

# Michigan Journal of Race and Law

---

Volume 9

---

2003

## Breaking the Camel's Back: A Consideration of Mitigatory Criminal Defenses and Racism-Related Mental Illness

Camille A. Nelson  
*Saint Louis University School of Law*

Follow this and additional works at: <https://repository.law.umich.edu/mjrl>



Part of the [Criminal Law Commons](#), [Law and Psychology Commons](#), [Law and Race Commons](#), and the [Law and Society Commons](#)

---

### Recommended Citation

Camille A. Nelson, *Breaking the Camel's Back: A Consideration of Mitigatory Criminal Defenses and Racism-Related Mental Illness*, 9 MICH. J. RACE & L. 77 (2003).

Available at: <https://repository.law.umich.edu/mjrl/vol9/iss1/4>

This Article is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of Race and Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

# BREAKING THE CAMEL'S BACK: A CONSIDERATION OF MITIGATORY CRIMINAL DEFENSES AND RACISM-RELATED MENTAL ILLNESS†

Camille A. Nelson\*

INTRODUCTION.....	77
I. CRITICAL PSYCHOLOGY AND RACISM AS ABUSE.....	83
A. <i>Stress and Distress</i> .....	87
B. <i>Coping</i> .....	98
C. <i>The Humiliation Dynamic</i> .....	102
II. CRIMINAL LAW DEFENSES CAPABLE OF CRITICAL PSYCHOLOGY INFUSION .....	108
A. <i>Provocation</i> .....	110
B. <i>Extreme Emotional Disturbance</i> .....	117
C. <i>Diminished Capacity</i> .....	121
III. CONCERNS WITH INFUSION— IDENTITY, PATHOLOGIZATION, AND ACCESS .....	128
CONCLUSION .....	145

## INTRODUCTION

The following passage is from what the United States Court of Appeals for the Seventh Circuit deemed an X-rated decision. It is taken verbatim from one of a series of letters sent to a Black family in Illinois:

You filthy fag sick garbage puke slime vomit mutt sooner mother fucker. . . . I wishes a vicious death upon your scum of the earth head. You watch your back you faggott bastard less you receive five bullets in your spine. Your big black ugly maggott witch wife should be hung or burned at the stake like

† © 2003 by Camille A. Nelson. All rights reserved.

\* Assistant Professor, Saint Louis University School of Law. B.A. 1991, University of Toronto; LL.B. 1994, University of Ottawa; LL.M. 2000, Columbia Law School; J.S.D. Candidate, Columbia Law School. I wish to thank Dean Jeffrey Lewis and the faculty of Saint Louis University School of Law for their support. Thanks also to the participants and organizers of the 2003 Critical Race Theory Workshop, held at American University, Washington College of Law, for their suggestions and constructive feedback. I also owe my gratitude to the participants and organizers of the 2002 Northeastern People of Color Legal Scholarship Conference, held at The University of the West Indies School of Law, Barbados, for allowing me the honor of presenting this paper in its infancy as a work in progress. A special thanks to Professors Cheryl Wade, Frank Rudy Cooper, and Lenese Herbert for their thorough readings of a draft of this article. I also owe a debt of gratitude to Dr. Vetta Thompson who provided invaluable insight regarding the critical psychology. Thanks also to Piran Farhadieh for his able and insightful research assistance.

witches used to you Fat Fuck Motherfucker. If I weren't a child of God I'd catch you coming out of UPS and blow your head to dust particles. Nevertheless your wife is in store for a very dramatic/harmful incident. Before it is over that big black scorcerer will pay a debt to society like no other black bitch like her on earth.<sup>1</sup>

The above quote from *United States v. Bohanon* attests to the power of words. Coupling such language with conduct makes its import even greater. The intentional use of such words to injure marginalized persons has the potential to elicit a physiological response, generate emotions, and lead to responsive actions. This potential remains largely unrecognized by the American legal system. While in the United Kingdom,<sup>2</sup> Australia,<sup>3</sup> and Canada<sup>4</sup> the courts or legislatures acknowledge the provocative power of words and symbols, American jurisprudence attempts a careful balancing between, on the one hand, the provocative capacity of words and symbols in the absence of conduct and, on the other hand, protecting the First Amendment right to free speech.<sup>5</sup> Where relevant, the mental health ef-

---

1. 290 F.3d 869, 872 (7th Cir. 2002) (includes spelling and grammatical errors).

2. United Kingdom Law in Force Homicide Act, 1957, c. 11, § 3 (Eng.).

3. New South Wales Crimes Act, 1990, § 23 (1990) (Austl.). The Australian provocation statute is as follows:

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

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

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

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

4. See Camille A. Nelson, *(En)Raged or (En)Gaged: The Implications of Racial Context to the Canadian Provocation Defence*, 35 U. RICH. L. REV. 1007 (2002).

5. In a number of American jurisdictions, words are not adequate provocation unless accompanied by conduct indicating a present intention and ability to cause the defendant bodily harm. See, e.g., *Virginia v. Black*, 123 S. Ct. 1536, 1548 (2003) (holding that a Virginia statute that prohibited cross-burning with the intent to intimidate did not violate the Constitution because it banned conduct rather than expression); *Lang v. State*, 250 A.2d 276 (Md. Ct. Spec. App. 1969) (stating that it is "generally held that mere words, threats, menaces or gestures, however offensive and insulting, do not constitute adequate provocation," but holding that provocation is insufficient to mitigate murder where, before the shooting, the victim had called the appellant a "chump" and a "chicken," dared the

fects stemming from racist abuse and violence should form part of the deliberations in a criminal trial. The mitigatory defenses, in particular, have a role to play in allowing due consideration of the psychological impact of racism.

---

appellant to fight, shouted obscenities at him and shook his fist at him), *cert. denied*, 396 U.S. 971 (1969); *see also* Commonwealth v. Nelson, 523 A.2d 728, 733–34 (Pa. 1987) (allowing provocation brought about by prolonged stress, anger, and hostility caused by marital problems to provide grounds for a verdict of voluntary manslaughter rather than murder).

Additionally, some words in and of themselves, even in the absence of accompanying conduct, might properly be seen as “fighting words” pursuant to the constitutional law definition. Fighting words, “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace,” are not worthy of free speech protection. This method of identifying fighting words is highly context-dependent as a particular speech act may be protected under the First Amendment in one set of circumstances, while under different circumstances, where violence is imminent, the same speech act may constitute unprotected fighting words.

In *RAV v. City of St. Paul*, 505 U.S. 377, 381 (1992), the U.S. Supreme Court unanimously found that a St. Paul, Minnesota ordinance that criminally punished persons who placed on public or private property objects or words they knew or should have known would “arouse anger or resentment in others on the basis of race, color, creed, religion, or gender” violated the Free Speech Clause. Writing for a five justice majority, Justice Scalia accepted the Minnesota Supreme Court’s interpretation that the ordinance reached only fighting words, and announced that even though the ordinance applied only to proscribable fighting words, it was nonetheless facially unconstitutional because it “prohibited otherwise permitted speech solely on the basis of the subjects the speech addresses.” *Id.* He concluded that the ordinance discriminated on the basis of content because it “applie[d] only to ‘fighting words’ that insult, or provoke violence, ‘on the basis of race, color, creed, religion or gender,’” thereby leaving unpunished “displays containing abusive invective, no matter how vicious or severe . . . unless they were addressed to one of the specific disfavored topics.” *Id.* at 391.

Perkins states that it is “with remarkable uniformity that even words generally regarded as ‘fighting words’ in the community have no recognition as adequate provocation in the eyes of the law.” ROLLIN M. PERKINS, *PERKINS ON CRIMINAL LAW* § 1 (2d ed. 1969). It is noted that:

[M]ere words or gestures, however offensive, insulting, or abusive they may be, are not, according to the great weight of authority, adequate to reduce a homicide, although committed in a passion provoked by them, from murder to manslaughter, especially when the homicide was intentionally committed with a deadly weapon . . . .

40 C.J.S. *Homicide* § 47 (1944) (citations omitted); *see also* 40 AM. JUR. 2D *Homicide* § 64 (1968).

While it is unclear whether this statement actually reflects the current state of the law of provocation, it is worth considering whether “fighting words” may operate to mitigate murder to manslaughter in doctrine akin to, but distinct from, provocation such as diminished capacity and extreme emotional disturbance. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) placed fighting words outside the coverage of the First Amendment on a *per se* basis. According to this approach, there is a category of “fighting words” that, because of their content, do not constitute speech at all. Therefore, any restriction on such “speech” is constitutionally permissible.

In the lexicon of racial abuses, there are many words and phrases capable of inflicting physiological and mental injury.<sup>6</sup> Even absent accompanying conduct, the use of some words can inflict deep wounds based on identity, be that identity based on race, gender, culture, religion, or sexuality.<sup>7</sup> The excerpt from the X-rated decision outlined above is but one example of the violent and abusive words that many Americans are exposed to from an early age. The perpetrators who deal in this vitriol and its symbolism (such as racist graffiti or anti-Semitic imagery) are well aware of its powerful potential—they select and deploy the imagery with care to assure maximum damage to their victims.

Hateful speech and racially violent symbolism, such as that in *Bohanon*, are symptoms of social processes. They are the legacy of a past of racialized nation-building. The First Amendment is designed to protect political speech of all types, yet speech that infringes on public order (such as bomb threats, incitements to riot, obscene phone calls, and “fighting words”) can be prohibited in the interest of the common good.<sup>8</sup> Moreover, even absent a constitutional reclassification of hate speech and racially violent symbolism as fighting words, there is conceptual space in the criminal law to consider the impact-driven legal significance of such racial abuse. Examination of the defenses of provocation, extreme emotional disturbance, and diminished capacity might prove informative and provide an equitable point of departure when informed by the social sciences. Specifically, the elasticity of the reasonable person standard in the defense of provocation, the recognition of trauma in the extreme emotional disturbance defense, and the allowance for impairment in diminished capacity provide opportunities to consider the role of racism in criminal culpability determinations.

While the abusive letter reproduced above undoubtedly engendered both physiological and mental effects on its intended victims, if the family members had responded with violence to such abuse, they would have

---

6. The prevalence of the use of words as weapons is revealed by the incidence of such words triggering litigation. A simple Lexis search of the term “Black bitch” received 211 hits, “nigger” received in excess of 3000 hits, “cunt” received 336 hits, “squaw” received 594 hits, “spic” received 261 hits, “chink” received 279 hits, “kike” received 91, “gook” received 115 hits, “coon” received in excess of 3000 hits, “porch monkey” received 27 hits, “jigaboo” received 9 hits, “faggot” received 550 hits, “fag” received 588 hits, “slut” received 676, “nip” received 833 hits, “wetback” received 189 hits, and “mooley” received 26 hits (Lexis search Dec. 7, 2003) (on file with author) [hereinafter Lexis search].

7. See generally WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (Mari J. Matsuda et al. eds., 1993) [hereinafter WORDS THAT WOUND].

8. See PATRICIA HILL COLLINS, FIGHTING WORDS: BLACK WOMEN AND THE SEARCH FOR JUSTICE 84 (1998).

been denied access to criminal law defenses.<sup>9</sup> It is, however, possible to recognize such speech and symbolism as a form of racial violence that, like all forms of violence, inflicts both physical and mental damage upon its victims and might lead to responsive violence. It is this point—the prospect of responsive violence—from which this Article departs.

This article will examine the concept of racist words, symbols, and actions that are used as weapons to “ambush, terrorize, wound, humiliate, and degrade,”<sup>10</sup> as psychological and physiological violence. The implications of such violence are relevant to several affirmative defenses and, indeed, to the initial formulation of mens rea. The historical and contextual legacy that is intentionally invoked by the utilization of racialized violence is what separates the racial epithet or racially violent symbolism from other distressing insults and slurs. While First Amendment<sup>11</sup> protection extends to offensive or insulting speech, the mental and physical sequelae of such speech, even absent conduct, are appropriate considerations for the criminal law, as such speech is racial violence itself and may lead to the responsive physical violence that is beyond the protection of the First Amendment.<sup>12</sup>

Words used as weapons to inflict maximum damage upon racially designated victims should be distinguished from violent speech in the abstract as such targeted utterances intentionally draw upon a history of racist terrorism.<sup>13</sup> In the face of such violence, courts should respond in

9. In *Bohanon*, the Walkers testified as to their fear, humiliation, and embarrassment. They changed their behavior, becoming much more cautious than they had been. *United States v. Bohanon*, 290 F.3d 869, 876 (7th Cir. 2002). Note that these are not the victims' real names. The Court changed them to spare the victims further embarrassment. *Id.*

10. WORDS THAT WOUND, *supra* note 7, at 1.

11. While so much of the debate surrounding racist symbolism and expression focuses on the constitutional law implications, legal analysis should simultaneously consider the physical and mental sequelae of racialized terrorism and its implications for criminal law. Recent history has taught us that this sentiment of heightened vulnerability in the face of violence and terror is real and normal.

12. See Michael J. Mannheimer, Note, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527 (1993).

13. Indeed, for Blacks and many people of color, much of America history has been racially violent and terror filled. See generally MARK BAUERLEIN, *NEGROPHOBIA: A RACE RIOT IN ATLANTA, 1906* (2002) (discussing the 1906 Atlanta race riot where Whites carved their initials in the backs of their Black victims); ALFRED L. BROPHY, *RECONSTRUCTING THE DREAMLAND, THE TULSA RIOT OF 1921: RACE, REPARATIONS, AND RECONCILIATION* (2002) (describing how the “Black Wall Street” section of Tulsa was laid to ashes by angry White mobs which left over 150 Blacks dead, 30 city blocks destroyed, and over seven thousand Blacks homeless); PHILLIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA* (2003) (documenting in vivid detail the history of lynching of Blacks in America between 1882 and 1962); MICHAEL D'ORSO, *LIKE JUDGMENT DAY: THE RUIN AND REDEMPTION OF A TOWN CALLED ROSEWOOD* (1996) (detailing how the 150 residents of Rosewood, Florida were chased into the swamps while their homes, stores, and churches were burned to the ground following the alleged rape of a White woman); LEON F. LITWACK, *TRouble in Mind: Black Southerners in the Age of Jim Crow* (1998)

one of two ways: prohibition or regulation of such speech or, as this Article will argue, acknowledgement of the mitigatory potential of provocation, diminished capacity, and extreme emotional disturbance for victims of racialized violence. These defenses have been effectively used by jealous husbands, homophobes, and those claiming the sanctity of their cultural practices. Accordingly, there is no tenable basis to deny these defenses to persons of color who are provoked to respond to racialized violence. If a victim, such as the recipient of the above quoted letter, responds by self-help to the racialized violence inflicted upon her, legal recognition of the material impact of such racial terrorism, and the violence done to a victim so abused, is in order for purposes of mitigated sentencing.

Part I of this Article explores the salience of “critical psychology,”<sup>14</sup> focusing on the mental, and to a lesser extent the physiological, implications of exposure to racism. Part II explores the criminal law doctrines of extreme emotional disturbance, provocation, and diminished capacity as substantive areas capable of incorporating critical psychology. Part III analyzes the pros and cons of an infusion of the critical psychology into the criminal law for communities of color. This part focuses on the potential pathologization of Blacks<sup>15</sup> as “mad” or “bad,” as well as considerations of intersectionality and multidimensionality.

---

(describing the genital mutilation, stabbing, and burning alive of a Black man as over 2000 White onlookers cheered); STEWART E. TOLNAY & E.M. BECK, *A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882–1930* (1995) (documenting the murder of 2500 Blacks in ten southern states over the course of six decades); DINA TEMPLE-RASTON, *A DEATH IN TEXAS: A STORY OF RACE, MURDER AND A SMALL TOWN’S STRUGGLE FOR REDEMPTION* (2002) (the 1998 account of three White men who chained a Black man to their truck and dragged him for three miles to his death in Jasper, Texas); HERBERT S. KLEIN, *THE ATLANTIC SLAVE TRADE* (1999) (empirical evidence regarding the social, political, and economic impact of the 27,224 trans-Atlantic slave voyages between 1562 and 1867).

It is specifically because of the history of racialized terror that racist symbolism and racist speech have such abusive potency as forms of violence. Many Blacks and people of color perceive such imagery and expression as profoundly assaultive—they are not abstract random acts or utterances.

14. I have referenced critical psychology as that subcategory of the discipline that responds to the traditionally assumed universality of experience by recognizing the subjectivity of experience, especially as this psychical experience is impacted and determined by societal factors including race, gender, sexual orientation, class, culture, religion and the intersection of these realities. Hence, critical psychology recognizes and addresses the social and political constructs that impact mental, and therefore physical, health and disparately affect those relegated to the margins of society.

15. While I prefer the term Black, as I find it to be more inclusive of the diversity of persons of color and avoids confusion with, for instance, Whites from the continent of Africa, I will use the term African American where appropriate. I believe Blackness to be an identity framework which includes, but is not limited to, African Americans, West Indians, Brazilians, Africans and Latinos/Latinas. African American is, therefore, a subset of Black identity.

## I. CRITICAL PSYCHOLOGY AND RACISM AS ABUSE

*"I had to meet the [W]hite man's eyes. An unfamiliar weight burdened me. In the [W]hite world the man of colour encounters difficulties in the development of his bodily scheme. . . . I was battered down by tom-toms, cannibalism, intellectual deficiency, fetishism, racial defects. . . . I took myself far off from my own presence. . . . What else could it be for me but an amputation, an excision, a hemorrhage that spattered my whole body with [B]lack blood?"<sup>16</sup>*

The study of abuse and its consequences has preoccupied many mental health practitioners throughout the last century. The repercussions of abuse are not limited to the manifestations of physical battery. Rather, like the many forms of abuse, there are many consequences.

The recognition of racism as abuse is consistent with traditional and contemporary definitions.<sup>17</sup> Mental health practitioners have identified common consequences of exposure to mental and physical abuse, including psychological sequelae, which some believe are even more serious than the physical effects.<sup>18</sup> In domestic violence cases, for instance, the abuse often erodes women's self-esteem and puts them at a greater risk for a variety of mental health problems, including depression, post-traumatic stress disorder, anxiety disorders, suicide, and alcohol and drug addiction.<sup>19</sup> Such abuse has additional consequences for families. Children who witness marital violence face increased risk for emotional and behavioral problems including anxiety, depression, poor school performance, low

---

16. FRANZ FANON, *BLACK SKIN WHITE MASKS* 110–12 (Charles Lam Markmann trans. 1967).

17. Indeed, the following dictionary definitions of abuse provide ample opportunity for the commencement of a dialogue concerning the nature of racism and how to define the consequences flowing from its perpetuation. For instance, the American Heritage Dictionary defines abuse as the following: "To use wrongly or improperly; misuse: abuse a privilege;" "To hurt or injure by maltreatment; ill-use;" "To force sexual activity on; rape or molest;" "To assail with contemptuous, coarse, or insulting words; revile." AMERICAN HERITAGE DICTIONARY (4th ed. 2002). Interestingly, these definitions were found at the Abuse Support Center site of Mental-health-matters.com. Mental-Health-Matters.com, *Abuse Support Center: Definition of Abuse*, at <http://www.mental-health-matters.com/abuse/index.php> (last visited Dec. 8, 2003); cf. Merriam-Webster Dictionary Online, at <http://www.m-w.com/cgi-bin/dictionary> (last visited Oct. 23, 2003) (defining abuse as "a corrupt practice or custom; improper or excessive use or treatment; obsolete: a deceitful act; language that condemns or vilifies usually unjustly, intemperately, and angrily; physical maltreatment").

18. See The Johns Hopkins School of Public Health, *Ending Violence Against Women*, 27 POPULATION REP. Ch. 5.3 (1999), [http://www.jhuccp.org/pr/l11/l11chap5\\_3.shtml](http://www.jhuccp.org/pr/l11/l11chap5_3.shtml) (last visited Oct. 23, 2003).

19. *Id.*



self-esteem, disobedience, nightmares, and physical health complaints.<sup>20</sup> Children exposed to abuse are also more likely to act aggressively.<sup>21</sup>

Critical psychology reveals widespread racial discrimination against Blacks.<sup>22</sup> Studies have found that Blacks continue to be discriminated against in a variety of arenas, ranging from face-to-face interactions to discrimination in housing, health, and social services.<sup>23</sup> Such discrimination is not limited to low-income or uneducated Blacks, but is also reported by Black middle-class professionals.<sup>24</sup> Indeed, one analysis drawing on the National Study of Black Americans suggests that recent

20. See David R. Williams et al., *Racial Differences in Physical and Mental Health: Socio-economic Status, Stress and Discrimination*, 2 J. HEALTH PSYCHOL. 335, 342 (1997).

21. See The Johns Hopkins School of Public Health, *supra* note 18, at ch. 5.4.

22. See Elizabeth Klonoff et al., *Racial Discrimination and Psychiatric Symptoms Among Blacks*, 5 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 329, 329 (1999).

23. See *id.*; see also DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992); *THE SOCIAL PSYCHOLOGY OF INTERPERSONAL DISCRIMINATION* (Bernice Lott & Diane Maluso eds., 1995).

24. See ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* (1993); see also JOE R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* 12-17 (1994). Feagin and Sikes state:

In contrast to the common [W]hite view, few middle-class African Americans interviewed for *Living with Racism* see the significance of racism in their lives declining. Indeed, in the late 1980s and early 1990s many African Americans perceive an increase in the significance of race. The first of these general propositions is that modern racism must be understood as *lived experience*. When our respondents talk about being [B]lack in a country dominated by [W]hites, they do not speak in abstract concepts of discrimination or racism learned only from books, but tell of mistreatment encountered as they traverse traditionally [W]hite places.

...

A second proposition gleaned from the interviews is that experiences with serious discrimination not only are very painful and stressful in the immediate situation and aftermath but also have a cumulative impact on particular individuals, their families, and their communities. A [B]lack person's life is regularly disrupted by the mistreatment suffered personally or by family members.

...

The third generalization we suggest is that the repeated experience of racism significantly affects a [B]lack person's behavior and understanding of life.

...

A fourth proposition we offer is that the daily experiences of racial hostility and discrimination encountered by middle-class and other African Americans are the constituent elements of the interlocking societal structures and processes called "institutionalized racism."

experiences with racial discrimination may be associated with "higher levels of chronic health problems, disability and psychological distress, and lower levels of happiness and life satisfaction."<sup>25</sup> Membership in the Black race has been described as entailing exposure to highly stressful experiences, triggered essentially by race.<sup>26</sup>

While education alone does not diminish the discrimination experienced by Blacks in America, Blacks are 1.6 times more likely than Whites to have completed less than twelve years of education. Education is positively related to well-being.<sup>27</sup> A similar pattern is evident for income.<sup>28</sup> The racial distribution by social class follows the pattern noted for education and income. Blacks are more likely than Whites to be workers (61 percent vs. 51 percent); equivalent percentages of Blacks and Whites are supervisors, but Whites are almost twice as likely as Blacks to be managers (24 percent vs. 13 percent).<sup>29</sup> Blacks are more than twice as likely as Whites to report major experiences of discrimination in employment and police interactions.<sup>30</sup> Levels of financial stress are significantly higher for Blacks than for Whites.<sup>31</sup> Further, poverty and ethnicity have been found to be two of the most important consequential factors contributing to stress.<sup>32</sup>

Critical psychology has expanded models of stress to account for racially predicated social hierarchies and the mechanisms through which they contribute to differences in mental and physical health. Unlike traditional psychology, critical psychology makes the implicit explicit by acknowledging race-related mental health issues. Critical psychology explicitly recognizes that race, ethnicity, social class, community, family, and work environment are *independent* contributors to the chronic stress burden of a racialized person. This chronic stress burden, which has

25. JOE R. FEAGIN & KARYN D. MCKINNEY, *THE MANY COSTS OF RACISM* 54 (2003).

26. See Hector F. Myers, *Holistic Definitions and Measurements of States of Non-Health*, in *AFRICAN PHILOSOPHY: ASSUMPTION AND PARADIGMS FOR RESEARCH ON BLACK PERSONS* (Lewis M. King et al. eds., 1976).

