at least mean this: that wherever possible an attempt be made to break free of the apathy of stereotyping and that we make a sincere effort to treat all individuals, whatever their colour, race, sex or age, as *individuals*, deserving of recognition on the basis of their unique talents and abilities. Respect for the dignity of every member of society demands no less.¹²

[emphasis in original]

When police officers are allowed to rely on stereotypical perceptions of their victims to justify their conduct and thereby avoid punishment the rights of those victims to dignity are infringed. The victim is treated with less concern, respect and consideration than he should be accorded as a human being. The officer has denied the victim his s. 15 right to dignity by assuming that

¹⁰ L'Heureux-Dube at para. 36.

¹¹ [1990] 3 S.C.R. 483 [hereinafter "Stoffman"].

¹² *Stoffman* at 555; see also *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 per Wilson J.

because of his membership in a particular group he poses a threat. The officer has reduced the victim to a single definable characteristic -- threatening -- rather than viewing him as an individual with his own set of unique characteristics. The reasonableness standard then perpetuates the infringement of the victim's right to dignity by allowing the officer to rely on the jury's stereotypical perceptions of the victim and to justify his own stereotypical perceptions of the victim. The officer's defence hinges on whether the jury will buy into his concept of what is reasonable behaviour when confronted by a (threatening) black man. This defence in turn hinges on the jury's willingness to deny the victim his rights to equality and dignity. The values enshrined in s. 15 should be available therefore to inform the inquiry surrounding a police officer's shooting of a black man.

PART II - A Possible Solution

Once we accept that the notion of reasonableness may contain racist bias where a black "suspect" is shot by a police officer, we must address the problem in the context of a criminal trial. When a police shooting occurs where there is *prima facie* evidence of racism, for example, if the officer is of a different race than the suspect, the Crown should, at the very least, be allowed to introduce evidence suggesting the possibility that racism played a role. The Crown should be able to adduce evidence of the prevalence of racism in society generally and, if possible, in police forces in particular. The Crown

should be able to argue that the victim's race is not probative of the issue of dangerousness. More, importantly, the Crown should also be able to direct the jury's attention to the absence of any non-racial indicia of the victim's dangerousness, and ask the jury to draw an inference of racist motive. This would all be done in rebuttal of the officer's claim that he was acting in self-defence. An evidentiary burden would then be placed on the accused to put forward evidence of independent factors, other than race, that would have led him to have a "reasonable" apprehension of harm. He could show that he was aware that the "suspect" had a weapon, or that the "suspect" was actually preparing to attack. This second allegation would have to be supported by compelling evidence, and not simply the officer's word alone. The officer's fear must be rooted in some "fact" other than the victim's race. Stereotypical perceptions of a particular race are not probative of the dangerousness of that race as a whole, let alone of any particular member of that race. Judges would have to be vigilant to prohibit the use of innuendo such as was used in the Monette trial to cast the shadow back over the victim. The triers of fact would have to be reminded that it is the officer and not the victim who is on trial. The current strategy used by defence lawyers to criminalize the victims would have to be seriously curtailed.

This approach can be used to address both the systemic and individual aspect of racism in the criminal justice system. By forcing the individual police officer to confront the possibility of his unconscious racism, we are also addressing the systemic issue because we are not allowing hidden bias to

creep in through the mechanism of reasonableness. The systemic problem arises because of the way the mechanism functions in concealing bias; it can only be corrected by throwing off the covers and exposing it.

To avoid any confusion on this issue, I am not attempting to hold an individual accused police officer responsible for systemic racism. As I argued earlier, the problem of police shootings is both systemic and individual. The systemic problem is the way the justice system deals with the problem once it has occurred. The mechanism of the unarticulated reasonableness standard perpetuates racist stereotypes by leaving them unexpressed, and therefore, unaddressed. The police officer is not being punished for this. What I am arguing is that he should not be able to take advantage of this systemic flaw to escape punishment.

The crucial element of this entire discussion is that the issue of racism must be raised. It must not be allowed to remain as a spectre hovering over the trial, about which no one will speak in the belief that if we do not acknowledge it, we can continue to deny that it exists. Racism is with us, and will always be with us. What must be done, however, is to expose it, to discuss it, to ferret it out of its hiding places so that it cannot exert its influence in furtive and pernicious ways. An enemy is far less formidable when it attacks us frontally than when it attacks us guerilla-style from the bushes and strikes when we are not looking. When we hide racist notions in concepts like reasonableness, they can sneak up on us without our ever knowing.

