

LAW AND THE ENCULTURED SUBJECT

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I INTRODUCTION

Many theoretical discussions of multiculturalism begin with a question that goes something like this, "how can a liberal democracy accord equal respect to the autonomy of all individuals in a way that acknowledges and respects the formative significance of people's membership in sub-state communities?" Two currents run through the literature. One emphasizes the procedural aspect of citizenship, and promotes participation of members of identity groups in the political, social, and judicial institutions that shape the national community. The virtues of representation exceed the soundness or quality of resultant policies. Inclusion in the process of formulating, interpreting, and enforcing the laws and policies that affect citizens is itself a critical indicator of one's citizenship status, independent of particular outcomes.

The second current focuses on substantive content of multiculturalism – and uses particular case studies to illuminate the theory's practical utility. Commentators typically pick a 'hard case' – Should Sikh construction workers be permitted to wear turbans on the work site where occupational safety laws require labourers to wear hard hats? May young Muslim girls wear head scarves to publicly funded school? Should the state fund denominational schools? -- as a means of illustrating the operation of a particular normative framework as well as the limits of multicultural accommodation.

These two genres seem to more or less co-exist. Some scholars circulate in both streams. At a minimum, proponents of one usually wave congenially at proponents of the other as they navigate their own respective currents of thought. I want to suggest, however, that there is a latent tension between the substantive and procedural approaches to multiculturalism. Procedural accounts have as at least one objective the vindication of citizenship status. Inclusion of marginalized groups in deliberative and decision making institutions is not about conferring citizenship on non-citizens as such; it is about acting upon the recognition that 'they' are already 'us' – that is to say, citizens entitled to equal recognition, and thereby entitled to join in making the rules that govern 'us'.

When one moves to substantive accounts that explore specific cultural practices the question rapidly becomes some version 'should *we* tolerate what *they* do?', where we are the liberal majority and they are the encultured minority. The way in which the question is formulated necessarily reifies a rigid and homogenized us/them binary, with its attendant distribution of decision-making authority. This is the very sort of paradigm that a truly multicultural vision of citizenship would presumably repudiate. In making this point, I do not mean to diminish the importance of addressing substantive, concrete problems – indeed, this is a terrain in which I am most comfortable as an academic. Moreover, one cannot talk about everything at once. Nevertheless, it bears emphasizing acknowledging the ways in which this form of discourse works against its normative ambitions.

It is in part for this reason that I believe it important to experiment with alternative ways of framing these issues. This paper attempts to do so by embarking on a 'micro-analysis' of three encounters between criminal law that present difference moments in the relationship between law and the encultured subject. My objective is to capture the ambiguities, contradictions and complexities resulting from the fact that law simultaneously configures and reflects the social meaning and consequences of 'cultural

difference'. That law struggles with this task is not surprising, given the heterogeneity of Canadian society and the level of debate about multiculturalism.

In the language of citizenship, to be a citizen presumes equal status with others who share the designation. Transposed to the legal context, one speaks of equality before and under the law. From there, practical legal discussions around ethno-cultural diversity investigate whether and how the justice system can recognize and accommodate cultural difference while maintaining its commitment to equality. The way the questions are framed, I suggest, presupposes a culturally neutral legal landscape onto which some "culture" is super-imposed. This neutrality only reflects the objectivity that law arrogates to itself in general.¹

It is perhaps an indicator of diffidence at the highest normative level that the *Canadian Charter of Rights and Freedoms* protects freedom of religion (s. 2), guarantees equality and freedom from discrimination on grounds of race, religion, sex, national or ethnic origin, promotes interpretation consistent with Canada's 'multicultural heritage' (s. 15), yet also proclaims in the Preamble that "Canada is founded upon principles that recognize the supremacy of God".

Through unpacking my three case studies, I hope to depict an evolving interaction between law and the encultured subject under conditions of social flux. A graphic representation of my method might start with law standing separate and apart from culture, treating the latter as a discrete object of legal scrutiny. I use the doctrinal debate over the so-called 'culture defence' to illustrate this stance, and to expose the limits of the tacit presumption that the other criminal defenses as 'culture-free' constructs. From there, I move to a scenario where members of a racialized immigrant community become agents in the production of law, thereby engaging in norm production through law, rather than merely providing the passive bodies upon which law is inscribed and enacted. One might view this as law and culture entering into dialogue. The criminalization of female genital mutilation (FGM) in the *Canadian Criminal Code* provides the vehicle for this discussion. Finally, I use the Supreme Court of Canada's judgment in *RDS v. The Queen* to consider the racialized subject as the embodiment of law, where law and culture become physically fused in the person of the judge. The story of what this judge said and what was said about her disclose something important about patterns of disruption, reform and retrenchment during periods of transition.