27. College graduates enjoy higher levels of psychological well-being than do people with less education. Consideration of education reduces racial differences in well-being by more than 20 percent. There are no racial differences in the middle of the education distribution (high school graduation, some college), but Whites are almost twice as likely as African Americans to have graduated from college. Williams et al., *supra* note 20, at 343.

28. Blacks are almost four times as likely as Whites to have a total annual income of less than \$10,000 (21 percent vs. 6 percent) and are 1.4 times more likely than Whites to be in the \$10,000–\$29,999 range. Equivalent percentages of Blacks and Whites are in the middle-income category (\$30,000–\$59,999), but Whites are 2.5 times more likely than Blacks to have incomes over \$60,000 (41 percent vs. 16 percent). The lower average income of Blacks provides for households that on average are significantly larger than those of Whites. *Id.* at 341.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

cumulative implications, includes both generic life stresses and ethnicity and race-related stresses.<sup>33</sup> A racially disparate vicious circle is generated which contributes over time to cumulative vulnerability.<sup>34</sup> This in turn creates disparate vulnerabilities to mental and physical disease and dysfunction.<sup>35</sup>

Mental health implications of racial abuse reveal several points of departure including stress, distress, the humiliation dynamic, anxiety, and depression, and coping. This Article will examine stress, distress, coping, and the humiliation dynamic as points of departure within the critical psychology for incorporation into mitigatory criminal law defenses.

---

33. This chronic burden of stress is hypothesized as contributing to disease through a biological pathway that includes the triggering of physiological response mechanisms, constitutional predispositions or vulnerabilities, and wear and tear on the system. *Id.* at 348.

34. Hans Selye first proposed the notion that stress exposure may have a damaging effect on physical health in 1956. According to Selye, individuals who experience "general adaptation syndrome" (GAS), respond to stressful events with nonspecific physiological responses that, over time, produce wear and tear on the system. See HANS SELYE, *THE STRESS OF LIFE* (1956). Selye argued that repeated cycling through the stress response would eventually lead to damage to the organism. See *id.*

More recently, McEwen and Stellar coined the term "allostasis" to refer to the normal fluctuations of certain body systems that maintain stability and "provide protection to the body by responding to internal and external stress." B.S. McEwen & E. Stellar, *Stress and the Individual: Mechanisms Leading to Disease*, 153 *ARCHIVES INTERNAL MED.* 2093 (1993). The most common allostatic responses involve the activation of the sympathetic nervous system and hypothalamic-pituitary-adrenal (HPA) axis and the resulting release of stress hormones. A normal stress response involves the activation of these systems (such as stress hormones mobilize the body for action by increasing heart rate, blood pressure, and respiration, and also mobilize the immune system to protect against infection), and subsequent deactivation once the stressors are removed or reduced. However, when deactivation is insufficient or incomplete, there is prolonged exposure to stress hormones. Over time, this exposure results in an increase in allostatic load, indicating the physiological costs of overtaxing these systems.

According to McEwen, allostatic load is increased under four conditions: (a) frequent stress exposure, which promotes frequent exposure to stress hormones; (b) inadequate habituation to stressful experiences, which also results in prolonged exposure to stress hormones; (c) inability to recover, in which physiological arousal and reactivity continue even after the stressor has been removed or terminated; and (d) system fatigue or dysfunction, which triggers pathological compensatory responses in other systems. Bruce S. McEwen, *Protective and Damaging Effects of Stress Mediators*, 338 *NEW ENG. J. MED.* 172, 172-75 (1998).

35. Stress, biological processes' and disease pathways are influenced by a number of psychosocial and behavioral factors, including psychological characteristics (such as personal dispositions), lifestyle factors (such as diet, exercise, smoking, or substance use), stress appraisal, coping strategies, and the availability of social resources. All of these factors operating synergistically over time result in differential health status and disparate trajectories for racial and ethnic groups. Williams et al., *supra* note 20, at 385-91.

## A. Stress and Distress

Stress has been defined as "environmental demands that tax or exceed the adaptive capacity of an organism, resulting in biological and psychological changes that may be detrimental and place the organism at risk for disease."<sup>36</sup> Essentially, stress is now recognized as harms, threats, and challenges, the quality and intensity of which depend on personal agendas, resources and vulnerabilities of the person, and environmental conditions.<sup>37</sup> Stressful life events have been characterized as those situations that are tension producing and could adversely affect an individual's mental health, while distress is the state that occurs when the individual is unable to cope effectively with the stressor.<sup>38</sup>

These definitions exemplify a shift in psychological theory from a focus on environmental inputs and outputs to a relational assessment of stress and its impact.<sup>39</sup> This shift in focus to the subject experiencing stress implies a knowing person who construes or appraises the significance of what is happening with regard to his or her well-being. This shift also requires an approach to stress measurement that takes into account the personal and environmental variables that influence the appraisal process.

Over the past decade, critical psychologists have researched the well-established relationship between race and psychological distress. Specifically, critical psychology has revealed that race differences in psychological distress are particularly pronounced among people with low incomes. Blacks in America report lower levels of *well-being* than do Whites.<sup>40</sup> Everyday discrimination and higher levels of stress are positively related to poorer health status.<sup>41</sup>

Critical psychological findings are consistent with sociological findings that social conditions are important determinants of variations in health.<sup>42</sup> High levels of stress and low socio-economic status ("SES")<sup>43</sup> are

---

36. See Sheldon Cohen et al., *Strategies for Measuring Stress in Studies of Psychiatric and Physical Disorders*, in MEASURING STRESS: A GUIDE FOR HEALTH AND SOCIAL SCIENTISTS 3 (Sheldon Cohen et al. eds., 1995).

37. See Richard S. Lazarus, *Puzzles in the Study Of Daily Hassles*, 7 J. BEHAV. MED. 375 (1984).

38. See Judith G. Rabkin & Elmer L. Struening, *Life Events, Stress, and Illness*, 194 SCIENCES 1013, 1013-20 (1976); Vetta L. Sanders Thompson, *Perceived Experiences of Racism as Stressful Life Events*, 32 COMMUNITY MENTAL HEALTH J. 223, 224-25 (1996).

39. Lazarus, *supra* note 37.

40. "Well-being" is loosely defined as a harmonious fit between the person and his or her environment. See Lazarus, *supra* note 37, at 376. Women report higher levels of psychological distress than men. Williams et al., *supra* note 20.

41. *Id.*

42. See FEAGIN & MCKINNEY, *supra* note 25, at 39-64.

43. SES includes income, education, and occupation.

two social factors that have been identified as pathogenic.<sup>44</sup> Education and especially income, two of the three considerations for SES, are related to health outcomes and play a major role in explaining racial differences in health.<sup>45</sup>

The fact is, however, that poor income positioning, occupational status, and educational achievement *disparately* impact racialized persons.<sup>46</sup> That is, SES is itself racially corrupted. This intersection of class and race is particularly important for the criminal law defenses discussed herein in light of the fact that race-related stress is more strongly related to indicators of mental health than to indicators of physical health.<sup>47</sup> The research relating to social class, as an additional factor impacting stress is equally important to racialized people because of the "colored" face of American poverty.<sup>48</sup> Accordingly, those most affected by the additive or interactive nature of race and poverty are the focus of this Article. In fact, critical psychologists have demonstrated that Blacks are more distressed than Whites even at low levels of income.<sup>49</sup>

Differences in physical health may be due, at least in part, to differential exposure to chronic and acute life stressors.<sup>50</sup> Blacks, especially those from lower social classes, often report a greater number of negative life events<sup>51</sup> and greater and more frequent exposure to "generic life stress-

---

44. Williams et al., *supra* note 20, 347 ("At the same time, the findings are consistent with a large body of work that suggests the societal conditions are important determinants of variables in health."); *see also id.* at 341 ("The interplay of race, socio-economic status, stress and disease is hypothesized to result in cumulative bio-behavioral vulnerability over the life span . . . [which] accounts, at least in part, for the cross-generational persistence of the health disparities that is documented in the epidemiological literature.").

45. *Id.*

46. Sarah Staveteig & Alyssa Wigton, *Racial and Ethnic Disparities: Key Findings from the National Survey of America's Families*, at <http://www.urban.org/url.cfm?ID=309308> (Feb. 2000); Chris Bailey, *The Misrepresentations of the Black Male*, at <http://gasou.edu/~cbarley3/occupational.html>.

47. *See* Williams et al., *supra* note 20, at 348.

48. *See generally* TODD SWANSTROM ET AL., *PLACE MATTERS: METROPOLITICS FOR THE TWENTY-FIRST CENTURY* (2001); MICHAEL HARRINGTON, *THE OTHER AMERICA: POVERTY IN THE UNITED STATES* (rev. ed. 1981).

49. Ronald C. Kessler & Harold W. Neighbors, *A New Perspective on the Relationships Among Race, Social Class, and Psychological Distress*, 27 J. HEALTH & SOC. BEHAV. 107, 113 (1986).

50. *See* Arline T. Geronimus, *The Weathering Hypothesis and the Health of African American Women and Infants: Evidence and Speculations*, 2 ETHNICITY & DISEASE 207, 209-17 (1992); Williams et al., *supra* note 20.

51. *See* Philip H. G. Ituarte et al., *Psychosocial Mediators of Racial Differences in Night-time Blood Pressure Dipping Among Normotensive Adults*, 18 HEALTH PSYCHOL. 393, 393-94, 399-400 (1999).

ors.”<sup>52</sup> Blacks also tend to perceive these events as more stressful and report greater psychological distress from these stressful life experiences than their White counterparts.<sup>53</sup> As such, Blacks are likely to be particularly vulnerable to the long-term effects of high allostatic load<sup>54</sup> because of their relative socio-political position. Chronic or cumulative stressors may trigger physiological response mechanisms, predispositions, and wear and tear on the system.<sup>55</sup> Chronic stressors due to financial strain, inadequate housing, crowding, and violence may all contribute to more frequent activation of stress-response systems and prolonged exposure to stress hormones.<sup>56</sup>

This compounding of race and class is consistent with critical race theorists' scholarship on intersectionality.<sup>57</sup> For Blacks in America, the intersection of race and class produces an experience of oppression that is greater than the sum of its parts.<sup>58</sup> Accordingly, it makes sense that critical psychology has demonstrated that poverty compounds and exacerbates the effects of racism and vice versa. When the interactive effects of race and class are taken into consideration, the data show that race has a substantial effect on psychological functioning among lower-class people, a result that is consistent with the view that racial discrimination exacerbates the health-damaging effects of poverty among Blacks.<sup>59</sup>

Irrespective of the type of analysis conducted, race discrimination has emerged as a powerful predictor of Blacks' psychiatric symptoms at all levels of socio-economic status. Indeed, in keeping with the findings of Cose,<sup>60</sup> Feagin, and Sikes, critical psychologists Kessler and Neighbors have explained that:

52. This refers to stressors that are a usual part of modern life—financial, occupational, relationship, parental. See Elizabeth A. Klonoff et al., *supra* note 22, at 330.

53. Collins et al., *African American Mothers' Perceptions of Their Residential Environment, Stressful Life Events, and Very Low Birthweight*, 9 EPIDEMIOLOGY 286 (1998); Hector F. Myers, *Stress, Ethnicity and Social Class: A Model for Research on Black populations*, in MINORITY MENTAL HEALTH 118–48 (Enrico E. Jones & Sheldon J. Korchin eds., 1982).

54. “Allostatic load” is a psychological term that recognizes the chronic burden of stress as contributing to disease through biological pathways. See *supra* note 34.

55. See HANDBOOK OF RACIAL AND ETHNIC MINORITY PSYCHOLOGY 382 (Guillermo Bernal et al. eds., 2002).

56. Norman B. Anderson et al., *A Contextual Model for Research of Race Differences in Autonomic Reactivity, in PERSONALITY, ELEVATED BLOOD PRESSURE AND ESSENTIAL HYPERTENSION* 197–216 (Ernest H. Johnson et al. eds., 1992).

57. Professor Kimberlé Crenshaw states that “because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.” Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, U. CHI. LEGAL F. 139, 140 (1989).

58. *Id.*

59. Kessler & Neighbors, *supra* note 49, at 108.

60. See *infra* note 24.

It is also possible that the joint effects of poverty and discrimination have synergistic effects or that financial success functions to shield blacks from the more distressing aspects of discrimination. Any of these processes would lead to an interaction in which the effects of race are most pronounced at the lower end of the social class distribution.

Alternatively, race differences in distress could be most pronounced at high levels of social class, because financially successful Black-group members might experience the psychological stresses associated with this marginal position. Inferential evidence consistent with this possibility was reported in a treatment study . . . .<sup>61</sup>

In stepwise regressions,<sup>62</sup> racist discrimination was the best predictor of half of the symptoms measured, including somatization, anxiety, obsessive compulsiveness, interpersonal sensitivity, and depression. Racial discrimination was a more powerful predictor of those symptoms than generic stressors such as social status.<sup>63</sup> In hierarchical regressions,<sup>64</sup> racist

---

61. *Id.* (emphasis added). They further state:

It might be that the pronounced distress among lower-class [B]lacks as compared to that of lower-class [W]hites is due to the greater proportion of [B]lacks than [W]hites with thwarted mobility aspirations. It has been found that high distress among lower-class [B]lacks was associated with high goal-striving stress. Other explanations are possible. For example, the joint effects of poverty and discrimination might have synergistic effects that explain the comparatively high distress scores of lower-class [B]lacks, or certain resources for coping with stress might be less readily available to lower-class [B]lacks than to lower-class [W]hites.

See *id.* at 113.

62. When there are a large number of regressors, a computer is sometimes programmed to introduce them one at a time, in a so-called "stepwise regression." The order in which the regressors are introduced may be determined in several ways. Two of the most common ways are: (1) The statistician may specify a priori the order in which the regressors are to be introduced. For example, among many other regressors suppose there were three dummy variables to take care of four different geographical regions; then it would make sense to introduce these three dummy variables together in succession, without interruption from other regressors; (2) The statistician may want to let the data determine the order, using one of the many available computer programs (with names such as "backward elimination," "forward selection" or "all possible subsets"). THOMAS H. WONNACOTT & RONOLD J. WONNACOTT, *INTRODUCTORY STATISTICS FOR BUSINESS AND ECONOMICS* 499 (4th ed. 1990).

63. Klonoff et al., *supra* note 22, at 335.

64. Hierarchical regression attempts to improve standard regression estimates by adding a second-stage "prior" regression to an ordinary model. This regression yields semi-Bayes relative risk estimates by using a second-stage model to pull estimates toward each other when the corresponding variables have similar levels. Unlike classical Bayesian

discrimination was more significantly correlated to these symptoms than were contextual factors such as age, gender, education, social class, and generic stressors.<sup>65</sup> Despite the enormous variability in the social class levels of Blacks researched (for example, some were high school dropouts on welfare, others had law degrees and six-figure incomes), findings indicate that racism may play a role that is as large as, or larger than, social class.<sup>66</sup>

Social class marginalization exacerbates stress due to the compounding effects of racism.<sup>67</sup> As Krieger has stated, "race conditions social class such that exposure to generic life stressors are not greater among the lower classes, but at equivalent levels of Socio-Economic Status, racialized persons experience higher stress burdens and poorer health outcomes."<sup>68</sup> This relationship between race and SES can have direct disparate effects on health in the form of additional stress burden and higher allostatic load,<sup>69</sup> as well as indirect effects in the form of structural barriers to health care and other social resources.<sup>70</sup> While blatant acts of racism and

---

analysis, however, no use is made of previous studies. Compared with results obtained with one-stage conditional maximum-likelihood logistic regression, our hierarchical regression model gives more stable and plausible estimates. In particular, certain effects with implausible maximum-likelihood estimates have more reasonable semi-Bayes estimates. See generally J.S. Witte et al., *Hierarchical Regression Analysis Applied to a Study of Multiple Dietary Exposures and Breast Cancer*, 5 EPIDEMIOLOGY 612 (1994).

65. Klonoff et al., *supra* note 22, at 335.

66. *Id.* at 337.

67. Nancy Krieger et al., *Racism, Sexism, and Social Class: Implications for Studies of Health, Disease, and Well-Being*, 9 AM. J. PREVENTIVE MED. 82, 93-99 (Supp. 1993).

68. *Id.*; see also David R. Williams, *Race, Socioeconomic Status, and Health: The Added Effects of Racism and Discrimination*, in SOCIOECONOMIC STATUS AND HEALTH IN INDUSTRIAL NATIONS 173-88 (Nancy E. Adler et al. eds., 1999).

In addition to conditioning generic life stresses, racial abuses also contribute to greater stress burdens through additional stresses that are specifically related to being a member of a racialized community. For example, in a recent study examining the effects of social class, racism, and stress on the self-reported physical and mental health of 520 Whites and 586 Blacks in Detroit, it was determined that both race-related stressors and general life stressors significantly account for racial differences in physical health status. Black status stresses make a significant additional contribution to the level of psychological distress experienced beyond that accounted for by generic life stresses that all students and young adults experience. Williams et al., *supra* note 20; see also Brian D. Smedley et al., *Minority-Status Stresses and the College Adjustment of Ethnic Minority Freshmen*, 64 J. HIGHER EDUC. 434 (1993) (finding similar results in three studies testing this hypothesis on Black college students and young adults); Norma Rodriguez et al., *Latino College Student Adjustment: Does an Increased Presence Offset Minority-Status and Acculturative Stress?*, 30 J. APPLIED SOC. PSYCHOL. 1523, 1548 (2000) (finding that Latinos experience additional stresses as a result of their cultural group affiliation). These studies also indicate that Black students evidence greater sensitivity to race-related stressors than Chicano, Latino, and Filipino students and that being the numerical majority in a large university does not reduce the additional burden of Black-status stresses experienced by Latino students. See Smedley et al., *supra*.

69. See *infra* note 34.

70. These effects include: access to housing, employment, and, safety; acceptance of a societal stigma of inferiority (such as acceptance of Black status); high-risk unhealthy



discrimination might be less commonplace today, more common insidious and aversive forms of racism have evolved.<sup>71</sup> As Calmore points out:

During the 1980s and 1990s, it appears that American racism had become known throughout the world as “state of the art.” Its picaresque genius lay in developing so brilliantly the conception that it had disappeared except as it was “imagined” by its subordinated subjects, who continued to “suffer” in an unbelievable world—a color blind world of white innocence. Race neutrality, or “racism in drag” (to quote Pat Williams) had displaced race consciousness.<sup>72</sup>

What are known as micro-aggressions in the critical race theory literature,<sup>73</sup> or the battery of hyper-visibility or ascribed otherness,<sup>74</sup> might

---

lifestyles; and negative affective states (such as depression hostility, dispositional pessimism). See generally Rodney Clark et al., *Racism as a Stressor for African Americans: A Biopsychosocial model*, 54 AM. PSYCHOLOGIST 805 (1999); Krieger et al., *supra* note 67; Williams, *supra* note 68.

71. See Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (analyzing the law’s singular recognition of intentional, as opposed to unconscious racial animus and arguing that by recognizing only explicitly articulated, intentional, conscious racism, American anti-discrimination law itself embodies a form of White privilege).

72. John O. Calmore, *The Case of the Speluncian Explorers: Contemporary Proceedings*, 61 GEO. WASH. L. REV. 1764, 1776 (1993).

73. See e.g., Peggy C. Davis, *Law as Microaggression*, in LAW AS CRITICAL RACE THEORY: THE CUTTING EDGE 170 (Richard Delgado ed., 1995). Another measure, which is akin to the notion of racism as micro-aggression, takes account of everyday discrimination and attempts to measure more chronic, routine, and relatively minor experiences of unfair treatment. It sums nine items that capture the frequency of the following experiences in the day-to-day lives of respondents: being treated with less courtesy than others; being treated with less respect than others; receiving poorer service than others in restaurants or stores; people acting as if you are not smart; people acting as if they are better than you; people thinking you are dishonest; being called names or insulted; and being threatened or harassed. Examples of such cumulative behavior include making exclusionary decisions in college admissions and employment, treating successful Blacks as exceptions that prove the rule of Black inferiority, and the randomized disparate treatment that a person of color may encounter from the bus to the boardroom. See Williams et al., *supra* note 20, at 341; John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 PSYCHOL. SCIENCE 315 (2000).

74. I use the term “ascribed otherness” to delineate the fact that there are consequences that flow from how we are perceived and interpreted by the observer. That process of interpretation—the “what are you” question and subsequent judgment—based not only on one’s self-conceptualization and performance of identity, but on how others perceive one’s identity and performance—this is the “what one is thought to be” reference point. For instance, if an observer thinks that a person is a lesbian, he or she may treat that individual differently, whether or not the person actually is a lesbian. Sikh Americans and others who are deemed to “look” Arab or who are thought to be Muslim are painfully aware of this ascribed otherness in the wake of 9/11. See generally Human Rights Watch, *Hate Crimes in the*

now represent the preferred manner of discrimination and racial abuse of persons of color. The cumulative impact of micro-aggressions, those daily interferences and assaults on one's bodily and mental integrity based upon race, has the potential to be the straw that breaks the camel's back due to the relentless nature of the racialized bombardment and the difficulty of attributing racial animus, that hostility which is thought to indicate intention. Significantly, macro-aggression<sup>75</sup> continues to exist in the form of structural constraints and barriers to access and control over essential resources, resulting in continued residential segregation, disparate educational access, and limited access to quality health care.<sup>76</sup>

Racism has substantial pathogenic, psychological, and physical effects.<sup>77</sup> Moreover, a strong relationship exists between mental health,

---

*Aftermath*, at <http://www.hrw.org/campaigns/september11/#hatewatch> (last visited Oct. 23, 2003); Educators for Social Responsibility, *List of Publicly Reported U.S. Hate Crimes Against Arabs, Muslims and other South Asians From September 11 Through September 26, 2001*, at <http://www.esnational.org/discrimincidents200109.htm> (last visited Oct. 23, 2003).

75. Katheryn K. Russell, *The Racial Hoax as Crime: The Law as Affirmation*, 71 IND. L.J. 593 (1996). Russell states:

Microaggressions—individually directed, incessant, and cumulative assaults—do not operate in a vacuum. In addition to one-on-one aggressions, Blacks are confronted with assaults upon their group. Group assaults are termed macro-aggressions. Macroaggressions are attacks, insults, and/or pejorative statements made against Blacks by Whites. Unlike microaggressions, however, they are neither directed at nor designed to offend a specific Black person. Further, they are primarily characterized by the effect they have of rendering Blacks invisible and portraying them in a stereotypically negative light. Finally, macroaggressions are played out through the press at the national level, and as a result become part of our collective racial consciousness.