R. v. Lavallee

A somewhat modified version of my proposed approach was advocated by the Supreme Court of Canada in the context of self-defence. In *R. v. Lavallee*, Wilson J. attempted to broaden the scope of the defence of self-defence to allow for claims by a battered woman that she acted in self-defence when she killed her abusive partner. In order to do so, Wilson J. had to articulate to some extent what "reasonableness" meant in the context of self-defence.

Lavallee was concerned with an accused who shot her abusive partner in the back of the head. The issue was whether evidence of the deceased's battering of the accused was relevant to the claim of self-defence. The relationship between the accused and the deceased was characterized by frequent episodes of violence. The accused had been treated in hospital several times for injuries received at the hands of the deceased. On the night of the killing, the accused and the deceased had argued, the deceased struck the accused several times, and then he threatened that she would "get it" later when their guests had left. He handed the accused a shotgun and, as he was leaving the room, she shot him in the back of the head.

The defence led substantial expert evidence of the history of the relationship between the parties, and the effect that such a relationship would have had on the accused, to support the argument that the accused's reaction was based on a "reasonable apprehension of death or grievous bodily harm".

The trial judge left the defence to the jury and they acquitted the accused. The acquittal was set aside and a new trial ordered by the Manitoba Court of Appeal.¹³ Although the issue appealed was the adequacy of the trial judge's instructions, the Supreme Court chose to address the broader issue of "the utility of expert evidence in assisting a jury confronted by a plea of self-defence to a murder charge by a common law wife who had been battered"¹⁴ by the "victim". In other words, the court was concerned with whether the jury needed to hear evidence of how a reasonable person would react in the situation.

Delivering the reasons for the majority, Wilson J. began with an analysis of the general rules of admissibility of expert evidence. The rationale for allowing expert testimony is that the subject of the expertise generally lies outside the experience and knowledge of the trier of fact:

The long-standing recognition that psychiatric or psychological testimony also falls within the realm of expert evidence is predicated on the realization that in some circumstances the average person may not have sufficient knowledge of or experience with human behaviour to draw an appropriate inference from the facts before him or her.¹⁵

Wilson J. challenged the common assumption that juries have a natural ability to determine what is reasonable or ordinary behaviour¹⁶:

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

¹³ (1988), 44 C.C.C. (3d) 113, 65 C.R. (3d) 387.

¹⁴ *Lavallee* at 100.

¹⁵ *Lavallee* at 111.

¹⁶ see for example Dickson C.J.C. in *Hill*.

no more is needed. They are, so to speak, their own experts on human behaviour.¹⁷

The Crown's position was that evidence of the abuse would provide the jury with enough evidence on which to decide if the accused had acted in self-defence, and that it was unnecessary to show how that abuse would have affected the accused. Madam Justice Wilson clearly did not accept that triers of fact are experts on human behaviour in all circumstances, and she identified several questions that the "average member of the public"¹⁸ might ask that could only be answered by expert evidence.

Throughout the judgment Wilson J. used the term "Reasonable Man", which was ironic given that the accused was a woman. The insistence on the phrase "Reasonable Man" instead of "reasonable person" suggests that Wilson J. recognized that despite the change in the words, the concept is still male.¹⁹ She explicitly stated the need to re-evaluate the concept to give it more universal application:

If it strains credulity to imagine what the "ordinary man" would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. 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".²⁰

She carried this adaptation of the male concept of reasonable self-defence through by pointing out the difference between the paradigmatic bar room brawl

¹⁷ *Lavallee* at 111.

¹⁸ *Lavallee* at 112.

¹⁹ see references *supra* note 2 regarding the gendered nature of the Reasonable Man.

²⁰ *Lavallee* at 114.

and the "cyclical nature of the abuse...that begets a degree of predictability to the violence that is absent in an isolated violent encounter between two strangers".²¹ The battered woman's apprehension of harm is nonetheless still "reasonable", despite the fact that it arises in a different context.

It may be argued that by treating the battered woman's plea of self-defence as a syndrome requiring expert testimony the implication arises that the woman is really behaving in an unreasonable manner. Why else would a psychologist, an expert in "abnormal" behaviour be called to explain her reaction? It is perhaps in the classification of the defence as a "syndrome" that causes this problem. Many scholars have commented that there is no need to treat the defence as a syndrome suggesting psychological illness.²² It can be conceptualized as a particular context just as the bar room brawl puts the defensive action in context. The emphasis should be placed on the recurring nature of the violence to provide a basis for the battered woman's belief that she will be attacked again. Expert testimony may still be necessary to explain the nature of the relationship, but it will go to establishing a context rather than to excusing the woman's alleged pathology. Sheila Noonan comments on the use of expert opinion in the area of battered woman syndrome and says:

Significant concerns have been articulated as to the constitution of expertise within this domain and as to dangers attached to the reception of expert evidence. The difficulty is that the individual woman's account of her relationship and the reason for her actions are only relevant to the degree to which they successfully

²¹ *Lavallee* at 119.