II LOOKING AT LAW THROUGH THE LENS OF CULTURE

Regardless of how one conceptualizes citizenship, one common premise shared by theorists across disciplines is that 'true' citizenship includes/requires equality under the law. In Canadian legal discourse, scholars and the courts have agreed that the constitutional guarantee of equality requires more than formal sameness of treatment, and embraces treatment that recognizes and accommodates conditions of difference and disadvantage. This is sometimes referred to as substantive equality. For instance, Kymlicka's model of 'multicultural citizenship', which endorses certain group-differentiated rights, is not necessarily inconsistent with the idea of equality among citizens, if equality is understood in the richer, more substantive sense.

Of course, an abstract commitment to equality before the law must still grapple with the practical challenges arising from a multiplicity of identity claims and demands for recognition in the name of equal citizenship. These features have challenged the legal system and its actors' claims to neutrality, objectivity, and fairness--the very qualities law invokes to legitimate its authority.

I begin by exploring one aspect of the criminal law in order to expose the limits of the conventional understanding of law as a 'culture free' (read: objective) domain of analysis. This approach to law and culture treats 'culture' as distinct from law, and as a discrete object of legal scrutiny. This technique attempts to resolve various conflicts between law and culture by simply applying the former to the latter. I call this method 'looking at culture through the lens of law'.

People are lawfully kidnapped and confined, isolated and sometimes even killed in many 'liberal democracies'. The criminal justice system calls these acts imprisonment, corporal punishment, solitary confinement and capital punishment. It is critical to most legal systems that the state retains a monopoly on when and how these forms of violence are administered. The law punishes citizens who arrogate to themselves the power to inflict violence, and constrains the defences available to those citizens. Where an accused commits an act of violence to preserve his/her own life or safety, the lives or safety of loved ones, or occasionally property, the law may excuse² the violence. The costs of avoidance may be so high that even if the law cannot formally approve of the act, it can understand and forgive it. Nevertheless, access to defences is strictly regulated,³ and usually based on the idea that the accused subjectively believed s/he had no viable alternative but to commit an act of violence, and further that this belief was *objectively* valid when viewed from the perspective of the hypothetical 'reasonable person'.

One ongoing debate in North American criminal law concerns the so-called 'cultural defense'. Cases where it is raised involve situations where the accused, an immigrant from a non-European country, intentionally commits an act of violence and claims as a defense that his/her actions were objectively reasonable when viewed from within the accused's particular cultural framework. Other cases raising the defense concern Aboriginal accused. I will not engage with these situations for two reasons. First, the application of Canadian law to Aboriginal people is inextricably bound up with the question of Aboriginal self-government and related issues of sovereignty and jurisdiction over certain aspects of criminal law and punishment. These issues do not arise, or at least do not arise in the same terms, in the context of other ethnic and racialized minorities within Canada. Secondly, the most notable cases where Aboriginal culture was raised as a defense concerned property offences such as mischief or trespassing, not crimes of personal violence. Moreover, both cases arose in the context of organized political protest by Aboriginal people against non-recognition of Aboriginal title to land.⁴

²Some scholars, such as George Fletcher, maintain a distinction between defences that excuse wrongful acts and those that justify what would otherwise be wrongful acts. Canadian legal doctrine does not implement the distinction, but in any event, the defense of provocation, which I discuss *infra*, is categorized as an excuse even by those who support the distinction.

³For instance, self-defence may excuse X for killing the assailant Y, but the defence of duress will not excuse X for abducting Y under threat of death from Z.

⁴See, e.g. *R. v. Ashini*, (1989) 2 C.N.L.R.119; *R. v. Potts* [1990] O.J. No. 2567, (Ontario Court of Justice - Provincial Division), November 28, 1990. In the former case, Provincial Court Judge Iglolorte

In fact, there exists no separate and discrete 'cultural defense' in Canada. Thus, the phrase is somewhat misleading. It is used to encompass the various legal analyses where the accused's culture is incorporated as a factor relevant to determining guilt. This is distinguishable from situations where the accused (and/or victim's) culture is introduced as a factor relevant to sentencing once the accused has been convicted of the offence. The deployment of culture to mitigate sentencing of persons convicted of a criminal offence has produced mixed results. Two notorious examples out of Quebec featured sexual assault cases decided by white, Quebecois women judges. In 1994, a man convicted of sodomizing his 9 year old stepdaughter (over a 2 year period) was given a relatively light sentence because he had 'spared' the girl's virginity, which the girl's mother had testified was an important attribute in Muslim culture. The sentence was overturned on appeal. In early 1998, another judge issued 'conditional' (*i.e.* non-custodial) sentences to two men convicted of raping a young woman. Both accused and the complainant were of Haitian background. The judge commented that "the absence of regret of the 2 accused seems to be related more to the cultural context particularly with regard to relations with women, than a veritable problem of a sexual nature". Both decisions, and others like them, were excoriated as degrading to the respective cultural communities generally and female members particularly.⁵