*Id.*

76. See HEALTH, RACE AND ETHNICITY (Thomas Rathwell & David Phillips eds., 1986), for a comprehensive assessment of a multiplicity of health issues implicated by race and racialization.

77. HANDBOOK OF RACIAL AND ETHNIC MINORITY PSYCHOLOGY, *supra* note 55, at 386. It is important to acknowledge, however, that there is substantial individual and group variability in the experience of racism and discrimination, with the quantity and severity of racism a person experiences depending to some degree on his or her phenotypic characteristics (skin color, hair, other physical features) and social mannerisms (such as clothing, speech, social skills). "Those who look, sound, or behave more "White" are more likely to be accepted and less likely experience overt discriminatory experiences than those with more ethnically distinct features, accents, and behaviors." Similarly, there is considerable anecdotal and some empirical evidence of differences in reported risk of exposure to discrimination, with poor male Blacks and Latinos, reporting more overt experiences with discrimination than other ethnic groups ("driving while Black," assumptions that young Black and Hispanic males are likely to be gang members, or sentencing differences as a function of race). See also Marjorie S. Zatz, *Race, Ethnicity, and Determinate Sentencing*, 22 CRIMINOLOGY 147 (1984) (discussing the subtle forms of racial disparities that still exist to enhance or mitigate sentence lengths). But cf. Malcolm D. Holmes et al., *Judges' Ethnicity and Minority Sentencing: Evidence Concerning Hispanics*, 74 SOC. SCI. Q. 496 (1993) (explain-

physical health, and well-being—the connection might be even more pronounced for Blacks in America given the evidence of disparate physical health for minority populations.<sup>78</sup> Current evidence indicates that while the general health for residents of the United States has improved significantly in the past decade, this improvement has not been uniform. Whites enjoy a significant health advantage over racial and ethnic minorities in virtually all major health status indicators.<sup>79</sup> The notion of socially induced stress as a precipitating factor in chronic disease is gaining acceptance. Many now recognize that stress can be one of the components of any disease, not just of those designated “psychosomatic.” Indeed, chronic diseases are etiologically<sup>80</sup> linked to excessive stress and, in turn, this stress is a product of specific socially structured situations inherent in the or-

---

ing that further research is necessary to determine whether minorities are discriminated against in the judicial system).

78. See National Center on Minority Health and Health Disparities Website, available at [http://ncmhd.nih.gov/old/about\\_ncmhd/what.asp](http://ncmhd.nih.gov/old/about_ncmhd/what.asp) (last visited Dec. 4, 2003) (stating that minorities bear a disproportionate burden of health problems); AHRQ Focus on Research: Disparities in Health Care, <http://ahrq.gov/news/focus/disparhc.htm> (last visited Dec. 4, 2003) (citing higher cancer and diabetes rates among African Americans); Addressing Racial and Ethnic Disparities in Health Care: Fact Sheet, <http://ahrq.gov/research/disparit.htm> (last visited Dec. 4, 2003) (discussing the lack of a usual source of health care for African Americans); see also National Center for Chronic Disease Prevention and Health Promotion, *Racial and Ethnic Approaches to Community Health (REACH 2010): Addressing Disparities in Health*, [http://www.cdc.gov/nccdphp/aag/aag\\_reach.htm](http://www.cdc.gov/nccdphp/aag/aag_reach.htm) (last visited Dec. 4, 2003) [hereinafter NCCDPHP] (stating that mortality rates until age 85 are higher for Blacks than for Whites); Ellen Beck, *Medicine Plus Health Information: Health Disparities Persists*, [http://www.nlm.nih.gov/medlineplus/news/fullstory\\_14275.html](http://www.nlm.nih.gov/medlineplus/news/fullstory_14275.html) (finding that disparities in morbidity are also pronounced; the African American rate of diabetes is more than three times that of Whites; heart disease is more than 40 percent higher than that of Whites; prostate cancer is more than double that of whites; HIV/AIDS is more than seven times that of Whites; deaths due to HIV/AIDS have increased dramatically in the African American population in the past decade, and this disease is now one of the top five causes of death for this group; breast cancer is higher than it is for Whites, even though African American women are more likely to receive mammography screening than are White women); James S. Marks, *Assistant Secretary for Legislation: Testimony on Infant Mortality and Prenatal Care*, <http://www.hhs.gov/asl/testify/t970313a.html> (testifying that infant mortality is twice that of Whites; the disparity in infant mortality rates, which are considered sensitive indicators of a population's health status, is particularly stark; it is not entirely accounted for by socioeconomic factors; although infant mortality tends to decrease with maternal education, the most educated Black women have infant mortality rates that exceed those of the least educated White women).

79. NCCDPHP, *supra* note 78, at 25; see also David R. Williams & Chiquita Collins, *US Socioeconomic and Racial Differences in Health: Patterns and Explanations*, 21 ANN. REV. SOC. 349 (1995) (discussing the widening socioeconomic differential in health status and an increasing racial gap in health between Blacks and Whites due to the worsening of health status of the Black population).

80. Etiology is “a branch of knowledge concerned with causes; specifically: a branch of medical science concerned with the causes and origins of diseases.” Merriam-Webster Dictionary Online, at <http://www.m-w.com/cgi-bin/dictionary> (last visited Dec. 4, 2003).

ganization of modern societies.<sup>81</sup> Even susceptibility to microbial infectious diseases is now considered a function of environmental conditions that culminate in physiological stress on the individual, rather than simply a function of exposure to an external source of infection.<sup>82</sup>

Current epidemiologic evidence documents the persistent health status differences in the U.S. population, in which Blacks, Native Americans, Native Hawaiians, and Southeast Asians, in particular, carry a disproportionate burden of morbidity and mortality. These facts create a vicious cycle as poor health status leads to emotional upheaval, stress, and other mental health sequelae; in turn, these disparate mental health implications lead to disparate physical health effects.<sup>83</sup> A review of literature on the subject reveals that stress is a contributor to disease risk and impacts the psychosocial resources of persons such as coping and social support. Indeed such stress moderators partially account for ethnic health disparities:

*[A]t the core of ethnic health disparities is differential exposure and vulnerability to psychosocial stresses moderated by inadequate access to and control over essential material, psychological, and social resources. . . . [T]his disadvantageous stress-resource imbalance is created by social status, defining attributes of race [and] ethnicity and*

---

81. Williams et al., *supra* note 20, at 281 (exploring the "Racism-Stress Paradigm").

82. Williams & Collins, *supra* note 79, at 377-85.

83. *Id.* Different explanations have been offered to account for the excess burden of disease on racial and ethnic minorities, both overall and for specific disorders. See e.g., Richard S. Cooper & James L. Borke, *Intracellular Ions and Hypertension in Blacks*, in *PATHOPHYSIOLOGY OF HYPERTENSION IN BLACKS* 181 (John C.S. Fray & Jancie G. Douglas eds., 1993) (suggesting differences in intracellular ion transfer mechanisms (salt metabolism) as an explanation for differences in essential hypertension); Patrice G. Saab et al., *Influence of Ethnicity and Gender on Cardiovascular Responses to Active Coping and Inhibitory-Passive Coping Challenges*, 59 J. AM. PSYCHOSOMATIC SOC'Y 434 (1997) (suggesting differences in autonomic stress reactivity as an explanation for differences in essential hypertension); Hector F. Myers & Faith H. McClure, *Psychosocial Factors in Hypertension in Blacks: The Case for an Interactive Perspective*, in *PATHOPHYSIOLOGY OF HYPERTENSION IN BLACKS*, *supra*, at 90-106 (suggesting differences in psychosocial risk factors as an explanation for differences in essential hypertension); Clifton Bogardus & Stephen Lillioja, *Pima Indians as a Model to Study the Genetics of NIDDM*, 48 J. CELLULAR BIOCHEMISTRY 337, 337 n.4 (1992) (suggesting differences in genetic susceptibility as an explanation for differences in diabetes rates); Sherman A. James, *John Henryism and the Health of African Americans*, 18 CULTURE MED. PSYCHOL. 163 (1994) (suggesting John Henryism as an explanation for differences in health status and tendency to seek help); Thomas A. Arcury et al., *Faith and Health Self-Management of Rural Older Adults*, 15 J. CROSS-CULTURAL GERONTOLOGY 55 (2000) (suggesting religiosity and spirituality as explanations for differences in health status and tendency to seek help); Hector F. Myers et al., *Behavioral Risk Factors Related to Chronic Disease in Ethnic Minorities*, 14 HEALTH PSYCHOL. 613, 613 n.7 (1995) (suggesting differences in individual health behavior such as dietary intake, exercise, smoking, and drug use as an explanation for differences in health status).

social class that define the social hierarchy and life opportunities [in America].<sup>84</sup>

Psychosocial behavioral risk factors are "nested within geographic, developmental, [and] occupational social environments." The individual characteristics cannot therefore adequately explain environmental effects on health.<sup>85</sup> Predictors of health and health differentials between groups are shaped by race, ethnicity, and social class.<sup>86</sup> Accordingly, contextualization is as important an instrument of analysis in healthcare as it is in legal analysis.

Macro-social factors such as poverty and social status influence health through a variety of intermediary mechanisms, including individual health behaviors, access to and control of psychosocial resources, and exposure to chronic life stresses.<sup>87</sup> For instance, doctors caring for inner-city patients have noted that such patients attend with a greater number of "sociomas,"<sup>88</sup> the psychosocial bundle of burden disparately affecting people of color. The evidence shows that Blacks are generally exposed to more chronic and insidious stresses and report more distress, disease, and dysfunction than Whites.<sup>89</sup> This in turn feeds into general health care issues on many levels. The circularity of physical and mental health is highlighted by the Surgeon General's remarks that, "Americans do not share equally in the best that science has to offer. . . . [D]isparities in mental health services exist for racial and ethnic minorities, and thus, mental illnesses exact a greater toll on their overall health and productivity."<sup>90</sup>

---

84. HANDBOOK OF RACIAL AND ETHNIC MINORITY PSYCHOLOGY, *supra* note 55, at 378.

85. Shelley E. Taylor et al., *Health Psychology: What is an Unhealthy Environment and How Does it Get Under the Skin*, 48 ANN. REV. PSYCHOL. 411, 413 (1997).

86. See David R. Williams et al., *The Concept of Race and Health Status in America*, 109 PUB. HEALTH REP. 26, 28-34 (1994).

87. See Andrew Baum et al., *Socioeconomic Status and Chronic Stress: Does Stress Account for SES Effects on Health*, ANNALS N.Y. ACAD. SCI 131 (1999); Nancy Krieger et al., *supra* note 67; Myers et al., *supra* note 83; Williams et al., *supra* note 86.

88. According to Abraham: "Poor patients' ailments are made worse by delays in getting care, and they show up at doctors' offices with more of what one physician called 'sociomas,' social problems that range from not having a ride to the doctor's office, to drug addiction, to homelessness, to the despair that accompanies miserable life circumstances." LAURIE KAYE ABRAHAM, MAMA MIGHT BE BETTER OFF DEAD 4 (1993).

89. Ethnic and racial minorities perceive discrimination as more stressful, although White Americans will report discrimination, particularly claims of reverse discrimination in employment. See Vetta L. Sanders Thompson, *Racism: Perceptions of Distress Among African Americans* 38 COMMUNITY MENTAL HEALTH J. 111, 117 (2002); Krieger et al., *supra* note 67, at 1375-76; Williams, *supra* note 68.

90. *Mental Health: Culture, Race, Ethnicity—Supplement, Message from Tommy G. Thompson, Surgeon General's Report*, <http://www.mentalhealth.org/cre/message.asp> (last visited Oct. 13, 2003).

As part of his commitment to the elimination of inequality for Americans with disabilities, President George W. Bush established the President's New Freedom Commission on Mental Health in April 2002.<sup>91</sup> The Commission was charged with identifying policies that could be implemented by all levels of government to maximize the utility of existing resources, improve coordination of treatment and services, and promote successful community integration for all persons with serious mental illness or emotional disturbance.<sup>92</sup> The Commission began on the heels of the first ever Surgeon General's report devoted entirely to mental illness.

According to the report,<sup>93</sup> mental health is essential for personal well-being, family relationships, and successful contributions to society. While documenting the disabling nature of mental illness, the Surgeon General's report also indicates that, as with access to physical health, there are racially disparate statistics with respect to mental health. Specifically, racial minorities have less access and availability to mental health care and tend to receive poorer quality mental health services.<sup>94</sup> More relevant to the analysis contained in this Article, the report indicates that factors such as race, ethnicity, and culture affect all aspects of mental health and illness but have particular impact upon the nature of the stressors confronted.<sup>95</sup> A growing number of researchers have emphasized that racism is a neglected but central societal force that adversely affects the health of people of color.<sup>96</sup>

The cause of these adverse effects comes in two forms. First, the quality and quantity of health-enhancing resources, including medical care, are disparately distributed to members of marginalized communities.<sup>97</sup> Second, racism shapes the creation and operation of societal institutions, socio-economic opportunities, mobility and access, life opportunities, and the general well-being of racialized groups and individuals.

91. See President's New Freedom Commission on Mental Health Official Website (2002), at <http://www.mentalhealthcommission.gov> (last visited Oct. 13, 2003).

92. *Id.*

93. DEP'T OF HEALTH & HUMAN SERVS., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL (1999).

94. *Id.* at 180.

95. *Id.* at 182.

96. See HANDBOOK OF RACIAL AND ETHNIC MINORITY PSYCHOLOGY, *supra* note 55. Moreover, the disparate health care reality is a civil rights issue. See Sidney Watson, *Reforming Civil Rights With Systems Reform: Health Care Disparities, Translation Services and Safe Harbors*, 9 RACE & ETHNIC ANC. L. J. 13 (forthcoming 2003) (noting racial disparities in medical care are a civil rights issue and also a quality of care problem).

97. HANDBOOK OF RACIAL AND ETHNIC MINORITY PSYCHOLOGY, *supra* note 55, at 1-9.

### B. Coping

Coping is a term used to describe the manner in which individuals respond to stressors.<sup>98</sup> The methods of coping most commonly employed by Blacks further illustrate the connection between racial abuse and the mental and physical sequelae that result from such abuse, and suggest a heightened reaction to specific racial abuses.<sup>99</sup>

Models of stress and disease often distinguish among stress exposure, which involves confrontation with an environmental stressor, stress appraisal, which involves estimating the relative threat of the stressor, and weighing demands against available resources and stress response, which involves emotional, physiological, and behavioral responses to the appraised stressor.<sup>100</sup> There is, of course, enormous variation in how an individual responds to racial abuse. Four stress coping styles employed by Black individuals have been identified by Myers:

- the overt expression of anger or fear;
- suppression and inward direction of anger;
- artificial methods of reducing tension (e.g., narcotics and alcohol); and
- self-directed stress-management style based upon the demands of the situations.<sup>101</sup>

Researchers believe that the fourth option is the most productive and valuable.<sup>102</sup> However, this is not an option for everyone.<sup>103</sup> Inevitably,

98. See Richard S. Lazarus, *Coping Theory and Research: Past, Present, and Future*, 55 PSYCHOSOMATIC MED. 234 (1993). Coping is defined as the strategies engaged in to manage demands that are perceived as taxing or exceeding one's available resources. See RICHARD S. LAZARUS & SUSAN FOLKMAN, *STRESS, APPRAISAL AND COPING* 141 (1984).

99. *Id.*

100. Lobel et al., *Prenatal Maternal Stress and Prematurity: A Prospective Study of Socio-economically Disadvantaged Women*, 11 HEALTH PSYCHOL. 32 (1992).

101. Myers, *supra* note 26, at 148.

102. See Linda James Myers et al., *Physiological Responses to Anxiety and Stress: Reactions to Oppression, Galvanic Skin Potential, and Heart Rate*, 20 J. BLACK STUD. 80 (1989).

103. A critical factor in evaluating the impact of stressful events is the individual's perception of them. Such perception depends on personal characteristics determining the appraisal of the significance of potentially harmful, challenging, or threatening events. It is this cognitive process which differentiates a stressor from a stimulus and which determines the nature of the stress reaction and subsequent coping activities. Barbara Snell Dohrenwend & Bruce P. Dohrenwend, *Overview and Prospects for Research on Stressful Life Events*, in *STRESSFUL LIFE EVENTS: THEIR NATURE AND EFFECTS* 317 (Barbara Snell Dohrenwend & Bruce P. Dohrenwend eds., 1973).

The perception of stressful events is mediated by two broad categories of variables, one consisting of personal or "internal" factors and the other of interpersonal or external ones. Personal factors include: biological and psychological threshold sensitivities, intelligence, verbal skills, morale, personality type, psychological defenses, past experience, and a

there are victims of racial abuse incapable of such self-reflection, or without the coping mechanisms for relieving stress. Arguably, these are the individuals most likely to come into contact with the criminal law and for whom an infusion of critical psychology into criminal mitigatory defenses is the most relevant.

As mentioned above, in addition to the mental sequelae of racism, there are also corollary physiological responses. In assessing the cumulative burden of racism, it is reasonable to expect greater psychological and physiological impacts, and consequently greater allostatic load, in those that report repeated exposure to both objectively measurable stressors as well as subjectively experienced stress and distress due to exposure to racism.<sup>104</sup> Therefore, "stress response," as explored in the critical psychology, is an essential point of analysis for provocative conduct and the reaction thereto, the disturbance assessed in extreme emotional disturbance, and the mental impairment determination in diminished capacity. Specifically, if the stress response relates to a micro- or macro- aggression, this information may be worthy of evidentiary consideration in the criminal defense analysis.

Of course, it is also likely that racialized individuals and groups will differ in the degree to which they have developed "racial" filters, cognitive

---

sense of mastery over one's fate. Demographic characteristics such as age, education, income and occupation may also contribute to the individual's evaluation of stressful conditions and his response to them. *Id.*

Another broad set of contingencies, or mediating variables, in the stress equation which may be considered social or transactional in nature consists of the buffers and supporters accessible to the individual in his social environment. The social positions individuals or groups occupy in a community can materially influence their experience of stress and presumably, therefore, their vulnerability to a broad range of chronic diseases. While the effects of exposure to stressful events may be reduced for those who are effectively embedded in social networks or support systems, they are commonly exacerbated by deficiencies or impairments of such systems. Lawrence E. Hinkle, Jr., *The Effect of Exposure to Culture Change, Social Change, and Changes in Interpersonal Relationships on Health*, in *STRESSFUL LIFE EVENTS*, *supra*. Three such categories—social isolation, social marginality (Black membership) and status inconsistency—may be considered in this context.

Similarly, persons with more skills, assets, and resources and with more versatile defenses and broader experience tend to fare better when confronted with abuses or stressors. In general, the more competence individuals have demonstrated in the past, the more likely it is that they will cope adaptively with a current stressor. The more experience they have had previously with a particular stressor, the more probable that their present responses will be effective. Jeremone K. Myers et al., *Social Class, Life Events, and Psychiatric Symptoms: A Longitudinal Study*, in *STRESSFUL LIFE EVENTS*, *supra*.

104. See Cheryl A. Armstead et al., *Relationship of Racial Stressors to Blood Pressure Responses and Anger Expression in Black College Students*, 8 *HEALTH PSYCHOL.* 541 (1989); see also Carolyn Y. Fang & Hector F. Myers, *The Effects of Racial Stressors and Hostility on Cardiovascular Reactivity in African American and Caucasian Men*, 20 *HEALTH PSYCHOL.* 64 (2001); Nancy Krieger & Stephen Sidney, *Racial Discrimination and Blood Pressure: The Cardiac Study of Young Black and White Adults*, 86 *AM. J. PUB. HEALTH* 1370 (1996); *HANDBOOK OF RACIAL AND ETHNIC MINORITY PSYCHOLOGY*, *supra* note 55, at 179–234.



schemas, or scripts that mediate how they interpret and respond to “racially meaningful experiences” experiences.<sup>105</sup> American history and contemporary racial problems may explain why some individuals or groups have more sensitive racial filters that predispose them to interpret a wider range of experiences and events as “racially meaningful.” Such a racial default position should come as no surprise—American history has taught Blacks and other people of color to be wary of Whites and has led to heightened scrutiny of suspect behavior or speech. Interracial communications are burdened by subtext; little is taken at face value in such interactions and reactions are often devoid of filtration. Admittedly, responses need not be violent. There are substantially different individual responses to stressors. These individual responses are conditioned by factors related to the constitutional make-up of an individual, coping<sup>106</sup> skills, and resources such as financial, religious and familial access for counseling and support. Additionally, psychological behavioral factors are likely to mediate or moderate distress effects on well-being.<sup>107</sup>

According to Banyard and Graham-Bermaun, “coping occurs in a context shaped by social forces based on gender, race, class, age and sexual orientation. These forces exert a powerful influence both on how a stress-

---

105. Furthermore, racialized persons may also differ in the extent and salience of racial filters and scripts that influence their relative “sensitivity” to stressful racial cues and degree of reactivity to racially meaningful events. These individual and group differences in appraisal also apply to life stresses generally. Some racialized people may minimize or downplay the significance of stressful events and experiences. This may be interpreted as a response bias (such as denial, minimization) and a form of defensive reappraisal and coping. However, it may also be the result of habituation to a chronic stressor to which one has become familiar and for which one has developed a way of coping that reduces the impact of the stressor (such as less distress in the face of limited financial resources). It is noteworthy that even though psychological accommodation can be protective against distress, exposure to the stressors still has physiologic effects and costs, and it is the latter that might contribute over time to the cumulative vulnerability that results in adverse health outcomes and responsive behavior. See HANDBOOK OF RACIAL AND ETHNIC MINORITY PSYCHOLOGY, *supra* note 55, at 389.

106. The impact that exposure to chronic stresses has on health is also moderated by how one copes with these experiences. The relative effectiveness of coping effort is determined by the type of coping (such as active vs. passive), the type of stressor (such as controllable vs. uncontrollable), match between type of stressor and the coping response used, and the availability of adequate resources for coping (such as adequate knowledge or access to treatment). See *supra* note 98.

107. The vulnerability of a person to such racialized stressors is dependent upon appraisal and coping styles (such as cognitive schemas or proactive vs. avoidant coping), social supports, psychological dispositions (such as perceived persona and collective control; dispositional optimism/pessimism), and sociocultural factors (such as acculturation and acculturative stress, and religiosity that can either exacerbate or moderate stress vulnerability). See Richard J. Contrada et al., *Ethnicity-Related Sources of Stress and their Effects on Well-Being*, 9 CURRENT DIRECTIONS IN PSYCHOL. SCI. 136 (2000); Krieger & Sidney, *supra* note 104.

ful situation is appraised and on judgments made about what coping resources are available."<sup>108</sup> An individual's social position can constrain resources and choice of coping strategies. Therefore, those with more resources typically cope "better."<sup>109</sup> Members of marginalized groups may face special challenges to active, as opposed to passive, coping. Factors such as limitations on finances, information, and access to requisite technical expertise or other resources, as well as cultural, social, or psychological barriers, may discourage active coping.<sup>110</sup>

As such, Blacks confronted with interactions that are hostile or otherwise uncomfortable likely adopt a default position, described by critical psychologists as "Constant Threat Awareness,"<sup>111</sup> which ascribes racial animus to those interactions. Unlike most Whites, many Blacks are aware of their racialized status.<sup>112</sup> Blacks are often either consciously or unconsciously on their guard, gauging how they are perceived and treated by Whites and by other ethnic or racial groups. Many Blacks engage in what is colloquially known as "picking your battles."<sup>113</sup> Such a state of heightened vigilance, hyper-reactivity, and preemptive coping is psychologically taxing, tiring, and is likely to increase the risk of psychological distress and other disorders.<sup>114</sup> In addition to being burdensome, such constant "sizing

108. Victoria L. Banyard & Sandra A. Graham-Bermann, *Can Women Cope?: A Gender Analysis of Theories of Coping with Stress*, 17 *PSYCHOL. WOMEN Q.* 303, 311 (1993).