²² see for example: Sheila Noonan, "*Lalonde: Evaluating the Relevance of BWS Evidence*" (1995), 37 C.R. (4th) 110 at 111; E. Sheehy, "What Would a Woman's Law of Self-Defence Look Like? Grant, Chunn and Boyle also prefer a contextualized rather than a pathologized version of "women's self-defence".

converge with medical and legal constructions of the syndrome. The impact of transliteration and decontextualization are potentially distorting. In this respect, the expert's account of the battered woman syndrome may prevent a woman from explaining the context in which her action transpired. Given that the introduction of expert evidence tends to medicalize and pathologize the woman's mental state, some commentators will applaud the departure from the requirement of adducing expert testimony.²³

Prior to *Lavallee*, a judge could get away with a sexist notion of self-defence in the context of a battered woman who kills in self-defence by imposing an unexamined male standard of reasonableness. A judge's analysis of the situation would have consisted of determining how reasonable men would react in a given confrontation. The bar room brawl is a male-oriented paradigm. In *Lavallee*, however, Wilson J. attempted to explore the underlying and therefore unarticulated basis of the law of self-defence to get at its potentially sexist element. This is similar to the approach I am advocating.

Some might argue that battered woman's defence achieves the opposite of my aim in that it criminalizes the victim by portraying him as the abuser. That is a misunderstanding of how *Lavallee* operates. Battered woman's defence does not criminalize the victim; it places the defensive action in context. It is aimed at exposing the actual danger that confronted the battered woman who acted to protect herself. I am advocating the same approach. Simply because they may achieve opposite results does not mean that they are contradictory. I am suggesting an approach where the actual danger that confronted the police is exposed rather than simply relying on

²³ see Noonan, Sheehy and Grant, Chunn and Boyle

implicit stereotypes to create an image of dangerousness in the trier of fact's mind. The accused's reasonable apprehension of harm must be based on something real and not simply something conjured by him from his stereotyped perceptions of black men.

PART III - Problems with the Proposed Approach

All of this theorizing about how the law should treat offenders who kill blacks under racist circumstances must eventually confront the obstacle of the real world. How will juries, whose members are drawn from a racist society, be able to accept that racism is not reasonable? How do the *Charter* rights enshrined in s. 15, on the one hand, get reconciled with the accused's right to a fair trial in s. 11? This remaining part will attempt to address those concerns, and it is hoped, resolve them.

(a) Juries

The one place where a man ought to get a square deal is in a courtroom, be he any colour of the rainbow, but people have a way of carrying their resentments right into a jury box.²⁴

One mantra, repeated in cases dealing with the Reasonable Man, is that a jury will intuitively know how to define the Reasonable Man and determine how he behaves. Dickson C.J.C. made this explicit in *R. v Hill* when he said:

²⁴ from "To Kill a Mockingbird" (1955)

In terms of other characteristics of the ordinary person, it seems to me that the "*collective good sense*" of the jury will naturally lead it to ascribe to the ordinary person any general characteristics relevant to the provocation in question.²⁵[emphasis added]

Judicial faith in the jury's "collective good sense" suggests that there is a universal shared understanding of who the Reasonable Man is and how he or she behaves.²⁶ Despite his detailed review of the case law in *Hill*, Dickson C.J.C. gave the issue fairly scant treatment, suggesting that the answer was self-evident. The Reasonable Man has received so little scrutiny because he reflects the "norm" in society. Faith in the jury's shared understanding reflects the judiciary's belief that their perception of what constitutes the "norm" is universal.

The notion of a shared understanding was challenged by Wilson J., for the court, in *Lavallee*. *Lavallee* broadened the scope of the inquiry into the Reasonable Person in that it allowed testimony as to what constitutes reasonable behaviour where prior cases held that such determinations were strictly within the purview of the jury.²⁷

²⁵ *Hill* at 335.

²⁶ Pickard and Goldman discuss the notion of a shared understanding and its relation to the requirement of universal standards of behaviour. They suggest that the use of the ordinary person "posits the existence of shared values, perceptions, and reactions to inform a finding of 'ordinary' behaviour." To abandon this "objective" approach in favour of a more "subjective" one would be an "admission that shared expectations are impossible in a heterogeneous society" (at 928).

²⁷ For a discussion of the actual "benefits" of this broadened approach to battered women see Elizabeth A. Sheehy, "What Would a Women's Law of Self Defence Look Like". Professor Sheehy examines the thirteen cases reported between 1990 and 1994 dealing with battered women who have killed, and notes that the cases reveal "that not a single woman has been found not guilty of homicide in reliance upon *Lavallee*" (at 9). This suggests that despite the expanded scope of the inquiry, judges are still reluctant to accept "new" notions of reasonableness.

It may seem somewhat presumptive for a judge to assume that a jury consisting of 12 people would share his view on any given subject, unless we remember that judges universalize their truths through "objectivity". What they express is not so much a point of view as it is "objective reality". One recent decision, however, has challenged at least the jury's "objectivity". In *Parks* the Ontario Court of Appeal expressly challenged the "'presumption' that duly chosen and sworn jurors can be relied on to do their duty and decide the case on the evidence without regard to personal biases and prejudices".²⁸ While acknowledging that jury verdicts reflect the "shared values of the community",²⁹ the court also acknowledged that those shared values may include racist attitudes, be they express, subconscious or systemic.³⁰ The result of combining the findings in *Parks* with the traditional judicial reliance on the "collective good sense" of the jury is that the jury, without proper guidance, may "intuitively reach an unjust conclusion in certain types of cases".³¹

Parks does not solve the problem of racism in the judicial process by simply removing racist jurors; the problem runs deeper than individual racist jurors. As I have already suggested, the problem of racism in the justice system is systemic as well as individual and must be approached from both angles.

One way to address both the unconscious and the systemic racism in the process is for the unconscious racist elements in the trial to be exposed. The

²⁸ *Parks* at 360.

²⁹ *Parks* at 364.

³⁰ *Parks* at 366.

³¹ For further discussion of juries, see for example, Pickard and Goldman at 877, 929, 1115-1120; Cynthia Petersen, "Institutionalized Racism: The Need for Reform of the Criminal Jury Selection

whole problem with racist killings is that the racism is subverted to an unconscious level, such that while a racist undertone runs through the case, it does so unacknowledged by the triers of fact. As I have proposed, racism should be brought to the forefront and confronted head on. If the Crown can introduce evidence going to the issue of unconscious racism and expose the racist assumptions underlying the determination of "reasonable" apprehension of harm, then she can make it clearer to the trier of fact that the apprehension was not reasonable at all. Admittedly, this may not be an easy task since she would have to overcome the jury's own assumptions about race; but if the prosecutor could break the case down into its constituent elements and show that each individual element could not have provided a reasonable apprehension of harm, then perhaps the triers of fact could conclude in the end that the only element to which they could attach the reasonable apprehension would have to be race. To expect that all racial bias will be eradicated through this approach is naive, but perhaps laying bare feelings that most of us would be ashamed to admit that we harboured would at least enable us to publicly renounce them.

(b) Charter Rights

Process" (1993), 38 *McGill L.J.* 147; Sheri Lynn Johnson, "Black Innocence and the White Jury" (1985), 83 *Mich. L.R.* 1611.

I argued that a claim of self-defence based on racist beliefs violates s. 15 of the *Charter*, but what about the accused's rights under the *Charter*, particularly s. 11(d) and the right to make full answer and defence? The accused could definitely argue that being denied the opportunity to rely on the victim's race deprives him of the ability to make full answer and defence, and thereby prevents him from raising a reasonable doubt as to his guilt. An argument similar to that in *Seaboyer* could be advanced to allow an accused to introduce a race-based defence.

My first response to that argument is that of course an accused police officer could never be fully prohibited from raising the victim's race because, unlike a woman's sexual history, it is patently obvious to all concerned. Simply by identifying the victim as black, the accused can begin to employ implicit stereotypes in his defence. For this reason, I would argue that the accused should be required to rebut the presumption of racism raised by the Crown's arguments that only race could have created the officer's apprehension of harm. This of course would only place an evidentiary burden on the accused officer so as not to run afoul of the presumption of innocence.

The Supreme Court of Canada has said that when balancing competing values, no one value is to "trump" any other value in all cases:

A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict...*Charter* principles require a balance to be

achieved that fully respects the importance of both sets of rights.³²

One area in which the courts have recently found the accused's rights to be of paramount importance over the victim's is in the area of sexual assault. When the Supreme Court of Canada struck down the rape shield law in *Seaboyer*, they were making an unequivocal statement that the accused's right to a fair trial was more important than the victim's right to privacy and dignity. This case raises perhaps the most formidable obstacle for my argument. Perhaps some hope may be salvaged from the Court's promise in *Seaboyer* that the evidence used by accused persons could only serve a limited function and could not be used to "revive the old common law rules of evidence" and the "myths" that the rape shield was meant to eradicate. The new rule must conform to "current reality", the Court promised. Perhaps the current reality that racism is a pervasive evil in our society will find its way into the judges' approach to reasonableness so as not to allow it to accept racism as a foundation.