109. See Taylor et al., *supra* note 85, at 411.

110. For example, assertiveness in Black men and women is often misperceived as aggressiveness or arrogance and responded to with fear or punishment. On the other hand, passive compliance (such as going along to get along), although useful in deflecting threats, does not usually yield desired goals (such as earned rewards) and has been shown to confer greater health risks. See Krieger & Sidney, *supra* note 104. Lower-class members experience more severe though not more frequent stressful events than do middle-class members. Within social class, stressful situations are both more frequent and more severe for Blacks than for Whites. Dohrenwend & Dohrenwend, *supra* note 103.

111. Another preferred coping strategy is not to shrink from problems, but to confront them. See, e.g., C.L. Broman, *Coping with personal Problems*, in *MENTAL HEALTH IN BLACK AMERICA* 117-29 (Harold W. Neighbors & James S. Jackson eds., 1996); *HANDBOOK OF RACIAL AND ETHNIC MINORITY PSYCHOLOGY*, *supra* note 55, at 388.

112. See BARBARA J. FLAGG, *WAS BLIND BUT NOW I SEE: WHITE RACE CONSCIOUSNESS AND THE LAW* 969 (1998) (stating that the most interesting thing about White self perception is the fact that in most instances they have no racial self-awareness).

113. The impact that exposure to chronic stress has on health is moderated by how one interprets or appraises and responds to the stress experience. Stress appraisal involves the weighing of one's resources against the demands of the stressor to determine how large a threat the stressor is to well-being. Resources encompass personality factors such as self-esteem and self-efficacy, as well as demographic and social factors, such as monetary resources and social support. For Blacks, stress appraisal involves not only the subjective examination of resources versus demands but also the filtering of stressful experiences through one's unique cultural lens. See *HANDBOOK OF RACIAL AND ETHNIC MINORITY PSYCHOLOGY*, *supra* note 55, at 389.

114. See *id.* at 388. This hypothesis receives partial support in studies of Black-White differences in twenty-four hour ambulatory blood pressure, which suggest that the

up," by which the possibilities for racial conflict are estimated, may lead to misinterpretations or overreactions due to allostatic load. This in turn increases the impact such events may have on health and well-being. Criminal law implications stem from the reasonableness assessment.<sup>115</sup> Indeed, the (over)reaction which might result from a racialized encounter under a scenario of prolonged or heightened threat awareness is the catalyst of the criminal law defense theory. For instance, had the Walker family in *Bohanon* responded to the threatening letters with violence, such actions might have provided the prototypical case to examine the relevance of critical psychology—the Walker's allostatic loads, threat awareness, and level of (hyper)vigilance would be material for the determination of criminal culpability.

### C. The Humiliation Dynamic

Humiliation is an understandable consequence of racism, especially blatant and explicit racial abuse. Three players must exist in order to create a dynamic of humiliation: perpetrator, victim, and witness.<sup>116</sup> If these three roles exist in the presence of ridicule, scorn, contempt, or other degrading treatment, the humiliation dynamic is likely to occur.<sup>117</sup>

The humiliation dynamic can cause psychic trauma because repeated subjection to humiliation breeds common contempt, which may be inwardly or outwardly directed. As is the case with stress, individual reactions to humiliation are variable and dependent on a number of factors. The most common consequential responses are:

- the creation of a person who is very passive;
- the creation of a person who is enraged;<sup>118</sup> and
- frustration from the humiliation of racism which can be turned inward resulting in self-abusive behaviors, such as alcoholism or drug-abuse, or in violent acts towards fellow people of color.<sup>119</sup>

---

significantly higher mean blood pressures among Blacks may be the result of maintaining an unconscious state of heightened physical arousal even during sleep. See Williams et al., *supra* note 20. Among African Americans, in particular, symptoms of depression are associated with increased risk of hypertension. Thomas Pickering, *Depression, Race, Hypertension, and the Heart*, 2 J. CLINICAL HYPERTENSION 410–12 (2000).

115. See discussion *infra* Part III.

116. See Jean T. Griffin, *Racism and Humiliation in the African Community*, 149 J. PRIMARY PREVENTION 150 (1991).

117. *Id.*

118. Note that these two responses are not mutually exclusive, as one can be both passive and enraged.

119. *Id.* at 152.

No matter the manner of coping, "in any consideration of the humiliation dynamic and racism, it should be noted that among the most potent consequences of humiliation are that it engenders rage and causes damage to victims' sense of self and identity."<sup>120</sup>

It is indisputable that the humiliation dynamic has been employed against African Americans for quite some time. Social control through the use of humiliation pervaded the institution of slavery as Blacks were sold in public auctions, publicly whipped and disciplined, and invasive inspections of their bodies and the bodies of their loved ones were routinely carried out, often in public.<sup>121</sup> Indeed as Fede has noted, "[a] fixed principle of slave law granted masters the unlimited right to abuse their slaves to any extreme of brutality and wantonness as long as the slave survived. [Laws that] appeared to protect slaves from violent [W]hite abuse [in fact served a] legitimating purpose."<sup>122</sup> In the context of the plantation, all three players necessary for the existence of the humiliation dynamic were present.

The plantation was the place most masters and slaves struggled to define their relationship . . . Punishment was central to that relationship. There was a coherent purpose in punishment: it was one procedure used to "degrade and undermine" the humanity of the slave and "so distinguish him from human beings who are not property." At the same time, there were limits on the amount or type of violence that society would accept. . . . But as Daniel Flanigan notes: 'it was in the protection of [B]lacks from crime rather than the treatment of [B]lack offenders that the criminal law of slavery failed most miserably'. . . . To limit the power of slaveowners was always difficult, and it was not at all irrational to treat the violence they used against their slaves as if it were outside the legal order, as a noncrime. Vicious such a policy choice would be, but it would be logical. . . . The laws actually 'decriminalized' violence to the extent that it was thought a 'necessary' or 'ordinary' incident of slavery."<sup>123</sup>

---

120. *Id.* at 150.

121. Bennett notes that it was common for naked slaves to be crowded into stalls. Men, women, and children would be inspected to assess their value. After being sold, enslaved Africans were routinely branded with hot irons in order to facilitate identification. Given the fact that these humiliations were often witnessed by crowds of people, all three roles necessary for operation of the humiliation dynamic were present. See generally LERONE BENNETT, JR., *BEFORE THE MAYFLOWER: A HISTORY OF THE NEGRO IN AMERICA* (rev. ed. 1964).

122. THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619-1860* 182-183 (1996).

123. *Id.*

Whites were actually not discouraged from abusing and humiliating African slaves. Indeed such behavior had moral, physical, and legal sanction.<sup>124</sup>

The cultural imagery of humiliation is a permanent fixture in the lives of many Blacks. In this vein, the role of the media as a creator and purveyor of culture in the contemporary humiliation of Blacks deserves further analysis. The news media, as well as television programs like COPS, inscribes humiliating images on the psyche of many Blacks. As Griffin has explained:

One of the destructive results of the legacy of slavery is that African Americans experience themselves as society's underdogs. They undergo a legacy of repeated public humiliations, symbolized for them by the typical nightly local newscast in those parts of the country where it has become routine to have TV coverage of African American males being led to jail in

---

124. Slaves were deprived of two fundamental means of legal defense: the right to testify against White persons and judgment by a body of their peers. See ROBERT SHAW, *A LEGAL HISTORY OF SLAVERY IN THE UNITED STATES 174-75* (1978). Penalties inflicted upon slaves for given offenses were routinely more severe than those assigned to White persons for the same crimes. *Id.* Further, the conduct of the slave and, to a lesser degree, of free Blacks was also controlled by an additional body of vexatious petty enactments or municipal regulations that did not apply at all to the White community. *Id.* The slave was exempt from a few laws, usually of a family or moral nature, that applied to White persons. *Id.* He could not be prosecuted for bigamy or adultery, such crimes implying the recognition of legal marriage, which was denied to slaves. *Id.* Even the rape of one slave by another slave was not a crime at all, or was considered so minor an offense as seldom to give rise to prosecution. *Id.*

But this slight exemption was offset by a wide range of infractions that applied solely to slaves such as: gathering of more than seven male slaves at any place, without a White man among them; traveling beyond the limits of a town, or of a plantation, where a slave lived, without being accompanied by a White person or without a pass; being out upon the streets of a town or city, without a pass, after nine o'clock at night; frequenting grog shops; being found drinking or gaming; giving or selling alcoholic drinks to slaves (an offense on the part of White persons); hiring themselves out; renting or occupying, on his or their own account, any room, house or store; keeping, or carrying, a firearm; riding horseback, without the permission of his owner; keeping, or hunting with, a dog, even on his master's property; keeping or trading in any article for sale, without specific written permission from his master; keeping horses, cattle or swine as his own property (possession of chickens usually allowed, or even encouraged). *Id.*

Sources of racial humiliation need not rise to the level of cross-burning nor public tarring and feathering. Indeed, the systemic and systematic experiences of racism are often equally disconcerting when dealing with a faceless perpetrator—such as an institution, enterprise, university, or corporate entity. These perpetrators are frustrating precisely because of the difficulty in piercing the organizational structure to determine culpability. See Lenese C. Herbert, *A Cinema Racial Rating System* (unpublished manuscript, on file with author) (describing the damaging effects of the “racial sucker punch” when Blacks are blindsided by the callous and disparaging depictions of Black people in movies which do not feature a racial story line).

handcuffs for some real or alleged crime. Night after night African Americans sit before their TVs seeing members of their community arrested on charges that are often dropped or that result in verdicts of not guilty, exonerating outcomes that are rarely acknowledged, let alone featured, by the media. The criminal justice system and the news media play very active parts in the everyday humiliations with the accompanying pain, anguish, and sense of oppression experienced repeatedly by members of the African American community as they watch such biased newscasts.<sup>125</sup>

Media propaganda against Blacks in America has a long history and can be traced at least to the movie "Birth of a Nation."<sup>126</sup> Other, perhaps more onerous and certainly more obvious instances of humiliation include driving, walking, and standing while Black and Brown.<sup>127</sup> Over the last few years there have been public admissions of what most people of color, especially Black and Brown Americans, have known for years—that racial profiling is a prevalent practice amongst police, security guards, and customs and immigrations officials.<sup>128</sup>

These encounters are humiliating in the least and enraging at most. To be strip-searched, frisked, and wrongly accused of a crime is a terrifying experience that can generate a plethora of debilitating reactions and emotions. For example, the trauma, both mental and physical, inflicted upon the young Black woman who was publicly strip-searched by metropolitan police in Toronto reveals the depth of this injury.<sup>129</sup> Any public search is degrading and dehumanizing mistreatment calculated to humiliate. The mental and physiological sequelae of a public strip search are almost unimaginable. The effects of such humiliation may render the victim mentally disordered and increasingly vulnerable to racial and other forms of abuse.

---

125. Griffin, *supra* note 116, at 153; see also THE MEDIA IN BLACK AND WHITE (Everette E. Dennis & Edward C. Pease eds., 1997); ROBERT M. ENTMARD & ANDREW ROJECKI, THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA (2000).

126. See generally VINCENT F. ROCCHIO, REEL RACISM: CONFRONTING HOLLYWOOD'S CONSTRUCTION OF AFRO-AMERICAN CULTURE 29 (2000).

127. See generally DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 129–39 (2002) (describing how racial profiling affects Latinos, Asians, and Arabs); Victor C. Romero, *Racial Profiling: "Driving While Mexican" and Affirmative Action*, 6 MICH. J. RACE & L. 195 (2000); Victor C. Romero, *Critical Race Theory in 3 Acts: Racial Profiling, Affirmative Action, and Diversity Visa Lottery*, 66 ALB. L. REV. 375 (2003).

128. See HARRIS, *supra* note 127, at 16–48, 129–44; Racial Profiling Data Collection, at <http://www.racialprofilinganalysis.neu.edu> (last visited Oct. 23, 2003).

129. Audry Smith was on vacation in Canada in 1996 when police wrongly accused her of drug trafficking and publicly strip-searched her in a Toronto parking lot. Following the incident, a film crew returned to Jamaica with Smith to discover the impact the experience has had on her and her family members. See AUDRY SMITH: THE FIGHT FOR JUSTICE; see also Griffin, *supra* note 116, at 159.

Black communities and the individuals in them are repeatedly injured by humiliation—injury that begins early in life for Black children.<sup>130</sup> The humiliation of Black children is often present in the institutions in which they must participate, such as the educational system. The body of literature on racial disparities in education is substantial. The literature not only deals with the recent increase in educational segregation and the conditional accreditation of some inner city public schools, but also with the negligent and sometimes oppressive conditions under which Black and Brown children are expected (or not expected) to learn.<sup>131</sup>

One of the more common examples of such educational humiliation is the streaming of Black children, especially boys, into special education classes.<sup>132</sup> Beyond the lowering of personal self-esteem, there is a lowering of esteem associated with one's collective identity, a negative image projected onto entire Black communities.<sup>133</sup> Even for academically successful Black students, it is not uncommon to be taunted by fellow Black students about their academic success. Students are chided about "trying to be White," their proper English and grammar denounced as "talking White." It therefore seems that in the academic setting, some Blacks believe that Black academic attainment is an oxymoron or is a badge of inauthenticity or of cooptation into White culture.<sup>134</sup>

130. Griffin, *supra* note 116, at 159.

131. The Civil Rights Project: Harvard University, Research on Race & Ethnicity, <http://www.civilrightsproject.harvard.edu/research/race.php> (last visited Dec. 4, 2003) (describing research aimed to address civil rights issues affecting Latino and Asian communities); National Association of Elementary School Principals Official Website, <http://www.naesp.org> (last visited Dec. 4, 2003) (advocating for educators to take responsibility for improving the education of poor and minority students).

132. According to Fine: "Black students are three times more likely than White students to be labeled 'mentally retarded.'" Lisa Fine, *Disparate Measures*, EDUC. WEEK ON WEB, <http://www.edweek.org/ew/newstory.cfm?slug=41charlotte.h21> (last visited Oct. 23, 2003).

133. Griffin, *supra* note 116, at 159. Griffin notes:

[S]uch lack of group-esteem is enacted frequently whenever members of the African American community do not trust or accept fellow African American physicians, lawyers, teachers, social workers, or tradespeople. The phrase heard often is, "Get me a WHITE . . . doctor, lawyer, dentist, teacher, plumber, dressmaker, etc." The message that has become internalized is, "If the person is like me, or a member of my racial group, he/she cannot be any good, since I and my whole group are no good."

*Id.* While the comments expressed in the quote above are certainly not uncommon, perhaps some of the desire expressed to retain a White person stems not so much from self-loathing or community loathing, but from the pragmatic reality that White people are able to "get the job done" with greater ease and efficiency due to the many barriers, including systemic and structural impediments, that confront people of color.

134. See Bob Herbert, *Breaking Away*, N. Y. TIMES, July 10, 2003, at A23. Herbert writes:

While self-hatred, to the extent that it can be assessed is rare, negative group attitudes and orientations are quite common. Each of these is an acculturation and assimilation strategy for coping with a racialized world. Discrimination affects attitudes and behaviors towards these coping strategies and, to the extent that individuals understand racism and its insidious nature, they tend to defend self-esteem and image.<sup>135</sup> The violence is not self-denigration, as much as it is misdirected anger vented on less well defended targets than the racist society inflicting the abuse.<sup>136</sup> This is precisely the self-loathing and self-denigration that has its roots in past and present racial abuses. The result, for some, is the culturally manufactured self-fulfilling prophecy of violence in Black communities<sup>137</sup> and community norms calling for "keeping it real" or authenticity through gang or street culture, as opposed to through the alleged "majority" indicia of success.

The anger and rage experienced during these humiliating encounters that is not sublimated via social activism or other constructive behavior is typically discharged in one of two ways, either inwardly in the form of self-destructive behaviors, or outwardly in the form of other-directed destruction.<sup>138</sup> Even where an individual directs their destructive

---

Ms. Jhingory is a 22-year-old [B]lack woman from Washington, D.C., who went off to college a few years ago. "One of the connections I had with my friends back home was that we had always been sort of aspiring hip-hop artists and things like that," she said. "But we were young, you know, and I eventually woke up from la-la land and realized that I would have to get an education and a job, something a little more concrete than fantasies about the hip-hop underground." She noticed that when she came home on visits from school, some of her friends treated her differently. "I don't know if it was out of jealousy or resentment or whatever," she said, "but they would actually say to me, 'You're acting [W]hite now.' They'd say that. They'd say, 'You act [W]hite.' Or, 'You act proper.'"

*Id.*

135. E-mail from Dr. Vetta Thompson, Psychologist, University of Missouri, to Camille A. Nelson, Assistant Professor, St. Louis University School of Law (Aug. 7, 2003) (on file with author).

136. *Id.*

137. For some, the rhetoric in Black communities of "keeping it real" means educational under-attainment, urban warfare, hyper-sexuality, and celebrated criminality. There is much commentary on this philosophy as an externally manufactured, yet accepted implication of hip-hop culture. See Bob Baker, *Notorious PhD*, L.A. TIMES, Mar. 10, 2003, at D1.

138. Griffin, *supra* note 116, at 160. See BELL HOOKS, *KILLING RAGE: ENDING RACISM* 163 (1995) (discussing Black on Black violence as abuse and frustration that cannot be directed against White America without serious consequences). For information about self-destructive behaviors in Black communities, see Alton R. Kirk, *Destructive Behaviors Among Members of the Black Community with a Special Focus on Males: Causes and Methods of Intervention*, 14 J. MULTICULTURAL COUNSELING & DEV. 3 (1986), which contends that stress is significantly related to the degree and amount of power perceived by an individual within the societal context and that, consequently, Blacks experience a great deal of stress.



behavior inwards, they are rendered more vulnerable to forms of abuse, creating a spiral of enhanced vulnerability. Racial abuse, whether explicit isolated incidents, ongoing cumulative humiliations, or structural impediments, wears down even the most resilient victims.<sup>139</sup> What therefore, of the more vulnerable members of the Black community who may lack the coping skills of the Walkers in *Bohanon* and are without substantial coping resources?

For these individuals, responsive violence may result in prolonged interaction with the criminal justice system. Considering the stigma and loss of liberty resultant from a finding of criminal culpability for murder, relevant information pertaining to the circumstances of the killing and the mental vulnerabilities of the racially abused accused should be considered. Accordingly, critical psychology should be introduced as a consideration for mitigated sentencing where passion exceeds reason.

## II. CRIMINAL LAW DEFENSES CAPABLE OF CRITICAL PSYCHOLOGY INFUSION

*"Those who compose the fringe of society have always been the acceptable scapegoats, the butt of jokes, and the favored whipping boys. It resembles the pattern within psychotic families where one child is set up as "sick" and absorbs the whole family's destructiveness. The child may indeed be sick in unsociably visible and dramatically destructive ways, but the family is unhealthy in its conspiracy not to see in themselves the emanation of such sickness. The child becomes the public mirror of quietly enacted personality slaughter."*<sup>140</sup>

Traditionally, in order to be considered a homicide under the law, a killing must have been committed with a degree of premeditated coolness and deliberation under circumstances in which "ordinary men" would not have their reason obscured by passion.<sup>141</sup> Such a homicide, typical of what is considered a first-degree offense, must have sprung from a wicked, depraved, or malignant mind worthy of the attachment of criminal culpability.<sup>142</sup> Accordingly, a homicide committed in the absence of these criteria is deemed worthy of mitigation.

According to the Model Penal Code ("MPC"), "At common law, murder was defined as the unlawful killing of another human being with

---

139. See generally COSE, *supra* note 24.

140. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 167 (1991).

141. *Maher v. People*, 10 Mich. 212, 218 (1862).

142. *Id.*

'malice aforethought.'"<sup>143</sup> The difference between murder and manslaughter was generally understood to be the presence or absence of malice.<sup>144</sup> Malice was a complicated concept under the common law that generally included four states of mind:

- the intent to kill or an awareness that death would result, unless it was caused by the heat of passion;
- the intent to cause grievous bodily injury;
- extreme recklessness variously described as circumstances evincing "a depraved mind," an "abandoned or malignant heart" or a "wanton and wilful disregard of an unreasonable human risk"; or
- the intent to commit a felony, known as the "felony-murder" rule.<sup>145</sup>

Therefore, all unlawful homicides committed without malice aforethought were considered either voluntary or involuntary manslaughter.<sup>146</sup> Involuntary manslaughter consisted of unintentional homicide due to ordinary recklessness arising in the commission of minor crimes<sup>147</sup> while voluntary manslaughter, the precursor to extreme mental or emotional disturbance, has been defined as "an *intentional* homicide, done in a sudden heat of passion, caused by adequate provocation, before there has been a reasonable opportunity for the passion to cool."<sup>148</sup> Passion has typically been defined as rage, but also includes fear or any violent and intense emotion sufficient to dethrone reason.<sup>149</sup> The essence of voluntary manslaughter is the killing of the "provocateur," without malice aforethought, under the sudden impulse of passions ignited by the provocation. The provocation defense, as originally conceived, was a concession to human frailty, and perhaps non-deterability, where the provocative act was of such a nature that it disturbed the judgment and mental faculties of the "reasonable man."<sup>150</sup> The provocative act thus weakened the killer's

143. MODEL PENAL CODE § 210.2 cmt. 1 (Official Draft and Revised Comments 1980).

144. See, e.g., *State v. Faulkner*, 483 A.2d 759, 761 (Md. 1984); *State v. Ward*, 396 A.2d 1041, 1045 (Md. 1978); *Davis v. State*, 39 Md. 355, 362 (1874).

145. MODEL PENAL CODE, *supra* note 143 (citations omitted).

146. *Id.* § 210.3 cmts. 1 & 2.

147. *Id.* § 210.3 cmt. 2.

148. *Cox v. State*, 534 A.2d 1333 (Md. 1988); see MODEL PENAL CODE, *supra* note 143, § 210.3; see also *Faulkner*, 483 A.2d at 761–62; *Ward*, 396 A.2d at 1049–50; *Whitehead v. State*, 262 A.2d 316, 319 (Md. Ct. Spec. App. 1970).

149. MODEL PENAL CODE, *supra* note 143, § 210.3 cmt. 5(a); see also *People v. Borchers*, 325 P.2d 97, 102 (Cal. 1958); *People v. Danielly*, 202 P.2d 18, 27 (Cal. 1949), *cert. denied*, 337 U.S. 919 (1949); *State v. Smart*, 328 S.W.2d 569, 574 (Mo. 1959).

150. See Jeremy Blumenthal, *The Reasonable Woman Standard: A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 22 LAW & HUMAN BEHAV. 33, 33–34, 37 (1998); see also *Ellison v. Brady*, 924 F.2d 872, 878–79 (9th Cir. 1991).

self-control to the point where he was not sufficiently culpable for murder, but only for manslaughter.

This concession to human frailty is important and implicates the rationale for consideration of critical psychology as elucidating the psyche of a racially abused offender. The psychology along with the considered affirmative defenses suggests that one who kills while provoked might demonstrate a significantly different character deficiency than one who kills absent such passion.<sup>151</sup>

The doctrines addressed in this part spring from the evolution of the traditionally defined definition of murder. They are overlapping defenses that take account of the absence of some of the above-mentioned hallmarks of homicide in the first degree—the lack of premeditation, deliberation, and malice. Provocation, extreme emotional and mental disturbance, and diminished capacity share a common genesis, but have evolved to take on separate and unique forms. This part will explore the common history, highlight similarities, and focus on distinctions in these doctrines, especially as they allow for infusion with critical psychology.

### A. Provocation

An intentional killing committed in response to provocation constitutes manslaughter, rather than murder. In most jurisdictions, the defendant must prove the following to establish provocation:

- that the murder was committed under the influence of the heat of passion, produced by adequate or reasonable provocation;
- before a reasonable time had elapsed for the blood to cool and reason to resume; and
- the killing was the result of the temporary excitement, by which self-control was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition.

If these tests are met, the law mitigates the killing to manslaughter.<sup>152</sup>

---

151. MODEL PENAL CODE, *supra* note 143, § 210.3 cmt. 5(a).

152. *Maier v. People*, 10 Mich. 212, 218 (1862). Stated another way, the test is viewed as follows:

1. There must have been adequate provocation, usually in the form of a wrongful act or insult;
2. Which would have been sufficient to deprive the reasonable person of self-control;

Provocation, therefore, is a rule of mitigation for intentional homicides committed under certain extenuating circumstances. The principle involved suggests that reason would, at the time of a killing, be disturbed or obscured by passion to an extent which might render ordinary or reasonable people liable to act rashly or without due deliberation or reflection and instead from passion rather than judgment. Provocation affects the quality of the offender's state of mind as an indicator of moral blameworthiness.<sup>153</sup> Thus, the defense of provocation exists with respect to a charge of murder even though all the elements of the definition of murder have been established; it is an allowance made for human frailty and a recognition that a killing, even an intentional one, is extenuated by the loss of self-control caused by adequate provocation, and is less heinous than an intentional killing by a person in possession of his self-control.<sup>154</sup>

In order to determine whether murder should be mitigated to manslaughter, the circumstances surrounding the homicide are examined and an attempt is made to discover if the victim provoked the murder. This examination of the victim's behavior is an essential difference from the Model Penal Code requirements—only at common law is there a direct provocative nexus requirement between the victim and the insult. Thus, provocation is properly regarded as legal recognition that an inquiry into the reasons for the actor's formulation of intent to kill might reveal factors significant for the grading of the offense.<sup>155</sup> Racist abuses leveled by the victim, therefore, validly form part of the inquiry into the criminal culpability of the offender.

Whether the provocation defense is properly categorized as a partial excuse or partial justification is disputed.<sup>156</sup> Seen as a partial justification,

- 
3. The accused must actually have been provoked and the murder must have been committed in a sudden heat of passion—that is, the murder must have occurred following the provocation and before there was a reasonable opportunity for the passions to cool;
  4. There must have been a causal connection between the provocation, the passion, and the fatal act.

*See generally* Sims v. State, 573 A.2d 1317 (Md. 1990); Glenn v. State, 511 A.2d 1110 (Md. Ct. Spec. App. 1986), *cert. denied*, 516 A.2d 569 (Md. 1986); Carter v. State, 505 A.2d 545 (Md. Ct. Spec. App. 1986); Tripp v. State, 374 A.2d 384 (Md. Ct. Spec. App. 1977); *Whitehead*, 262 A.2d at 316.

153. MODEL PENAL CODE, *supra* note 143, § 210.3 cmt 5(a).

154. In *Cox*, the court defined voluntary manslaughter to include “intentional homicide, done in a sudden heat of passion, caused by adequate provocation, before there has been a reasonable opportunity for the passion to cool.” 534 A.2d at 1335; *see also* *Maier*, 10 Mich. at 168; *Nelson*, *supra* note 4, at 1012–13.

155. MODEL PENAL CODE, *supra* note 143, § 210.3 cmt. 5(a).

156. JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 231–32 (2d ed. 1999) [hereinafter DRESSLER, CASES AND MATERIALS]; JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 31.07(A)–(B) (3d ed. 2001) [hereinafter DRESSLER, UNDERSTANDING CRIMINAL LAW]; JEREMY HORDER, PROVOCATION AND RESPONSIBILITY 85–86 (1996).

the moral notion that the punishment of wrongdoers is justifiable surfaces as a veiled rational. This formulation itself creates a moral problem, as it is disconcerting to suggest that there is less societal harm, and accordingly less criminal responsibility, for a victim's death given his or her immoral or offensive behavior.<sup>157</sup> In this vein, it is inappropriate to construe provocation as a doctrine of justification as the victim's immoral conduct should not, theoretically, jeopardize their life.<sup>158</sup>

While it is arguably never morally right to kill a wrongdoer, it is implicit in the construction of provocation as justification that the deceased provocateur is complicit in orchestrating the loss of self-control of the accused.<sup>159</sup> Similar to the contributory negligence doctrine, the accused, under this formulation of provocation doctrine, is at least partially morally justified in responding punitively against the deceased offender. Accordingly, the paradigmatic facts in a provocation case do not involve the prototypical innocent victim, rather there are arguable moral wrongs committed by all parties involved in the crime—both victim and perpetrator.<sup>160</sup> Indeed, it may be disingenuous to claim that the provocation doctrine does not involve a certain amount of victim-blaming, or at least conduct-blaming, as the actions of the victim by necessity inform the deliberation of what is adequate or reasonable provocation, its seriousness and the accused's corresponding ability to control him or herself.

In the realm of a violent response to a racial offense or insult, the victim intentionally inflicts wounds that are orchestrated to be devastating. It is unlikely that a racially abusive victim is unaware of possible consequences of his abuses; indeed, the provocateur likely recognizes and intends the provocative effect of his words or deeds. Just as a defendant claiming self-defense must properly tender the conduct of the victim, so too in articulating racial abuse as provocative must the conduct of the victim be critically examined.<sup>161</sup> The examination is two-fold.

Common law provocation has both an objective and subjective framework for this analysis. Traditionally, courts limited the circumstances of adequate provocation by casting generalizations about reasonable human behavior into rules of law that structured the doctrine. Adequacy was

---

157. Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 456–58 (1982).

158. *Id.* There are, of course, other defenses where the victim's immoral behavior does jeopardize their life, such as self-defense.

159. A.J. Ashworth, *The Doctrine of Provocation*, 35 CAMB. L.J. 292, 307–08 (1976).

160. *Id.*

161. I recognize and appreciate the many valid reasons for limiting the provocation defense, including both its sexist and homophobic application. It is a challenge of using this doctrine to pragmatically and critically carve out a balanced application of the doctrine that does not further oppress and dehumanize already marginalized groups. See Nelson, *supra* note 4, at 1042.

measured by reference to the objective standard of the hypothetical "reasonable man."<sup>162</sup>

Further, a series of categories emerged to define conduct that a jury might deem adequate provocation. First and foremost, a physical attack might constitute provocation, though not every technical battery could suffice.<sup>163</sup> Of course, even a violent blow would be inadequate if the deceased were entitled to use force, for example in self-defense. Mutual combat became another established category of provocation.<sup>164</sup> Less clearly, a threat of physical attack might constitute provocation, at least in extreme cases. Unlawful arrest would sometimes suffice, and the law frequently recognized witnessing adultery as provocation for intentional homicide of either the unfaithful spouse or the paramour.<sup>165</sup> Certain other acts—chiefly violent or sexual assault on a close relative—might also constitute adequate provocation. Importantly, the courts excluded some situations from the jury's consideration altogether. Thus, it became an established rule at common law that words alone, no matter how insulting, could not amount to adequate provocation.<sup>166</sup> This restriction does not form part of the expanded Model Penal Code provision—extreme emotional or mental disturbance may, in fact, be generated by words. Therefore, as a point of departure for critical psychology, it is fair to interpret the MPC version of provocation as allowing for greater infusion.

The above-mentioned acts mitigate homicide to manslaughter because they create passion in the defendant such that any ensuing violence is not considered the product of free will.<sup>167</sup> Critical psychology is implicated by the possibility of passion generated by racialized psychological issues which adversely affect free will. Provocation, as a doctrine, allows for the possibility that some instances of intentional homicide may be as attributable to the extraordinary nature of the situation as to the moral depravity of the actor.<sup>168</sup>

162. MODEL PENAL CODE, *supra* note 143, § 210.3 cmt. 5(a).

163. *Id.*

164. *Id.*; see also DRESSLER, CASES AND MATERIALS, *supra* note 156; DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 156; HORDER, *supra* note 156; Dressler, *supra* note 157.

165. MODEL PENAL CODE, *supra* note 143, § 210.3 cmt. 5(a) (outlining a feminist critique of the sexist origins of provocation defense, which calls for the complete rejection of the defense).

166. *Id.* § 210.3 cmt. 5(a). The only apparent exception concerned informational words disclosing a fact that would have been provocation had the actor observed it himself. *Id.*

167. DRESSLER, CASES AND MATERIALS, *supra* note 156, at 261–63; DRESSLER, UNDERSTANDING CRIMINAL LAW, *supra* note 156, at 528–29.

168. See Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1281 (1937) ("The more strongly [most persons] would be moved to kill by circumstances of the sort that provoked the actor to the homicidal act, and the more difficulty they would experience in resisting the impulse to which he yielded, the less does his succumbing serve to differentiate his character from theirs.").

The slighter the provocation, measured against the reasonable person, the more reason for defining the actor's behavior as idiosyncratic and to see the result as his own extraordinary susceptibility to intense passion, or deficiency of reason.<sup>169</sup> However, this objective analysis cannot be equitably applied without some removal of the reasonable person from the realm of the abstract—there should be some subjectivization and contextualization to ensure that the objective standard reflects societal realities. I have suggested elsewhere that it is in this regard that critical psychology could prove useful:

Clearly, in order for the reasonable person to be “similarly situated and similarly insulted” and to assess racial abuse, the context of the reality and legacy of racism must be considered. Surprisingly and unfortunately, the consequences on the body, mind, and spirit of living in a world where one is subject to systemic discrimination on a regular basis have largely been unexplored by criminal justice systems. The courts are in a pivotal role of evaluating expert evidence in a manner that will not add to the vulnerabilities of those who come to them seeking justice. “Only by integrating scientific advancements with our ideals of justice can law remain a part of the living fiber of our civilization.”<sup>170</sup>

For provocation to be adequate, it must be “calculated to inflame the passion of a reasonable man and tend to cause him to act for the moment from passion rather than reason.”<sup>171</sup> Racial epithets, or the weaponry of words, are a quintessential example of calculated attacks intentionally meant to inflame or wound the person at whom they are directed. To determine what is reasonable or adequate provocation, the factfinder must consider what would naturally tend to produce such passion in ordinary people that self-control is lost and one acts on impulse without reflection.<sup>172</sup>

*Bohanon* utilizes the epithet “[B]lack bitch,” which implicated both the race and sex of the victim. A simple electronic search reveals that this particular slur was used in over 200 reported cases<sup>173</sup> to abuse Black

---

169. MODEL PENAL CODE, *supra* note 143, § 210.3 cmt. 5(a).

170. Nelson, *supra* note 4, at 1034 (quoting *Fisher v. United States*, 328 U.S. 463, 494 (1946) (Murphy, J., dissenting)).

171. *Carter v. State*, 505 A.2d 545, 548 (Md. Ct. Spec. App. 1986) (quoting PERKINS, *supra* note 5, at 56).

172. See *United States v. Roston*, 986 F.2d 1287, 1294 (9th Cir. 1993) (Boochever, J., concurring).

173. I confess my surprise at obtaining 211 hits in my search of federal and state cases where the specific term “Black bitch” was used in facts leading to lawsuits. See Lexis search, *supra* note 6.

women.<sup>174</sup> The reported cases no doubt comprise only the tip of the iceberg. The searches referenced in this Article reveal that words are indeed frequently and intentionally deployed in abusive ways.<sup>175</sup>

The victims, the Walkers, were naturalized citizens of the United States who emigrated from Jamaica. Thinking Mr. Bohanon to be down on his luck, the victims befriended him and introduced him to their friends. When the Walkers expressed disapproval of the romantic interest Bohanon showed in their niece, they started to receive threatening and vile letters. Bohanon sent between 100 and 300 such letters.<sup>176</sup> The letters often contained obscenities directed to the Walkers, such as the following:

Yo mama is the deadest piece of third world dog sewage nigger in the grave of Foney ass Jamaica. Worms crawl all over her rotten carcass and she loves it. . . . This dead bitch's skin has peeled off and her hair is so dry it feels like cardboard, I mean this bitch is dead. Your wife is next and when she hits the grave she will look like a big tub of nasty ancient. While doing the autopsy before her funeral, they are going to cut her rectum out and those sick doctors are going to fuck her with a big greasy Louisville slugger until the bottom falls out of that rotten dead body. They will be vindictive and fuck her in the ears and eye sockets[,] piss on her dead carcass then take that wet greasy bat and beat her whole body until it sweats and sweaters up like a balloon. . . . They will then urinate on it, ten or fifteen different people and then prepare that black pile of shit for the wake. A word from your mother: Son I feel like a dried up bitch, I'm wrapped in worms like a dead mummy, it's mommy.<sup>177</sup>

The language Bohanon used is deeply offensive on many levels including, but not limited to, race, sex, national origin, and sexuality. Much of this language might incite responsive violence, but the provocative potential of the racialized abuse is particularly relevant since the court in

---

174. See, e.g., *Reynolds v. USX Corp.*, 56 Fed. Appx. 80, 82 (3d Cir. 2003) ("dumb [B]lack bitch"); *Lacy v. Amtrak*, 205 F.3d 1333, 1333 (4th Cir. 2000) ("Amtrak manager called Lacy a '[B]lack bitch'"); *Martin v. City of Silverton*, Williamson 43 Fed. Appx. 948, 950 (6th Cir. 2002) ("How do you like that you [B]lack bitch?"); *Starks v. New Par*, 181 F.3d 103, 103 (6th Cir. 1999) ("called her a [B]lack bitch: and by singling her out and blaming her for inadequate performance"); *Carter v. Chrysler Corp.*, 173 F.3d 693, 696 (8th Cir. 1999) ("'Keep your [B]lack ass down the line, bitch' . . . and referred to her as '[B]lack mother-fucking bitch' or just '[B]lack bitch'").

175. See Lexis search, *supra* note 6.

176. The exact amount of letters is unknown as when the Walkers first informed the police of this abuse, they were told to throw out the letters and that there was really nothing that could be done. *Bohanon*, 290 F.3d at 873.

177. *Id.* at 872.



*Bohanon* recognized that the Walkers had suffered psychological injury from the communications.<sup>178</sup> Specifically, the court accepted the testimony that the Walkers had been humiliated, lived in fear and were understandably stressed by these incidents.

Had the Walkers responded to *Bohanon's* letters with violence, they would deserve sentence mitigation.<sup>179</sup> However, in that situation, the common law, as codified in most jurisdictions, would deny this relief. In so doing, the law denies the reality of psychological injury acknowledged both by the critical psychology and the *Bohanon* court. At this critical nexus, therefore, the ability of the traditional American common law doctrine breaks down to abstraction in its dismissal of the provocative potential of words alone.<sup>180</sup>

Of course, the jury would still need to be satisfied that the provocation at issue did, in fact, produce a mental state of passion in the offender. Provocation is not an applicable defense unless the accused was actually provoked.<sup>181</sup> As stated in the MPC, "[t]he underlying rationale is that the individual whose passions are not aroused by provocation merits the same condemnation and punishment as one who kills without provocation of any sort."<sup>182</sup>

178. The Walkers testified as to their fear, humiliation, and embarrassment. They changed their behavior, becoming much more cautious than they had been. The fact that they suffered psychological injury is clearly inferable from the record. *Id.* at 876.

179. Michael & Wechsler, *supra* note 168, at 1281–82.

180. The general rule is that words alone are not adequate provocation. Indeed, in a case involving the use of racial slurs and derogatory comments, the court of Appeals of Maryland held that: "[i]nsulting words or gestures, no matter how opprobrious, do not amount to an affray, and standing alone, do not constitute adequate provocation." *Sims v. State*, 573 A.2d 1317, 1322–23 (Md. 1990). In this case, someone shot and killed Michael Bucino in the parking lot of the 602 Club in Laurel, Maryland on September 9, 1986. *Id.* Jeffrey Sims claimed that he was not present and did not shoot Bucino, but a jury found to the contrary and convicted him of second-degree murder. Sims contended that the trial judge erred in refusing to instruct the jury concerning voluntary manslaughter. *Id.* According to the court: "Sims claimed he was entitled to a manslaughter instruction because the evidence fairly generated the question of whether the shooter, 1) acted in hot-blooded response to legally adequate provocation, 2) or was entitled to claim imperfect self-defense." *Id.* The court found no fault with the defendant's attempt to interpose inconsistent theories of defense and mitigation, but held *sua sponte* that the evidence was insufficient to warrant an instruction on manslaughter. *Id.* The court found the words did not constitute adequate provocation. *Id.* at 1323.

181. Thus, courts hold a person of exceptional restraint to a higher standard and should not excuse him because he did not actually lose control, even though a reasonable person would have. Similarly, if the actor actually regained self-control before killing, he would be guilty of murder, even though a reasonable person might not have cooled. MODEL PENAL CODE, *supra* note 143, § 210.3 cmt. 5(a); see also *State v. Faulkner*, 483 A.2d 759 (Md. 1984); C.J.S., *supra* note 5, §§ 48, 50.

182. MODEL PENAL CODE, *supra* note 143, § 210.3 cmt. 5(a).

Hence, the provocation doctrine requires a subjective assessment of the psychological situation of the accused—even a psychological situation rendered disparate by racism and its effects. This subjective mental state should, accordingly, be informed by the critical psychology where appropriate. Such outsider psychology, which recognizes the subjectivity of experience, especially as it implicates race, ethnicity and gender, comports with the court's recognition in *Bohanon* that the Walkers were psychologically injured, stressed, and humiliated. People with weaker coping skills and resources than the Walkers, might have had their "human frailties" exposed, might have reacted with less restraint than the Walkers were able to muster and, accordingly, might have needed a defense which recognized the provocative capacity of racialized abuses. While the common law defense of provocation would likely deny mitigated sentencing in the hypothetical posed above, the Model Penal Code's more expansive scope would allow for greater consideration of critical psychology in the *Bohanon* situation.

### B. *Extreme Emotional Disturbance*

The Model Penal Code departs from the common law defense of provocation in significant ways. As codification of homicide laws engendered a variety of approaches to the offense of murder<sup>183</sup>, the drafters of the MPC rejected many of these developments. In promulgating the Model Penal Code, the drafters noted that "the law . . . was not well developed" and the "perception on which the Model Code was based was that this pattern of statutory treatment was substantially deficient for failing to confront the major policy questions posed by the offense."<sup>184</sup>

Consequently, Model Penal Code section 210.3 defined manslaughter as follows:

- (1) Criminal homicide constitutes manslaughter when:  
it is committed recklessly; or a homicide which would otherwise be murder *is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a*

---

183. Beginning with Pennsylvania in 1794, many states sought to distinguish first-degree murder, which was premeditated and deliberated murder, from other murders in order to limit the application of the death penalty. *Id.* § 210.2 cmt. 2. At the same time, while recognizing manslaughter as a separate offense, most states had no explicit definition, preferring instead to rely on the definition provided by common law. *Id.* § 210.3 cmt. 1. Other states adopted definitions substantially similar to the common law definition, but divided manslaughter into different categories, such as voluntary and involuntary, for the purposes of sentencing. *Id.* § 210.3 cmt. 2.

184. *Id.* § 210.3 cmt. 2.

*person in the actor's situation under the circumstances as he believes them to be.*

- (2) Manslaughter is a felony of the second degree.<sup>185</sup>

Accordingly, extreme emotional disturbance, the MPC version of provocation, has two principle elements: the defendant must have acted under the influence of extreme emotional disturbance and there must have been a reasonable explanation or excuse for such extreme emotional disturbance, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be.<sup>186</sup> The first requirement is wholly subjective as it involves a determination that the particular defendant did in fact act under extreme emotional disturbance, that the claimed explanation as to the cause of his action is not contrived or a sham.<sup>187</sup> The second component was designed to replace the rigid rules that had developed with respect to the sufficiency of particular types of provocation, such as the rule that words alone can never be sufficiently provocative.<sup>188</sup>

This expansion allows for a consideration of racial imagery, symbolism, or articulations as violence. The ultimate test remains, however, objective. There must be a reasonable explanation or excuse for the actor's disturbance. In order to determine whether defendant's emotional disturbance, and not the act of killing, was supported by a reasonable explanation or excuse, the subjective internal situation in which the defendant found himself and the external circumstances as he perceived them should be viewed from the standpoint of the accused (no matter how inaccurate that perception may have been). An assessment must be made of whether the explanation or excuse for the emotional disturbance was reasonable so as to entitle the defendant to a reduction of the crime charged from murder to manslaughter.<sup>189</sup>

Critical psychology has much to add to this analysis, not only with regard to the reasonableness of any emotional disturbance based upon racialized violence, but also as to the normative basis. It is imperative to recognize that the test *is not* whether it is reasonable to kill but whether the emotional disturbance was reasonable given the situation as the accused assessed it. According to Herbert Wechsler, one of the architects of the MPC, "The purpose [of this expanded version of common law provocation] was explicitly to give full scope to what amounts to a plea in mitigation based upon a mental or emotional trauma of significant di-

---

185. *Id.* § 210.3 (emphasis added).

186. *People v. Casassa*, 404 N.E. 2d 1310, 1315-16 (N.Y. 1980).

187. *Id.* at 1316.

188. *Id.*

189. *Id.*

mensions, with the jury asked to show whatever empathy it can."<sup>190</sup> Critical psychology speaks directly to such trauma and racialized stress and is capable of infusion into the criminal law to grant mitigation based upon the mental sequelae of racism.<sup>191</sup>

Accordingly, the MPC made significant changes to the common law definition of manslaughter.<sup>192</sup> Most importantly, the MPC drafters intended extreme mental or emotional disturbance to be both broader and more subjective than provocation was at common law.<sup>193</sup> The MPC defense is a considerably expanded version of the common law defense of heat of passion on sudden provocation.<sup>194</sup>

For instance, the MPC allowance for distress in the abstract is a significant departure, especially insofar as critical psychology is concerned. The MPC does not require that the actor's emotional distress arise from some injury, affront or other provocative act of the deceased.<sup>195</sup> Emotional distress and some reasonable explanation for its existence is sufficient. The MPC states:

Under the Code, mitigation may be appropriate where the actor believes that the deceased is responsible for some injustice to another or even where he strikes out in a blinding rage and kills an innocent bystander. In such cases, the cause and intensity of the actor's emotion may be less indicative of moral depravity than would be a homicidal response to a blow to one's person.<sup>196</sup>

Accordingly, by not following the common law's traditional adherence to rigid rules limiting provocation to certain circumstances, the MPC allows the trier of fact to decide, where there is evidence of extreme emotional or mental disturbance, whether the circumstances

190. Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1446 (1968).