As I quoted above, the Court in *Dagenais* held that where two competing *Charter* values are involved, a balance must be struck between the two such that one does not necessarily override the other. When assessing the *Charter* values involved in a racist-based shooting, judges must be careful to accurately value the degree of harm that results from the racism. The issue is not only that the victim was shot and perhaps killed, but that he was shot in violation of his rights under the *Charter*. His right to dignity and his right to matter were violated

³² *R. v. Dagenais*, [1994] 3 S.C.R. 835 at 877.

by the officer. This raises the stakes, placing greater weight on the victim's side of the scale when valuing the degree of injury.

Conclusion

In this chapter I proposed a possible approach to trials of police officers charged with shooting black "suspects" that might help to eliminate some of the racist elements in the trial. I suggested that Crown counsel be allowed to address the subject of racism directly rather than allowing it to remain unaddressed yet very active. The accused should then be required to show that racism played no role by adducing evidence other than race to account for his apprehension of bodily harm. The current approach to police shootings of blacks is to deny that race is even a factor. Members of the "black community" become ignited when yet another young black man is shot by police, but those outside the community try to soothe the black masses with assurances that race played no part.³³ This strategy, rather than ameliorating the "race problem" in the justice system only exacerbates it because regardless of the official party line, blacks feel that they are unfairly targeted by the police for abuse. As I tried to argue in the first chapter, perceptions of racism differ depending on where one stands. What the "white community" may see as police fighting the war on crime, blacks may see as war against them. As I said earlier, I would not be so

³³ see *Re Urban Alliance on Race Relations for Metropolitan Toronto (Justice) and Huxter* (1993) 11 O.R. (3d) 641 (Gen. Div.) in which the Black Action Defence Committee was denied standing at the Lester Donaldson Inquiry on the basis that race played no role in his shooting. The Urban

naive as to think that my proposed approach will eradicate all racism in the criminal process, but by at least acknowledging that it exists, blacks can feel as though they too are acknowledged.

Alliance was given standing because they proposed to present evidence regarding cross-cultural training as it related to the mentally ill.

CONCLUSION

Racial bias can be imported into the criminal law through mechanisms such as the doctrine of reasonableness. Racist assumptions about what types of people pose threats to others inform the thinking of decision makers without those assumptions ever being acknowledged. I have chosen police shootings of blacks as the context in which to discuss this subject, but it is not the only example I could have used. I chose it because it is an example that causes strong public reaction. When a shooting of a black person occurs, opinion is divided largely along racial lines. Whites generally support the police in their fight against crime, while blacks on the other hand, often see the officer's exoneration as yet another example of how they are disenfranchised from the justice system. They see the deck stacked against them yet again. They feel that they have been victimized personally, by losing a "brother", and as a group in having to endure "open season". As I mentioned in the introduction to this paper, perceptions of racism differ depending on where one stands. If we are very carefully positioned, we do not see it at all. For those who do see it, I would like to think that open dialogue about the racist undercurrent in police shootings would at least make blacks feel as though they were acknowledged, especially since the current practice has been to deny that race is even an issue.

I have tried to argue that all assumptions should be expressed to allow them to be effectively challenged by counsel as well as by the public. While many people, especially those who experience racism, recognize racist

influences in decisions, those people can be effectively silenced by others who wish not to acknowledge racism. People who experience racism are told they are "imagining" it. To paraphrase Professor Williams, we are taught not to see what we see. It is a bad dream. It is difficult to counter such accusations when we have nothing but our "intuition" to rely on--and intuition is not generally very highly regarded in legal circles, which deal in "facts". The blindness of those who wish not to see is aided because that which they deny is effectively concealed.

Professor Williams wrote that theoretical legal understanding is characterized by the existence of objective "unmediated" voices by which allegedly transcendent, universal legal truths find expression. I have attempted to show that these "objective" voices are none other than subjective voices that assume legitimacy through various mechanisms, such as for example, the doctrine of reasonableness. I do not wish to suggest that judges should be stripped of their authority, but only that they should be recognized as having politics like any one of us. Their legitimacy should come from their ability to decide matters in a fair and just way, and not from their ability to disguise their politics. Justice is not a magic show where the audience should be impressed by what they do not see.