191. The term racism includes an ideology of superiority that categorizes and ranks various groups, negative attitudes, and beliefs about outgroups and differential treatment of outgroups by individuals and societal institutions.

192. First, it excluded negligence, basing manslaughter instead on recklessness as to risks of which an actor was actually aware. MODEL PENAL CODE, *supra* note 143, § 210.3 cmt. 3. Second, under a separate provision, it allowed for imperfect justification. *Id.* As a result, if an actor killed in self-defense but did so recklessly or negligently, he would be excused from the offense of murder but guilty of, respectively, manslaughter or negligent homicide because recklessness or negligence sufficed to establish those offenses. *Id.* § 210.3 cmt. 6. Third, the Model Penal Code entirely rejected the concept of misdemeanor-manslaughter. *Id.* § 210.3 cmt. 3.

193. See *id.* § 210.3 cmt. 3.

194. See *Patterson v. New York*, 432 U.S. 197 (1977).

195. MODEL PENAL CODE, *supra* note 143, § 210.3 cmt. 5(a).

196. *Id.*

provide a reasonable excuse for the actor's mental condition.<sup>197</sup> By abandoning preconceived notions of what is adequate provocation, the MPC allows a jury to consider critical psychology in its deliberations.

Most importantly, the MPC broadens the objective analysis of provocation. In assessing the reasonableness of the excuse, the relevant viewpoint is that of a person in the actor's "situation" under the circumstances as he believed them to be.<sup>198</sup> The MPC drafter's intentionally used the ambiguous term "situation" to allow a rich examination of context, while still preventing idiosyncratic individualization of the legal standard.<sup>199</sup> For example, situational context allows consideration of physical handicaps such as blindness, yet excludes idiosyncratic moral values such as an assassin's belief that it is right to kill a political leader.<sup>200</sup> The MPC also explains a middle ground:

In between these extremes, however, there are matters neither as clearly distinct from individual blameworthiness as blindness or handicap nor as integral a part of moral depravity as a belief in the rightness of killing. Perhaps the classic illustration is the unusual sensitivity to the epithet "bastard" of a person born illegitimate. An exceptionally punctilious sense of personal honor or an abnormally fearful temperament may also serve to differentiate an individual actor from the hypothetical reasonable person, yet none of these factors is wholly irrelevant to the ultimate issue of culpability. *The proper role of such factors cannot be resolved satisfactorily by abstract definition of what may constitute adequate provocation.*<sup>201</sup>

Extreme emotional disturbance, therefore, places far more emphasis on the subjective mental state of the actor than does the common law

---

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* (emphasis added). The Model Code endorses a formulation that affords sufficient flexibility to differentiate in particular cases between those special aspects of the actor's situation that should be deemed extreme mental or emotional disturbance material for purpose of grading and those that should be ignored. There thus will be room for interpretation of the word "situation," and that is precisely the flexibility desired. There will be opportunity for argument about the reasonableness of explanation or excuse, and that too is a ground on which argument is required. In the end, the question is whether the actor's loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen. Section 210.3 faces this issue squarely and leaves the ultimate judgment to the ordinary citizen in the function of a juror assigned to resolve the specific case. See *id.*

defense of provocation.<sup>202</sup> The MPC does not dismiss situations where the provocative circumstance is something other than an injury inflicted by the deceased on the actor, but rather focuses on whether some event aroused extreme mental or emotional disturbance.<sup>203</sup> The extreme emotional disturbance defense permits the defendant to show that his actions were caused by a mental infirmity, below the level of insanity, and that he was less culpable than an accused not so disturbed.<sup>204</sup> At this juncture the critical psychology may become particularly relevant to a racialized offender. The literature may indeed provide sufficient support for an infusion into the criminal law of information detailing the distressing, humiliating and cumulative impact of racism, the allostatic load if you will.

The MPC bolsters the notion of cumulative or serial provocation by jettisoning the concept of a cooling off period, a bedrock component of the common law.<sup>205</sup> The cooling off period rule temporarily limits access to the defense even where the defendant had not actually cooled and was still enraged at the time of the killing.<sup>206</sup> The MPC, however, does not speak to this issue and the omission of this temporal restriction on passion leads to the conclusion that so long as the offender was laboring under the condition of extreme emotional disturbance, for which there is a reasonable explanation or excuse, the defense is appropriately considered.

The calculus of what is or is not reasonable allows for an assessment of the cumulative and ongoing impact of racism, as analyzed by critical psychology. Where appropriate, such infusion makes acceptance of relevant critical psychology pragmatic, equitable and necessary. Wechsler's explanation of the MPC heat of passion provision indicates that the extreme emotional disturbance defense is just what it says—a broad allowance for mental trauma, whatever the source, such that the jury might properly consider the full scope and impact of the relevant impairment.

### C. Diminished Capacity

Turning from heat of passion defenses, diminished capacity provides another venue for consideration of critical psychology. The diminished capacity doctrine allows a criminal defendant to introduce evidence of mental abnormality at trial for one of two reasons. The first possibility is

---

202. It may also allow an inquiry into areas which have been treated as part of the law of diminished capacity and insanity. *Id.*

203. *Id.*

204. *People v. Patterson*, 347 N.E.2d 898, 905–06 (N.Y. 1976).

205. At common law, the passion of the reasonable man subsides and reason reasserts its logic “as the provoking event grows stale.” See MODEL PENAL CODE, *supra* note 143, § 210.3, cmt. 5(a).

206. *Id.*

essentially a rule of evidence which allows for negation of a mental element of the crime charged, so as to create a reasonable doubt in the minds of the jurors regarding the presence of a statutorily required mens rea element, thereby exonerating the defendant of that charge.<sup>207</sup> Used in this fashion, diminished capacity is a failure of proof defense<sup>208</sup> as it negates specific intent such as malice, premeditation, or deliberation in murder trials by the tendering of evidence establishing the offender's mental incapacity or abnormality, short of insanity.<sup>209</sup>

Diminished capacity may also be invoked at trial as a defense to homicide offenses. Rather than negating mens rea, its utility stems from the fact that it is an affirmative defense that provides either an excuse or a justification for the crime, thereby offering the opportunity for a mitigated sentence. Diminished capacity may permit proof of mental abnormality or defect severe enough to preclude liability for murder (of any degree).<sup>210</sup> In this way, evidence of diminished capacity may be used to reduce the degree of a crime for which the defendant may be convicted, even if the defendant's conduct satisfied all the formal elements of an higher offense. A successful assertion of this defense results in the accused being adjudged guilty of a lesser degree of the crime because mental or emotional impairment, short of insanity, mitigated their moral blameworthiness and culpability for the act.<sup>211</sup> Accordingly, this version of diminished capacity has been conceptualized as a partial or incomplete defense based on mental abnormality or defect.<sup>212</sup>

---

207. Stephen J. Morse, *Criminal Law: Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 1 (1984); see also MODEL PENAL CODE, *supra* note 143, § 210.3 cmt. 4(b).

208. See Paul H. Robinson, *Criminal Law Defenses: A Systemic Analysis*, 82 COLUM. L. REV. 199, 202-05 (1982).

209. At a homicide trial, the accused likely has a constitutional right to call expert testimony about his or her capacity to form the required mental element. Accordingly, mental health experts could be called to explain any relevant critical psychology at it implicates mens rea. Since due process requires that the prosecution prove each and every element of the crime beyond a reasonable doubt, the exclusion of such probative information, which directly impacts upon the requisite mens rea, would allow the prosecution to secure a conviction without establishing the mental element beyond a reasonable doubt. Professor Dressler goes one step further to suggest that the presentation of evidence regarding diminished capacity may also be constitutionally protected pursuant to the Sixth Amendment right to introduce competent and relevant evidence. See Joshua Dressler, *Reaffirming the Moral Legitimacy of the Doctrine of Diminished Capacity: A Brief Reply to Professor Morse*, 75 J. CRIM. L. & CRIMINOLOGY 953, 953 n.6 (1984); MODEL PENAL CODE, *supra* note 143, § 210.3 cmt. 4(b).

210. MODEL PENAL CODE, *supra* note 143, § 210.3 cmt. 4(b).

211. See Morse, *supra* note 207, at 1; Dressler, *supra* note 209, at 954.

212. Diminished capacity has also been seen as an implicit redefinition of premeditation to require mature and meaningful reflection by a mind capable of comprehending the gravity of the act or as judicial recognition of a mental abnormality no matter how long

The difference between insanity and diminished capacity is one of degree. Just as the criminal law differentially punishes people based upon gradations in *mens rea*, no principled basis exists for ignoring gradations where mitigating defenses are concerned because, "[t]he proffered evidence is no less reliable in the case of diminished capacity than with insanity. As long as the jury, not the 'expert', resolves the moral issues of accountability, there is no good reason for closing our eyes to partial responsibility claims."<sup>213</sup> Again, critical psychology becomes relevant as certain accused persons may suffer from diagnosable ailments generated by the violence of racism that do not rise to the level of insanity.

That being said, some scholars believe the doctrine of diminished capacity in the context of murder focuses on the wrong question. Professor Morse, for instance, advocates that rather than focusing upon "difficulties, burdens, problems, and misfortunes suffered by the perpetrator," we should ask, "how hard is it not to offend the law?"<sup>214</sup> Morse believes that the response to this question would reveal that it is not that hard to avoid breaking the law. He argues:

How hard is it not to offend the law? How hard is it not to kill, burgle, rob, rape, and steal? The ability to resist the temptation to violate the law is not akin to the ability required to be a fine athlete, artist, plumber, or doctor. *The person is not being asked to exercise a difficult skill; rather, he or she is being asked simply to refrain from engaging in antisocial conduct. Think, too, of all the factors mitigating against such behavior: parental, religious, and school training; peer pressures and cultural expectations; internalized standards ("superego"); fear of capture and punishment; fear of shame; and a host of others.* Not all such factors operate on all actors or with great strength: there will be wide individual differences based on life experiences and, perhaps, biological factors. Nonetheless, for all persons there are enormous forces arrayed against lawbreaking.<sup>215</sup>

While persuasive, Morse's underlying assumption must be that the accused is an er(raced)<sup>216</sup> person as many of the factors stressed as mitigating

---

or carefully the accused considered his course of action. MODEL PENAL CODE, *supra* note 143, § 210.3.

213. Dressler, *supra* note 209, at 960 (a negligent killing is punished less severely than a reckless one, even though the differences between the two killings may be only in the degree of risk; similarly, statutes frequently divide intentional killings into degrees of homicide based upon the strength of the intention (such as whether it was extreme mental or emotional disturbance versus premeditated and deliberate)).

214. Morse, *supra* note 207, at 30.

215. *Id.* at 31 (emphasis added).

216. I use this term to denote an individual abstracted to the point where racial identity is erased.



against lawbreaking have particularly responsive, defensive and even revolutionary messages for persons of color—messages which some, outside communities of color, may find antisocial. Indeed, the role of the Black Church, family, and school were integral to the civil rights movement—a movement that at its initiation involved lawbreaking and behavior then seen as antisocial.<sup>217</sup> It is indeed hard to avoid breaking the law in some situations into which persons of color may be forced. For instance, in the case of the cross-burning on the private property of a Black couple, might the law be asking too much to demand that the couple faced with this racialized violence and intimidation not be excused from or justified in a violent response?<sup>218</sup> Professor Paul Butler has analyzed the utility of using subversion, and even violence, to change unjust laws:

The struggle of African Americans, and many concerned others, to crush both the “peculiar institution” of slavery and Jim Crow segregation, is well known and shall not be rehearsed here. . . . The first observation is that the conversion of these discriminatory laws was caused, in part, by violence and subversion.<sup>219</sup>

Further the very definition of antisocial conduct is contextual—what is antisocial in one situation might be seen as legitimate self-defense in another. Similarly, what is antisocial to one person might be seen as mere speech to another—what is antisocial behavior to persons from a majority might be seen as provoked behavior from a racialized community perspective. The definition of antisocial or violent behavior cannot be

---

217. Martin Luther King, Jr. observed:

[T]here is a type of constructive, nonviolent tension which is necessary for growth. . . . The purpose of [civil disobedience] is to create a situation so crisis-packed that it will inevitably open the door to negotiation. . . . We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed.

Martin Luther King, Jr., *Letter from Birmingham Jail*, cited in Paul Butler, *By Any Means Necessary: Using Violence and Subversion to Change Unjust Law*, 50 UCLA L. REV. 721, 773 n.96 (2003).

218. Indeed, the law has traditionally protected the sanctity of the home and private property with a vengeance. See *United States v. Peterson*, 483 F.2d 1222, 1236 (D.C. Cir. 1973); *State v. Nieto*, 130 N.E. 663, 664 (Ohio 1920); *State v. Walker*, 598 N.E.2d 89 (Ohio Ct. App. 1991); *State v. Catlin*, 564 N.E.2d 750, 753–54 (Ohio Ct. App. 1990); Stuart P. Green, *Castles and Carjacks: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 30, 31 n.135 (1999).

219. Butler, *supra* note 217, at 726 (considering how radical tactics can help change discriminatory laws in the United States and concluding that the politics of respectability should not limit the tactics that minorities choose in their quest for racial justice, but morality should).

artificially abstracted to the point where race is removed from the analysis—a more nuanced approach to this endeavor is required. Furthermore, justifying or excusing the behavior of such a defendant does not result in acquittal. Rather, as with provocation and extreme emotional disturbance, the diminished capacity defense serves only as a partial defense to reduce duration of imprisonment or to preclude execution.

While as Morse stresses, “the function of conviction and sentencing is to punish the actor for what he has done, rather than for who he is,”<sup>220</sup> the affirmative defenses offered by the criminal law clearly provide for the possibility that what the actor has done necessarily calibrates with who he or she is. Indeed the “reasonable person” standard found in the defenses of provocation and self-defense necessarily focuses some of the inquiry on the characteristics of the accused.<sup>221</sup> Further, the affirmative defenses, compartmentalized between excuse and justification, do not function in the abstract—who the accused is, and how she has become that person is relevant to the calculus of whether she is worthy of mitigation for the crime committed. It is appropriate to consider any reasonably provable factors that tend to demonstrate that the actors’ accountability for their actions is less than that of normal persons under normal circumstances.<sup>222</sup> Indeed as Professor Dressler has indicated:

In our quest to treat people with dignity, we also must not cruelly ignore evidence of illness or other relevant forms of impairment. Each person is unique. We treat criminal actors with dignity when we treat each individual as unique. That means we should consider, and not ignore, the ways in which they differ from other people. One difference may be their mental impairment. If all people, as a species, possess free will, not all people command an equal degree of free will.<sup>223</sup>

Accordingly, the critical psychology above should be considered during criminal trials, where relevant, to elucidate the issues of mental impairment which might actually relate to significant social differences in society, such as race and ethnicity. While admittedly a social construct, the notion of race as carrying societal currency has operated to shape the lives of all Americans irrespective of color and its ramifications impact Americans’ lives in both trivial and profound ways.

---

220. Morse, *supra* note 207, at 32.

221. The law of self-defense has tended to infuse the reasonable person with the characteristics of the accused, and to examine the circumstances and contexts in which the accused found themselves. See *State v. Norman*, 378 S.E.2d 8 (N.C. 1989).

222. See Dressler, *supra* note 209, at 959; Dressler, *supra* note 157, at 422; Joshua Dressler, *Substantive Criminal Law Through the Looking Glass of Rummel v. Estelle: Proportionality and Justice as Endangered Doctrines*, 34 Sw. L.J. 1063, 1073–79 (1981).

223. Dressler, *supra* note 209, at 959.

As W.E.B. DuBois has indicated, "[t]he problem of the twentieth century is the problem of the color line."<sup>224</sup> Given the reality of historical and contemporary racism in twenty-first century America and its resultant psychological and physiological effects, there is still significant explanatory power, whether excusatory or justificatory, to be gleaned from the ravages of racism in the criminal law context.<sup>225</sup> Mitigating psychological factors may stem from this reality of the color line and should be considered just as any other relevant evidence of mental impairment should be examined in the criminal trial setting. Hence mitigatory considerations for the sentence of the accused should be examined through the lens of a defendant's lived reality. This reality may reveal significant mental health issues which impact upon the issue of moral guilt and criminal culpability. Indeed, as Justice Frankfurter noted in his dissent in *Fisher v. United States*, "[m]urder cases are apt to be peculiarly individualized."<sup>226</sup>

*Fisher* involved a Black defendant who intentionally strangled a White librarian. While Fisher was not legally insane, he was "mentally subnormal[.]"<sup>227</sup> He suffered from an aggressive psychopathic condition that affected his behavior. He killed suddenly, but intentionally; yet, he acted only after the victim called him a "Black nigger." He was sentenced to death. Dressler's comments about Justice Frankfurter's dissent are apt:

Fisher's impairment, and the victim's racial epithet, may not have been the legal causes of his conduct. His free will acts were the cause. Because he had free will, and chose to kill, he should be punished. But my intuition tells me that the information proffered by the defense would have been highly relevant to morally sensitive jurors in their decision regarding Fisher's degree of moral guilt. Jurors might conclude that it was harder for Fisher than for the juror *not* to kill.<sup>228</sup>

In this way the culpability of Fisher as a Black man suffering from mental impairment, whether brought on by, or merely exacerbated by, the

---

224. W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 41 (1995).

225. While excuses, such as diminished capacity, negate personal blameworthiness and do not mitigate the harm that has occurred, the proposals made here necessarily touch on possible justificatory frameworks within the confines of this affirmative defense. Specifically, if the capacity of an accused of color is diminished due to victimization from racialized abuses, that may implicate the justification rationale for the affirmative defense of diminished capacity in addition to the excuse rationale. Perhaps the excuse theory more directly correlates with the mental health information provided in Part I, while the justification rationale is more properly considered under the heading of heat of passion.

226. 328 U.S. 463, 478 (1946) (Frankfurter, J., dissenting).

227. *Id.* at 467.

228. Dressler, *supra* note 209, at 961; see also Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 715 (1995).

consequences of race and racism in America, should have been addressed in a holistic fashion to better judge his moral and legal responsibility. The abnormality, when it impairs the exercise of free will, is most relevant to the triers of fact. When the free will of the accused is compromised in some substantial and verifiable way, the jury ought to consider its potential as a source of mitigation, especially when the accused faces the death penalty. Criminal sanctions might properly be vitiated due to an impairment of the accused's volition (such that his intentional commission of the actus reus is questionable) or cognitive functions (such that his ability to form the mens rea) are compromised.<sup>229</sup> Dressler explains this reasoning in greater detail:

[I]nternal forces that serve to prevent law-breaking do not operate equally, or at all, on all people. Where there exists reliable evidence that a particular defendant suffers from some condition, the existence of which has substantial explanatory force regarding the criminal events and helps to explain why the actor committed the crime, then we have learned something very important about the actor (but not about the ultimate harm) that ought not to be ignored. We should not punish persons for possessing bad character, nor should we mitigate or exculpate because of good character. But we ought to consider explanations for behavior that indicate that the actors' personal blameworthiness for the events—their moral accountability for the harm—is less than we ordinarily would expect.<sup>230</sup>

Obviously psychiatric or psychological testimony about diminished capacity must be included in such analysis. This prospect is controversial. Many fear the mental health professional will usurp the role of the judge and jury.<sup>231</sup>

---

229. See HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 134 (1968); GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 461–63 (1978).

230. Dressler, *supra* note 209, at 959. There is an obvious need for the inclusion of psychiatric or psychological testimony about diminished capacity in such cases. This prospect is not without controversy. Many fear the role of the mental health professional as a usurpation of the role of the judge and jury. PETER R. BREGGIN & GINGER ROSS BREGGIN, *THE WAR AGAINST CHILDREN* 159 (1994); Citizens Commission on Human Rights Official Website, at <http://www.cchr.org/racism/toc.htm> (last visited Dec. 4, 2003); Peter R. Breggin, *Campaigns Against Racist Federal Programs by the Study for Psychiatry and Psychology*, <http://www.breggin.com/racistfedpol.html> (last visited Dec. 4, 2003).

231. Citizens Commission on Human Rights, *Creating Racism: Psychiatry's Betrayal in the Guise of Help*, <http://www.cchr.org/racism/toc.htm> (last visited Dec. 4, 2003); Peter R. Breggin, *Campaigns Against Racist Federal Programs by the Center for the Study of Psychiatry and Psychology*, 1 J. AFR.-AM. MEN 3 (1995/96), <http://www.breggin.com/racistfedpol.html> (last visited Dec. 4, 2003); PETER R. BREGGIN & GINGER ROSS BREGGIN, *THE WAR AGAINST CHILDREN* 159 (1994), at <http://www.scils.rutgers.edu/~lyonsm/psychiatry.html> (last visited Dec. 4, 2003).

Despite the doctrinal possibilities generated by the infusion of critical psychology into the diminished capacity defense, a nagging concern remains. Unlike provocation or extreme emotional disturbance, diminished capacity is entirely subjective in its recognition of the actor's own mental disorder or emotional instability as a basis for partially excusing his conduct.<sup>232</sup> This removal of analysis from the realm of the objective is worrisome as it has the potential to allow for the peculiar idiosyncrasies of the accused to propel mitigation. Accordingly, the project of diminished capacity doctrine may actually be antagonistic to critical psychology which highlights the possibilities of disparate mental health sequelae as *reasonable and expected* results of racialized violence, not as peculiar or de-ranged freak occurrences. The critical psychology discussed above explores the disparate mental health sequelae of persons struggling to cope in unbearable situations—persons taxed to the breaking point so the catalyst racialized event is the proverbial straw that breaks the camel's back. Further research is in order to ascertain the capacity of racialized abuses to generate defects of the sort conceptualized by diminished capacity. I doubt not that this potential exists, but I am concerned for pathologization of the Black person's experiences and responses to racialized violence. Such potential for pathologization is a well-founded fear. Pathologization shifts the focus to the mental abnormality of the actor and away from an assessment of the deviance of racism itself and its capacity to injure otherwise healthy individuals.

### III. CONCERNS WITH INFUSION—IDENTITY, PATHOLOGIZATION, AND ACCESS

*"Men are so necessarily mad, that not to be mad would  
amount to another form of madness."*<sup>233</sup>

Consequences flow from one's identity. However identity is a subject which defies easy definition. Conceptually, identity theory considers who we are, or more accurately, who we think we are and peripherally, how others perceive us. Identity is not static, rather there is an evolutionary process, which implies contextual fluidity, which is itself tethered to the groups, networks, societal structures, practices, and performances to which people and their identities are rooted. It is not simply a mental exercise to determine whether mental disability is an identity that, much like race, gender, and sexual orientation, marks an individual such that societal consequences follow. Even to conceptualize *disability* as such oth-

---

232. MODEL PENAL CODE, *supra* note 143, § 210.3 cmt. 4(b).

233. MICHEL FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON, at ix (Vintage Books 1998) (1965).

ers this "identity" as a marker which definitionally holds limitations within its very construction. Limitation is intrinsic in defining the identity and accordingly it marginalizes the *disabled* as "less than" the "abled." Those labeled *disabled* are defined as lacking in relation to the "abled" norm. Given these concerns, it might be conceptually preferable to consider mental disability as a mental "vulnerability" or "mental challenge." This is consistent with the more inclusive and sensitive language of "physical challenge" (as opposed to physical disability), which recognizes that the difficulties stem equally, if not predominantly, from societal construction, both literal and figurative, which delimit access. A postmodern critique<sup>234</sup> is, therefore, conceivable—a critique that acknowledges the externalities implicated in creating the *status quo* and constructing mental challenge as a site of marginalization.

In this vein, while mental vulnerabilities themselves create limitations, such as the inherent challenges deriving from the status, a postmodern analysis demands recognition of the societal manufacturing of that which is oppressive. As with other markers of identity, it is the societal reaction and ascription of marginal status that "disables" the identity. As a society, with the help of certain disciplines, in this context mental health professionals, we "mark" those with mental vulnerabilities as less than—they are alternatively ignored, marginalized, incarcerated, or otherwise locked up. Society ascribes those with mental vulnerabilities a marginal identity deserving of legal consideration. Hence mental

---

234. According to Dr. Mary Klages, Associate Professor, English Department, University of Colorado, Boulder:

Postmodernism then is the critique of grand narratives, the awareness that such narratives serve to mask the contradictions and instabilities that are inherent in any social organization or practice. In other words, every attempt to create "order" always demands the creation of an equal amount of "disorder," but a "grand narrative" masks the constructedness of these categories by explaining that "disorder" REALLY IS chaotic and bad, and that "order" REALLY IS rational and good. Postmodernism, in rejecting grand narratives, favors "mini-narratives," stories that explain small practices, local events, rather than large-scale universal or global concepts. Postmodern "mini-narratives" are always situational, provisional, contingent, and temporary, making no claim to universality, truth, reason, or stability.

Mary Klages, *Postmodernism*, <http://www.colorado.edu/English/ENGL2012Klages/pomo.html> (last visited Dec. 3, 2003); see also MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES* (Vintage Books 1994) (1970); JEAN-FRANCOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (1984); GEORGE E. MARCUS & MICHAEL M.J. FISCHER, *ANTHROPOLOGY AS CULTURAL CRITIQUE: AN EXPERIMENTAL MOMENT IN THE HUMAN SCIENCES* (1986); CHRISTOPHER NORRIS, *DECONSTRUCTION: THEORY AND PRACTICE* (1979); Gianni Vattimo, *THE END OF MODERNITY: NIHILISM AND HERMENEUTICS IN POSTMODERN AMERICA* (1998); Stephen Tyler, *Post-Modern Ethnography: From Document of the Occult to Occult Document* (1986), in *WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY* (James Clifford & George E. Marcus eds., 1986).

vulnerability, even within the context of critical psychology, is a site worthy of criticality due to the possibility and propensity towards pathologization.<sup>235</sup>

That pathologization, the ascription of disease, dysfunction, or deviance from the norm, has been utilized as a sword against members of marginalized groups is an uncontroversial historical reality. Psychiatry and psychology, like all disciplines, are constructed cultural products and mechanisms of society. The manifestation of discrimination in such, abstractly, noble professions is not surprising given that all noble endeavors, like law, have also been co-opted for ignoble ends.<sup>236</sup> This is inevitable given that all doctrine, no matter the profession, is “man-made,” interpreted and applied by people who, although claiming otherwise in the interest of supposed objectivity, bring their own societal-discriminatory baggage to bear. Thus, recognition of the possibilities for use of critical psychology as a mechanism to further the interests of marginalized persons is ironic given historical uses of mental health disciplines to subjugate these same interests and communities. The tension created by this irony should not, however, found the sole basis for dismissal of either the doctrine or the disciplines, rather the utility, and indeed the determination to dismantle the master’s house with his own tools, is a strategic decision made with full knowledge of the ugly history.

The history of psychiatry itself reveals the paradox inherent in utilizing mental health constructs with the normative goal of achieving liberatory ends. For instance, early psychiatrists felt that a “madman” was a savage beast who needed to be confined, dominated, and beaten.<sup>237</sup> Madmen were treated as animals based on the theory that a combination of fear and pain would rid them of the thoughts upon which they were fix-

---

235. See Judith Butler, *Is Kinship Always Already Heterosexual*, in LEFT LEGALISM/LEFT CRITIQUE 234 (Wendy Brown & Janet Halley eds., 2002). Butler states:

Without the critical perspective . . . politics relies fundamentally on an unknowingness—and depoliticization—of the very relations of force by which its own field of operation is instituted. Criticality is thus not a position per se, not a site or place that might be located within an already delimitable field, although one must, in an obligatory catachresis, speak of sites, of fields, of domains.

*Id.*

236. See e.g., *Loving v. Commonwealth*, 147 S.E.2d 78 (Va. 1966) (upholding the Virginia miscegenation statutes as not violating due process or equal protection); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that racially “separate but equal” facilities did not violate the Thirteenth or Fourteenth Amendments); *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (holding that the plaintiff, being a Negro, could not be a citizen of Missouri); *Johnson v. M’Intosh*, 21 U.S. 543 (1823) (holding that land grants made by Indian tribes cannot be recognized by the court).

237. See ROBERT WHITAKER, *MAD IN AMERICA: BAD SCIENCE, BAD MEDICINE, AND THE ENDURING MISTREATMENT OF THE MENTALLY ILL* 4–8 (2002).

ated.<sup>238</sup> For example, Thomas Willis, one of the first English physicians to write extensively on madness, explained that the insane, having lost their reason, were fierce creatures who had “descended to a brutish state” and “enjoyed superhuman strength.”<sup>239</sup> If the mad were to be cured, they:

needed to hold their physicians in awe and think of them as their “tormentors.” Discipline, threats, fetters, and blows are needed as much as medical treatment. . . . Truly nothing is more necessary and more effective for the recovery of these people than forcing them to respect and fear intimidation.<sup>240</sup>

Such rhetoric of the “lunatic” as beast or animal possessing superhuman strength is disconcerting given its resonance with stereotypical depictions of Black people. Racist vitriol often invokes the animalization of Blacks and a call for containment based upon superhuman strength and brutish tendencies.<sup>241</sup> Furthermore, the historical role of the mental health professional in orchestrated intimidation has historical connections to the abuses of slavery discussed above. The connections are troubling as the history of the mental health profession indicates that doctors would resort to what they called “breaking” their patients.<sup>242</sup> Breaking would involve bleeding, purging, emetics, nausea-inducing agents, blistering, and near-starvation diets, in order to “reduce even the strongest maniac to a pitiful, whimpering state.”<sup>243</sup>

There was a clear racist subtext to early mental health “science.” The Mentally ill were also seen as unfit to breed and produce children. Based on the idea that the mentally ill should be sterilized, speakers at the Second International Congress on Eugenics<sup>244</sup> presented papers suggesting that the “financial costs societies incurred by caring for defectives, the inheritability of insanity and other disorders, and the low birth rates of the elite in America” necessitated serious consideration of the sterilization of

238. See *id.* at 6–8.

239. *Id.* at 6.

240. *Id.* (alteration in original) (citations omitted).

241. See, e.g., Anti-Defamation League, *David Duke: In His Own Words*, at [http://www.adl.org/special\\_reports/duke\\_own\\_words/print.asp](http://www.adl.org/special_reports/duke_own_words/print.asp) (last visited Oct. 23, 2003) (“Divorced from White influence and culture, [Blacks] reverted quickly to their genotype. . . . Males exhibited exaggerated aggression and promiscuity. . . . White people don’t need a law against rape, but if you fill this room up with your normal [B]lack bucks, you would because niggers are basically primitive animals.”).

242. See WHITAKER, *supra* note 237, at 7.

243. *Id.*

244. This conference was largely financed by the Carnegie Institution and the Rockefeller Foundation. Some professors and scientists from the finest institutions in the country (such as Johns Hopkins, Princeton, Harvard, Columbia, Cornell, MIT, and NYU) spoke at the conference and supported the White supremacist Eugenics movement. See *id.* at 52–53.



undesirables.<sup>245</sup> It is a slippery slope from undesirable to White supremacy as the conference delegates spoke on "The Jewish Problem," the dangers of "Negro-White Intermixture," and the "Pedigrees of Pauper Stocks."<sup>246</sup>

This racialized bias in mental health has a long history. "During the nineteenth century, the perceived mental health of African Americans was closely tied to their legal status as free men or slaves."<sup>247</sup> African Americans who lived in free states or stated a desire for freedom were at a heightened risk for being deemed mad.<sup>248</sup> The Census of 1840 reported that "insanity was eleven times more common among Negroes living in the North than in the South."<sup>249</sup> Southern politicians used this statistic as evidence that "bondage was good for Negroes"<sup>250</sup> and used mental health rhetoric to justify the peculiar institution. Indeed, Senator John C. Calhoun reasoned that slavery was necessary because "[t]he African is incapable of self-care and sinks into lunacy under the burden of freedom. It is a mercy to give him the guardianship and protection from mental death."<sup>251</sup>

With any doctrine, science, or principle, whether good is achieved depends on its application and deployment. While intrinsic doctrinal neutrality might not exist either, it is clear that historical utilization of the "sciences" has produced sites of marginalization with findings of congenital illness along racial lines<sup>252</sup>—mental health diagnosis have not been

245. *Id.* at 53.

246. *Id.* At the end of the meeting, prominent eugenicists formed a committee to establish a national eugenics society that would recruit a scientific advisory council by sending a letter to candidates that warned of "racial deterioration and the need for societal leaders to resist the complete destruction of the white race." *Id.* The letter claimed that "our burden of taxes can be reduced by decreasing the number of degenerates, delinquents, and defectives supported in public institutions." *Id.* Hitler took the idea of eugenics to its "ultimate end" by instituting gas chambers to kill the mentally ill because he believed, as did others in the United States, that the insane were "social wastage," "malignant biological growths," and "poisonous slime." *Id.* at 64–66. Harvard's Earnest Hooten described the insane as "specimens of humanity who really ought to be exterminated." *Id.* at 65.

247. *Id.* at 171.

248. *Id.*

249. *Id.* One reason for this disparity is that Whites in some northern counties told census takers that "all of the Negroes in their communities were crazy." *Id.*

250. *Id.*

251. *Id.*

252. Indeed, even the color of the skin of Black people has been pathologized. Benjamin Rush, the father of psychiatry, whose face still adorns the seal of the American Psychiatric Association, pathologized blackness as a disease—Negritude. Rush theorized that "the Negro suffered from congenital leprosy which . . . 'appeared in so mild a form that excess pigmentation was its only symptom.'" THOMAS S. SZASZ, *THE MANUFACTURE OF MADNESS: A COMPARATIVE STUDY OF THE INQUISITION AND THE MENTAL HEALTH MOVEMENT* 154–55 (1970). With this theory, Rush "made the Negro a medically safe domestic," while at the same time called for his sexual segregation as a carrier of a dreaded hereditary

immune from such misuse and has historically been used to oppress the marginalized according to race.<sup>253</sup> For instance, in 1851, Samuel Cartwright, a prominent physician, wrote in the *New Orleans Medical and Surgical Journal* that he had discovered two new types of insanity among slaves.<sup>254</sup> The first, drapetomania, was diagnosed every time a slave desired to run away.<sup>255</sup> The second, dysaesthesia aethiopis, was characterized by idleness and improper respect for the master's property. Dr. Cartwright advised that light beatings and hard labor reliably cured this mental illness. Accordingly, medicine could turn an "arrant rascal" into "a good Negro that can hoe or plow."<sup>256</sup> After the Civil War ended:

[t]he definition of sanity in Negroes was still tied to behavior that a slave owner liked to see: a docile, hardworking laborer who paid him proper respect. Negroes who strayed too far from that behavioral norm were candidates for being declared insane and were put away in asylums, jails, and poorhouses. Nationwide, the incidence of "insanity" among Negroes rose fivefold between 1860 and 1880, and once again, such statistics

---

disease. *Id.* Here, then, was an early model of the perfect medical concept of illness—one that helps the physician and the society he serves, while justifying social maltreatment as medical prophylaxis. *Id.* at 155. According to Szasz: "Rush looked to science and found what he wanted: It was not God but nature that marked the [B]lack man; his blackness, moreover, is a sign, not of his 'congenital sin' but of his 'congenital illness.'" *Id.* at 156–57.

253. Many doctors tried to give medical justification for treating Negroes differently. In 1886, J.M. Buchanan, a Mississippi asylum Doctor, stated that Negroes:

did not have the biological brainpower to live free in a civilized country because the growth of the [Negro] brain is arrested by premature closing of the cranial sutures. When enslaved, he added, the childish Negro was able to enjoy life, fat, sleek, and contented, his mind unburdened by cares, and his passions and animal instincts kept in abeyance by the will of his master.

WHITAKER, *supra* note 237, at 172 (citations omitted).

Thirty-five years later another physician, W.M. Bevis, published an article that stated that "Negroes were particularly prone to psychotic illness . . . because they were descendants of savages and cannibals and thus, as free men in America, were living in an environment of higher civilization for which the biological development of the race had not made adequate preparation." *Id.* Doctors' frequent diagnoses of schizophrenia in Blacks in the first part of the twentieth century was attributable to "cultural beliefs that Blacks were happy-go-lucky and lacked the intelligence to worry about the myriad stresses in life. They might become maniacal or crazy in their thoughts but—or so the belief went—they weren't very likely to become morbidly sad." *Id.*

254. Samuel A. Cartwright. *Diseases and Peculiarities of the Negro Race*, 11 DEBOW'S REV., S. & W. STATES (1851).

255. This occurred because the owner stirred this mental illness by being too kind to their Negroes . . . treating them as equals, which confused the poor slaves because God had made them to be submissive knee benders, even giving them a super flexible knee joint for this purpose. *Id.*

256. *Id.*

were seen by many Southern doctors as evidence that the "colored race" simply couldn't handle freedom.<sup>257</sup>

Some contemporary information should similarly generate concern about arbitrary diagnosis of mental illness in Blacks. A study in 1982 of 1,023 African Americans diagnosed as schizophrenic determined that 64 percent did not exhibit symptoms necessary, under prevailing American Psychiatric Association (APA) guidelines, for making such a diagnosis.<sup>258</sup> Other studies found that Blacks were being disproportionately put into subcategories of schizophrenia that "connote dangerousness and (pathological) severity," and that in comparison with whites, they were more likely to be committed against their will to a psychiatric unit.<sup>259</sup>

Of course, the history of the mental health profession also has generated dimensions. Women who were found to be insane during the 1890s and the first decade of the nineteenth century were treated by gynecological surgeries because it was linked to the "sexuality" of the woman; an overly sexual woman was seen as abnormal, and therefore, insane.<sup>260</sup> Many gynecologists were so avid in their enthusiasm for curing insanity by surgically removing the uterus or ovaries that the American Medico-Psychological Association, in the early 1890s, cautioned against the overuse of this remedy. Even so, for the next fifteen years, various gynecologists continued to claim that hysterectomies and ovariectomies

---

257. WHITAKER, *supra* note 237, at 171-72.

258. *Id.* at 173.

259. *Id.*

260. *See id.* at 78-79. Grob writes:

Of course this diagnosis related only to White woman, as at the same time Black women were seen as normatively sexual beings with heightened sexual proclivities. The example of Lillian Thomas, age twenty-two, was instructive. She had been cared for at public expense since the age of ten. After becoming independent, she fell in love and agreed to "illicit relations" with a man and subsequently became pregnant. She rejected his proposal of marriage because she "preferred the alternative of living single and fighting out her own battle rather than being the wife of a drunkard." After giving birth at a home for expectant unmarried females, she was committed to Boston Psychopathic for a determination of her ability to care for the child. Investigation by social workers found that she entertained men in her rooms in the evening, and "went often to dances and came home very late." Staff disapproval of such behavior did not extend to African American females. Hypersexual activity in White females was taken as evidence of psychopathy to the staff; similar behavior by Black women was regarded as an expression of an ingrained natural immorality of that race.

produced improvement in more than fifty percent of their insane female patients.<sup>261</sup>

In essence, much of the history of mental health professions reveals the manufacture of "madness" as a site of marginalization and oppression.<sup>262</sup> By exposing that patriarchy of madness,<sup>263</sup> Foucault articulated the artifice of mental illness. Rather than originating in the world of the irrational, the madman is stigmatized since "he crosses the frontiers of

261. WHITAKER, *supra* note 237, at 78. Whitaker states:

"The gynecologist," proclaimed W.O. Henry, at the 1906 annual meeting of the American Medical Association, "may cure various forms of insanity if [pelvic] irritation is entirely removed . . . by whatever means are necessary, no matter how radical the [surgical] work required." Much attention also focused on the pathological influence that the vagina and the nerve-rich clitoris could have on the female mind. Women, said one physician, "are deeply concerned about these organs," and "insanity may occur because their minds are very much agitated" by this undue concern. Direct evidence of a female mind led astray could sometimes be found through measurement of her genitalia: women with "hypertrophy" of the clitoris were presumed to be habitual masturbators. The reason . . . was that masturbation stirred blood flow to the external genitalia, which led to the "exaggerated nutrition of these organs" and thus abnormal growth. Since masturbation was viewed as a cause of insanity, some sought to cure it [by removing the clitoris and uterus].

*Id.* at 78–79 (citations omitted).

262. Thomas S. Szasz has cogently articulated the similarities between the use of the inquisitions as a way of containing dissidents and deviants and psychiatry as performing the same function:

In the new—secular and 'scientific'—cultural climate, as in any other, there were still the disadvantaged, the disaffected, and the men who thought and criticized too much. Conformity was still demanded. The nonconformist, the objector, in short, all who denied or refused to affirm society's dominant values, were still the enemies of society. To be sure, the proper ordering of this new society was no longer conceptualized in terms of Divine Grace; instead, it was viewed in terms of Public Health. Its internal enemies were thus seen as mad; and Institutional Psychiatry came into being, as had the Inquisition earlier, to protect the group from this threat.

SZASZ, *supra* note 252, at 13.

263. According to Foucault:

The entire existence of madness, in the world now being prepared for it, was enveloped in what we may call, in anticipation, a 'parental complex.' The prestige of patriarchy is revived around madness . . . henceforth . . . the discourse of unreason will be linked with . . . the dialectic of the family . . . the madman remains a minor and for a long time reason will retain for him the aspect of the father . . . He isolated the social structure of the bourgeois family, reconstituted it symbolically in the mental asylum, and set it adrift in history.

FOUCAULT, *supra* note 233, at 58.

bourgeois order of his own accord, and alienates himself outside the sacred limits of its ethic."<sup>264</sup> Foucault, therefore, insightfully problematized the tensions inherent in a diagnosis of mental illness by highlighting its potential for strategic deployment. He recognized that mental illness has, to a certain extent, been constructed to contain those deemed deviant according to race, gender, class,<sup>265</sup> or sexuality.<sup>266</sup>

He accepts the Other in so far as the Other conforms to his image and conduct. However, if he and the Other differ, he defines the Other as defective—physically, mentally, or morally—and accepts him only if he is able and willing to cast off those of his features that set him apart from the normal. If the Other recants his false beliefs, or submits to treatment for his illness, then, and only then, will he be accepted as a member of the group. If he fails to do these things, the Other becomes the Evil one—whether he be called the Stranger, the Patient, or the Enemy.<sup>267</sup>

This post-modern conclusion provides a reality-check for one who attempts to advocate the potentially liberatory use of these disciplines. Mental health practitioners and the discipline itself became architects of confinement—in some sense the keepers of the status quo.<sup>268</sup> If, as the marginalized are apt to do, a person of color stepped out

264. *Id.*

265. As explained by Foucault:

All the poor who are capable of working must, upon work days, do what is necessary to avoid idleness, which is the mother of all evils, as well as to accustom them to honest toil and also to earning some part of their sustenance. . . . The classical age used confinement in an equivocal manner, making it play a double role: to reabsorb unemployment, or at least eliminate its most visible social effects, and to control costs when they seemed likely to become too high; to act alternately on the manpower market and on the cost of production.

*Id.* at 53–54.

266. Szasz recognizes that: "Psychiatric preoccupation with the disease concept of homosexuality—as with the disease concept of all so-called mental illnesses, such as alcoholism, drug addiction, or suicide—conceals the fact that homosexuals are a group of medically stigmatized and socially persecuted individuals." SZASZ, *supra* note 252, at 168.

267. *Id.* at 159.

268. Whitaker argues:

So too is Institutional Psychiatry an implementation of the unwritten laws of power-maintenance in a society insufficiently committed to honoring the Rule of Law. Feeling sad cannot very well be made illegal; but a poor woman who is depressed (and refuses to play the role assigned to her in society) can be committed. Commitment-law is thus an adjunct to American

of their assigned place or challenged the race-based schema, psychiatry and psychology could be summoned to do the dirty work of maintaining a racialized order which preserved White supremacy. A devastatingly simple example is the case of Clennon King who in 1958 became the first African-American to apply for admission to the University of Mississippi. Mr. King dared challenge the racist status quo by seeking an education. He was committed to a state mental hospital because "any [B]lack man who thought he could get into Ole Miss was obviously out of touch with reality."<sup>269</sup>

Similarly, women seeking to operate outside of the ascribed societal dictates were seen as insane.<sup>270</sup> In this context, the diagnosis of "madness" often appears for women who have totally or partially rejected their assigned sex-role.<sup>271</sup> Women who fully act out the conditioned female role are clinically viewed as neurotic or psychotic and their hospitalization or commitment produces diagnosis for predominantly female behaviors such as depression, suicidal tendencies, anxiety neurosis, paranoia, or "promiscuity."<sup>272</sup> Women who reject or are ambivalent about the female role frighten both themselves and society so much so that their ostracism and self-destructiveness assures them a psychiatric label—if they are hospitalized, it is for failing to adhere to the dictates of their assigned gender, with labels of 'schizophrenia,' 'lesbianism,' or 'promiscuity being attached.'<sup>273</sup>

Moreover, as recently as 1938, moral deficiency, masturbation, misanthropy, and vagabondage were listed among the forty psychiatric disorders in a leading textbook. Homosexuality, which had been universally regarded as a manifestation of mental illness by Western psychiatry, was "officially" de-pathologized in 1973, after a contentious political struggle, by a vote of the board of trustees of the American Psychiatric Association.<sup>274</sup>

---

Law on the books; it helps the rich and well-educated to keep the poor and ill-educated in their place.

*Id.* at 64.

269. *Id.* at 215.

270. "When the celebrated Mrs. Packard was hospitalized in the Jacksonville State Insane Asylum for disagreeing with her minister-husband, the commitment laws of the state of Illinois explicitly proclaimed that, 'Married women . . . may be entered or detained in the hospital at the request of the husband of the woman or the guardian . . . without evidence of insanity required in other cases.'" SZASZ, *supra* note 252, at 15.

271. See, e.g., PHYLLIS CHESLER, *WOMEN AND MADNESS* 94 (1972) (describing one research subject's experience with her family after announcing her dreams of becoming an artist).

272. Promiscuity, like frigidity, is both a female and a non-female trait: either can mean a flight into or a flight from femininity. *Id.* at 93.

273. See *id.*

274. Robert L. Woolfolk, *The Concept of Mental Illness: An Analysis of Four Pivotal Issues*, 22 J. MIND & BEHAV. 161, 173 (2001).

What these seemingly diverse “therapeutic” movements have in common not only with one another but also with such modern totalitarian movements as National Socialism and Communism, is that each seeks to protect the integrity of an excessively heterogeneous and pluralistic society and its dominant ethic. To accomplish this end, each represses certain individual and moral interests, and, in general, sacrifices the “one” for “many,” the “I” for the “we”; finally, to simplify the conceptual problem it faces, and to strengthen group cohesion, each channels—by systematic propaganda accompanied by the use of a brutal show of force—enmity toward a symbolic offender to whom the impending disintegration of the social order is attributed.<sup>275</sup>

Accepting for the moment that doctrine and discourse are captive and behooven, to a certain extent, to the culture and society in which they are manifested, what does that mean for the application, both legal and psychological, of the critical psychology discussed herein? That an alternative legal or mental health typology generated by those communities most affected by the relevant doctrines does not exist highlights the inherent tension found in so many disciplines—the challenge of using the very same doctrinal tools tainted from the construction of oppressive systems to destroy, reconstruct or reconfigure the system is necessarily precarious.<sup>276</sup> Accordingly, given the problematic history and legacy of diagnostic pathologization of marginalized communities, a perfect legal and ethical option might not exist for racialized communities, other than proceeding with extreme caution while embracing the intention not to allow repetition of past mistakes.

At this juncture, critical race theory scholarship on multiple identities and systems of oppression is informative, as the importance of the confluence of race and potential pathologization based on mental vulnerabilities is of paramount importance. These frameworks for analysis are alternatively referenced as models which are holistic,<sup>277</sup>

---

275. SZASZ, *supra* note 252, at 59.

276. See U.S. DEP'T HEALTH & HUMAN SERVICES, *HEALTHY PEOPLE 2000: NATIONAL HEALTH PROMOTION AND DISEASE PREVENTION OBJECTIVES* 542 (1990); see also *Break the Glass Ceiling: Equal Opportunities for Women and Minorities, Statistics*, [http://www.breaktheglassceiling.com/ST\\_minorities.htm](http://www.breaktheglassceiling.com/ST_minorities.htm) (last visited Dec. 4, 2003) (describing the lack of diversity in the legal profession).

277. See Elvia Arriola, *Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory*, 9 *BERKELEY WOMEN'S L.J.* 103, 139–41 (1994).

intersectional,<sup>278</sup> interlocking,<sup>279</sup> multidimensional<sup>280</sup> or multiply conscious.<sup>281</sup> In any event, it is instructive to use analytical paradigms which recognize that negative societal consequences flow from sites where multiple forms of oppression operate.

Hypothesizing identity, and the corresponding systems of oppression, as running along a single axis is misleading and has the tendency to oversimplify unstated reference points by essentializing.<sup>282</sup> While it is easier to overlook the distinct characteristics that comprise an individual and instead make an assessment based on an interpretation of "dominant" features, identity performance<sup>283</sup> or ascribed otherness, this point of departure ignores other overlapping reference points by its exclusivity. This phenomenon, of treating identities, or ascriptions, as separate, parallel and independent factors, is known as identity splitting<sup>284</sup>—it is the heuristic counterpoint to what critical race theorist have alternatively

278. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991) ("Feminist efforts to politicize experiences of women and antiracist efforts to politicize experiences of people of color have frequently proceeded as though the issues and experiences they each detail occur on mutually exclusive terrains.").

279. See Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 376 ("interlocking system of oppression based on race and gender that operates to the detriment of all women and all blacks"); Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991) ("all forms of subordination are interlocking and mutually reinforcing"); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 374 (1995) ("oppressions of various sorts always interlock because popular prejudice travels in multiples").

280. See Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 636–44 (1997); see also Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 10 (1999) [hereinafter Hutchinson, *Ignoring the Sexualization of Race*] ("multidimensionality posits that individual acts of discrimination and the various institutions of oppression are complex and multilayered, owing their existence to a host of interlocking sources of advantage and disadvantage").

281. See generally Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 586–87 (1990); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS L. REP. 7 (1989).

282. See Theresa Raffaele Jefferson, Note, *Toward A Black Lesbian Jurisprudence*, 18 B.C. THIRD WORLD L.J. 263, 265 (1998).

283. See Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 701 (2001) ("the theory of identity performance is that a person's experiences with and vulnerability to discrimination are based not just on a status marker of difference (call this a person's status identity) but also on the choices that person makes about how to present her difference (call this a person's performance identity)").

284. See generally Jefferson, *supra* note 282; Guadalupe T. Luna, *On the Complexities of Race: The Treaty of Guadalupe Hidalgo and Dred Scott v. Sandford*, 53 U. MIAMI L. REV. 691 (1999).



recognized as intersecting<sup>285</sup> or multidimensional<sup>286</sup> aspects of personhood.<sup>287</sup>

The concept of intersectionality emerged out of the particular forms of discrimination experienced by women of color that were neither recognized in feminist legal theory nor traditional civil rights scholarship. It recognized that the totality of oppression at identity crossroads was more than the sum of the parts:<sup>288</sup> “Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.”<sup>289</sup> Intersectionality illuminates the manner in which women of color are affected by both racial hierarchy and patriarchy.

In the context of Black women and political discourse, for example, political intersectionality highlights the simultaneous identity positioning within at least two inferior groups—women and Blacks—that frequently experience conflicting political agendas. Intersectionality in this context recognizes that political interests of women of color are masked and sometimes endangered by political strategies that ignore or suppress intersectional issues.<sup>290</sup> Accordingly, the intersectionality model developed as a response to an absence of theoretical or doctrinal approaches to the multilayered and particularized subordination endured by women of color. Such a framework of analysis allows for reflection on oppression in numerous venues, including, but not limited to politics, economics and the law.

Originally developed in the context of the experiential diversity of gay and lesbian existence, multidimensionality was conceived of as a methodology by which to analyze the impact of racial and class oppres-

285. Crenshaw, *supra* note 278 (considering how the experiences of women of color are frequently the product of intersecting patterns of racism and sexism and how these experiences tend not to be represented within the discourses of either feminism or anti-racism). Professor Crenshaw demonstrates that the intersection of racism and sexism factors into the lives of Black women in ways that cannot be captured entirely by looking separately at the race and gender experiences alone. *See id.*

286. *See* Darren Lenard Hutchinson, “Gay Rights” for “Gay Whites”? Race, Sexual Identity, and Equal Protection Discourse, 85 CORNELL L. REV. 1358 (2000).

287. *See, e.g.,* Caldwell, *supra* note 279, at 371–76; Crenshaw, *supra* note 278, at 1242; Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (Or Other -isms)*, DUKE L.J. 397, 401–10 (1991); Matsuda, *supra* note 279, at 1184. *See generally* CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 1997); Darren Lenard Hutchinson, *Black Gays and Lesbians, Racial Politics, and the Million Man March*, in BLACK MEN ON RACE, GENDER, AND SEXUALITY: A CRITICAL READER 28, 28–31 (Devon W. Carbado ed., 1999).

288. Crenshaw, *supra* note 278.

289. Crenshaw, *supra* note 57, at 140.

290. *Id.*

sion upon sexual subordination, gay and lesbian experience and identity and to cease treating these forces as separable, mutually exclusive, or even conflicting phenomena.<sup>291</sup> More generally, multidimensionality posits that individual acts of discrimination and the various mechanisms of oppression are complex and multilayered, owing their existence to a host of interlocking sources of advantage and disadvantage.

Multidimensionality complicates the very notion of privilege and subordination by pushing legal theorists and political activists to recognize the multiple and complex ways in which all individuals experience oppression.<sup>292</sup> As an outgrowth of intersectionality, multidimensionality differs conceptually as it attempts to complicate the implications of intersectionality that may lead to the conclusion that social identity categories or systems of oppression only "intersect" in the lives of persons burdened by multiple sources of disempowerment, such as women of color.<sup>293</sup>

Both intersectionality and multidimensionality recognize the exacerbation of oppression flowing from the confluence of compounding systems of domination and the complicated matrix of social identity around which power and disempowerment are distributed. Where systems of race, gender, and class domination converge, as they often do in the experience of mentally vulnerable people of color, intervention strategies based exclusively on the experiences of White men will be inadequate to overcome the obstacles faced at the confluence of marginalized identities.

Similarly the nexus of race and mental vulnerability, as identified by critical psychology, might provide a treacherous point of departure for haphazard or unsympathetic legal intervention for a number of reasons. First, despite unprecedented knowledge gained in the past three decades about the brain and human behavior, mental health, and mental illness in particular, is often an afterthought and illnesses of the mind are shrouded in fear, are misunderstood and maligned.<sup>294</sup> The alternate hyper-visibility or complete invisibility of mental vulnerability translates into punishment<sup>295</sup>—a penalty for the inability, lack of understanding or refusal to

291. Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 280, at 18. For example, the heterosexual stereotype that men of color, particularly Black males are violent sexual threats to White women has been offered to justify violent racial marginalization. Similarly, history has portrayed women of color as heterosexually promiscuous, and laws and social practices have reduced them to sexual property in a variety of contexts, including the legally sanctioned sexual abuse of female slaves. *Id.*

292. *Id.*

293. *Id.* at 12.

294. DAVID SATCHER, MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL, Foreword, <http://www.surgeongeneral.gov/library/mentalhealth/home.html> (last visited Dec. 4, 2003) (describing how mental illness is misunderstood by the public).

295. See SZASZ, *supra* note 252, at 63–64. Szasz notes:

Today, the Scientific Establishment supplies the ideology, the State the power. Formerly, the inquisitor accused the citizen of witchcraft and proved him to be a witch; he then "relaxed" the witch to the "secular arm"—this is, the

adhere to societal mandates.<sup>296</sup> Second, the convergence of racism and mental challenge is a messy affair given historical and contemporary pathologization of Blackness, even in the absence of diagnosable mental health issues.<sup>297</sup>

One must therefore approach the infusion of critical psychology and the law with caution. Any legal intervention that seeks to infuse the criminal law with the critical psychology addressed above must be done with learned trepidation and conscious caution, for it is a slippery descent to the equivalence of Blackness with madness or Blackness with badness. Concern must also be voiced for the potential over-medication of individuals deemed mad or bad—the equation of Black youth with badness is already a site for critical concern.<sup>298</sup> The ability of the legal and the mental health disciplines to act as both sword and shield is enough to justify an ever-vigilant historically knowledgeable approach to infusion, lest critical psychology be appropriated or co-opted to further subordinating ends.

While such intersectional subordination does not have to be intentional, and might even be well-intentioned,<sup>299</sup> the interface of race and mental challenge has the potential to be the site of yet another oppressive interaction generated by societally constructed multi-axial oppression. Simply put, the articulation of a multi-axial identity revolving around the intersection of race and mental illness might play all too easily into the

---

State—and he was burned at the stake. Today, the institutional psychiatrist accuses the citizen of mental illness and diagnoses him as psychotic; he then turns him over to the court—that is, the state—and he is committed to a prison called a mental hospital.

*Id.*

296. Jefferson, *supra* note 282, at 263.

297. See generally SZASZ, *supra* note 252; J.H. Carter, *Racism's Impact on Mental Health*, 86 J. NAT'L MED. ASS'N 543 (1994); Mental Health: A Report of the Surgeon General, <http://www.mentalhealth.org/cre/toc.asp> (last visited Dec. 4, 2003); CHARLYN HARPER-BROWNE, *TEACHING BLACK PSYCHOLOGY—A RESOURCE MANUAL*, <http://www.swagga.com/racism.htm> (last visited Dec. 4, 2003) (listing specific examples of scientific racism).

298. Angela Olivia Burton, *Black Children, Juvenile Justice, and Mental Health: A Reparations Perspective* (unpublished manuscript, on file with author).

299. Dr. Szasz takes a somewhat radical stance on what he labels benevolent paternalism arguing that:

Since the Inquisition, oppressors have insisted on wearing the uniforms of helpers. First, they donned the garb of the cleric. Today they will not show themselves without their white medical coats. Benevolent paternalism (if one wants to so mislabel human evil) was the basic article of faith and the fundamental strategic weapon for the clergyman's domination of those he deemed sinners; and so it has continued for the psychiatrist's domination of those he deems mad.

SZASZ, *supra* note 252, at 157–58.

hands of proponents of racialized theories of genetic inferiority bent on further disempowerment of already marginalized communities.<sup>300</sup>

The legal and psychological literature reveals ample reason for concern. Foremost among these are the disparate rates of incarceration and subsequent disenfranchisement of Blacks in America,<sup>301</sup> the over-diagnosis of Blacks with schizophrenia<sup>302</sup> and other conditions leading to over-medication, over-commitment of Blacks to psychiatric facilities on an in-patient basis, and the limited diversity within the professions of law, psychology and psychiatry.<sup>303</sup>

In addition to the concern for pathologization some would posit a futility to any criminal law recognition of critical psychology in the context discussed above. Specifically, the affirmative defenses discussed above do not implicate mental health treatment modalities; rather they implicate mitigated sentencing and shortened incarceration. The criminal justice system, as it presently exists, is ill-equipped to address the mental health issues of the vast majority of prisoners, let alone the mental health issues

300. See RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1996); Phillip Ruston, *Race as a Biological Concept*, at <http://www.evolution.com/articles/race.html> (last visited Dec. 4, 2003).

301. See National Ass'n for the Advancement of Colored People, *Reenfranchisement: American Justice Allows People to Return to Society: Why Can't They Vote?*, at <http://www.naacp.org/work/voter/reenfranchisement.shtml> (last visited Oct. 23, 2003); MARC MAUER & TRACY HULING, *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* (1995); Fox Butterfield, *Study Finds Big Increase in Black Men as Inmates Since 1980*, N.Y. TIMES, Aug. 28, 2002, at A14; Allen J. Beck, *Prison and Jail Inmates at Midyear 1999*, BUREAU OF JUSTICE STATISTICS: BULLETIN 1 (2000), <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim99.pdf> (last visited Dec. 4, 2003); Allen J. Beck & Thomas P. Bonczar, *Lifetime Likelihood of Going to State or Federal Prison*, BUREAU OF JUSTICE STATISTICS: SPECIAL REPORT 1 (1997), <http://www.ojp.usdoj.gov/bjs/pub/pdf/lsgsf.pdf> (last visited Dec. 4, 2003).

302. In 1973, Stanford University Psychology professor David Rosenhan conducted a study to show that the label "schizophrenia" was being loosely applied to patients in hospitals. WHITAKER, *supra* note 237, at 170. Rosenhan and seven others went to hospitals complaining of fake symptoms that included hearing voices and other noises, otherwise they behaved calm and described their relationships with others as they were. *Id.* Every time these patients were admitted and treated for schizophrenia, Rosenhan stated that other patients would tell him and the others they were "not crazy." *Id.* This implied that the people who were deemed insane could see they were not crazy but the doctors could not. *Id.* Furthermore, the study showed that the American doctors were preferentially applying the label to people with Black skin and to the poor. *Id.* He also wrote that we now know that "we are unable to distinguish sanity from insanity." *Id.*

303. See National Institute of Mental Health Report, *An Investment In America's Future: Racial/Ethnic Diversity in Mental Health Research Careers, a report of the National Advisory Mental Health Council Workgroup on Racial/ Ethnic Diversity in Research Training and Health Disparities Research*, <http://www.nimh.nih.gov/council/diversity.pdf> (last visited Oct. 23, 2003); see also U.S. DEPT' HEALTH & HUMAN SERVICES, *supra* note 276; Break the Glass Ceiling, *supra* note 276.

which may result from racial abuses.<sup>304</sup> Despite the overpopulation of prisons with people of color, the possibilities of culturally competent mental health services in the prison context are discouraging.<sup>305</sup>

The likelihood of suitable treatment opportunities is also disheartening outside of the prison context. Even the Surgeon General concluded that the existing mental health care system is ill-suited to address the needs of people of color.<sup>306</sup> The 2001 Surgeon General's supplemental report on mental health emphasizes the importance of considering race, culture and ethnicity in addressing the mental health needs of a diverse population. The report<sup>307</sup> confirms that serious disparities exist regarding the mental health services delivered to racial and ethnic minorities.<sup>308</sup> The supplemental report concludes that to achieve the benefits of effective mental health preventive and treatment services, "cultural and historical context must be accounted for in designing, adapting, and implementing services and service delivery systems."<sup>309</sup>

304. See TERRY KUPERS, *PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT* (1994); Report of Human Rights Watch, "Ill Equipped: US Prisons and Offenders with Mental Illness," at <http://www.hrw.org/reports/2003/usa1003> (last visited Oct. 23, 2003).

305. The Corrections Yearbook 2001, Statistics on Prison Populations, [http://www.cji-inc.com/cyb/download/01race\\_percent.pdf](http://www.cji-inc.com/cyb/download/01race_percent.pdf) (last visited Dec. 4, 2003).

306. See SATCHER, *supra* note 294; Mental Health: Culture, Race, Ethnicity, *supra* note 90. The Surgeon General's Report concludes that:

Disparities in access to mental health services are partly attributable to financial barriers. Many of the working poor, among whom African Americans are overrepresented, do not qualify for public coverage and work in jobs that do not provide private coverage. Better access to private insurance is an important step, but is not in itself sufficient. African American reliance on public financing suggests that provisions of the Medicaid program are also important. Publicly financed safety net providers are a critical resource in the provision of care to African American communities. Disparities in access also come about for reasons other than financial ones. Few mental health specialists are available for those African Americans who prefer an African American provider. Furthermore, African Americans are overrepresented in areas where few providers choose to practice. They may not trust or feel welcomed by the providers who are available. Feelings of mistrust and stigma or perceptions of racism or discrimination may keep them away.

*Id.*

307. Which has as its goal the provision of comprehensive coverage of issues relevant to the mental health of racial and ethnic minorities and a historical and cultural appreciation of context within which minority mental health may be better understood.

308. Mental Health: Culture, Race, Ethnicity, *supra* note 90, at 3.

309. The Supplement "documents the existence of striking disparities for minorities in mental health services and the underlying knowledge base. Racial and ethnic minorities have less access to mental health services than do Whites. They are less likely to receive needed care. When they receive care, it is more likely to be poor in quality." *Id.*

The legal system might similarly do well to examine these matters of context to ensure equality along multiple axes of identity. Despite these cautionary pronouncements, if all Americans, not just the privileged, are to place faith in the criminal justice system and be equal before and under the law, ways and means must be devised for appropriate legal consideration of relevant critical psychology as revealing disparate realities for certain segments of American society.

## CONCLUSION

Murder should never be condoned nor encouraged. Like many scholars who have analyzed provocation, extreme emotional disturbance, and diminished capacity defenses, I too recognize the need for criticality of their genesis, subordinating potential and rampant misuse.<sup>310</sup>

In addition to concerns with mitigating defenses stemming from the definitional concern over the unreasonableness of murder, some of the critiques of these defenses stems from their homophobic or sexist application so as to justify or excuse murder fueled by homophobic rage or panic,<sup>311</sup> misogyny<sup>312</sup> and "face-saving" veiled as cultural practices.<sup>313</sup> If these defenses are to be abolished, then so be it—this is indeed a tenable option in light of the homophobia and femicide, that theses defenses have supported. Given the power of patriarchy and heteronormativity,<sup>314</sup>

310. See Nelson, *supra* note 4.

311. See Muneer I. Ahmad, *Homophobia in the Halls of Justice: Sexual Orientation Bias and Its Implication Within the Justice System*, 11 AM. U. J. GENDER SOC. POL'Y & L. 117 (2002); Joshua Dressler, *When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726 (1995); Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133 (1992).

312. See Jenny Morgan, *Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them*, 21 MELB. U.L. REV. 237 (1997); Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331 (1997); Melissa Spatz, *A Lesser Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives*, 24 COLUM. J.L. & SOC. PROBS. 597 (1991); Laurie J. Taylor, Comment, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679 (1986).

313. See Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053 (1994); Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific—Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311 (1991); James J. Sing, *Culture as Sameness: Towards a Synthetic View of Provocation and Culture in the Criminal Law*, 108 YALE L.J. 1845 (1999); Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57 (1994).

314. James M. Donovan, *Same Sex Union Announcements: Whether Newspapers Must Publish Them, and Why We Should Care*, 68 BROOK. L. REV. 721, 789 (2003); Katherine Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 3–4 (1995); Jillian Todd Weiss, *The Gender Caste System: Identity, Privacy, and Heteronormativity*, 10 L. & SEXUALITY 123, 153 (2001).

however, it is doubtful whether defenses such as these, which have been so effectively deployed to disempower women and gay men, will be quickly discarded. Indeed, in the arsenal of the sexist and the homophobic, or just the plain-old desperate attorney, they are the defense strategy of choice as they resonate with the "majority" when a woman has allegedly been adulterous, or when a man has allegedly "hit-on" another man.

While it might seem inappropriate in the context of a death to invoke the logic of "what's good for the goose, is good for the gander," there is a simple equality principle inherent in such "ganderism." Formal equality, the most basic conceptualization of equality, demands equal treatment for all. The simplicity of "tit for tat" or "an eye-for-an-eye" logic demands that claims by persons of color to access these, admittedly corrupted, defenses be seriously considered. Since these defenses are susceptible to cooptation for subordinating purposes, harnessing the defenses with the normative goal of racial justice is an alternative deserving of reflection—cooptation for liberatory purposes, under principles of formal equality, should be similarly achievable.

If persons of color claiming access to these defenses on the basis of critical psychology, racist abuses, or uncontrollable rage are to be denied mitigated sentences, then an informed carefully articulated doctrinal differentiation is demanded; a differentiation which squarely addresses the disparate application of these defenses in limiting access to a few, thereby privileging the privileged at the expense of others, namely women, people of color and the gay, lesbian, bisexual, and transgendered communities. In the absence of an explanation delineating the confines of the operation of these defenses, the emancipatory potential of these defenses should be creatively utilized by able defense counsel to further the interests of their marginalized clients. Why not throw these defenses, infused with critical psychology where appropriate, into the mix, as it currently exists?

As stated elsewhere, the ideal approach to the provocation, extreme emotional disturbance and diminished capacity defenses might be a conscious and informed application which prevents utilization of these defenses in a manner that itself works an equality injustice.<sup>315</sup> In other words, pro-equality parameters might be articulated around the defenses such that the margins of their operation do not blur into marginalization and oppression on the basis of a particular jurisdiction's protected equality grounds such as race, gender, sex, religion, creed, color, class or sexual orientation. These defenses would not, therefore, be applicable if the outcome of their mitigatory potential would be to further subjugate women, if homophobia would be sanctioned, or if racism against traditionally marginalized communities would be legitimized, for instance. In this way, the application of the defenses discussed above would be teth-

---

315. See Nelson, *supra* note 4, 1011–20.

ered to the enumerated grounds of protection in a given jurisdiction's equality guarantees and further the interests of the historically disadvantaged. Such quests for equality are not within the exclusive domain of constitutional law—rather the law, in all its glorious manifestations, should be harnessed to promote justice. The criminal law affirmative defenses discussed above might, with the infusion of relevant critical psychology, provide one such opportunity to achieve the ends of justice.