By and large, the explicit resort to culture as a means of negating culpability has failed in Canada. For reasons that I will elaborate below, I believe a 'cultural defence' is conceptually doomed to failure. Apart from that, political objections to the use of culture as a legal defence to crimes of violence are compelling: The claims are usually asserted by male accused in defence of crimes of violence (sexual assault, domestic violence, homicide) committed against women and children. Perhaps the most highly publicized cases in North America involve so-called 'honour killings', where male relatives kill a young female kin for actual or suspected behaviour that allegedly brought shame to the family. Another oft-cited case concerned a charge of abduction and rape brought against a Hmong male, who claimed that Hmong 'marriage by capture' ritual required a woman to feign protest while the man abducts and forces intercourse on her.

Giving effect to a 'cultural defence' in these cases diminishes the protection provided by law to the women and children of those communities who are often the victims of the violence, thereby denying *them* equal protection of the law. The alleged respect shown to the accused's culture by recognizing a 'cultural defence' undermines the equal status of his victims and the value law attaches to their right to life. In other words, assertion of a 'cultural defense' in these circumstances places a higher value on the preservation of culture (as presented by the accused) than the preservation of women's lives and security. Of course, this feminist argument -- powerful as it is -- must contend with the occasional exceptional cases where women perpetrate the violence in the name

commented at p.120 of his judgment that "Since the concept of land as property is a concept foreign to original people, the Court must not assume that a "reasonable" belief be founded on English and hence Canadian law standards. The Innu People must be allowed to express their understanding of a foreign concept on their terms, or simply express what they believe."

⁵"Haitian Men Given Lenient Sentences on Cultural Grounds", CP Newswire, 27 January 1998, QuickLaw (CP98). Once again, it is important to note that s. 718.2(e) of the *Criminal Code* explicitly adopts sentencing principles that acknowledge Aboriginal cultural specificity by instructing judges that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders."

of their culture. One notorious US case concerned a woman charged with murdering her children. Upon learning of her husband's infidelity, she killed her children and unsuccessfully attempted to kill herself. Members of her community testified that parent-child suicide was an acceptable means of purging the shame of her husband's infidelity⁶.

Accused who assert a 'cultural defense' typically rely on expert testimony to portray a static, monolithic, hermetically sealed culture that unambiguously authorizes violence against those who transgress cultural norms prevailing within the minority community. While such a depiction obviously serves the interests of the accused in the courtroom, the cultural portrait that the accused paints tends to be simplistic, inaccurate, reactively stereotypical, and ultimately promotes (rather than combats) contempt for minority cultures. Indeed, liberal critics such as Susan Moller Okin (1999) are quick to seize upon (and accept) these images as evidence that other cultures and religions are worse for women than secular Anglo-European culture and therefore undeserving of respect within a liberal framework.

Much has already been written--pro and con, with greater and lesser degrees of nuance and qualification--about whether the law ought to recognize a 'cultural defense'. These analyses look at culture through the lens of law and ask if and where culture fits in the doctrinal picture. I do not propose to wade into the debate as it is currently framed. Instead, I pick up on the casual (and undeveloped) observation made by some scholars that reference to a 'cultural defense' presumes that only certain immigrants, racialized minorities, have a 'culture', whereas mainstream society--read white, Anglo-European society--in whose image law is created, does not. (In a sense, this complaint about the 'othering' of culture mirrors one of the most common complaints levelled against the Canadian state policy of multiculturalism, namely that it conveys a marginalizing rather than inclusive message about the place of cultural minorities in Canadian society.)

What I want to do here is unpack the observation about who has culture and demonstrate how law strategically ignores the cultural norms already embedded in criminal law defences. I contend that this oversight facilitates rejection of *other* cultural norms raised in the 'cultural defense' while retaining access to the defence for those whose conduct comports with dominant norms of 'mainstream' culture. I call this process looking at law through the lens of culture.

Commenting on the limits of liberal accommodation of cultural difference, Charles Taylor (1994) remarks in passing that "There would be no question of cultural differences determining the application of *habeas corpus*, for example. (page 63). Elsewhere, he makes a similar remark about homicide, "Even if, in the nature of things, compromise is close to impossible here – one either forbids murder or allows it" (page 63). In fact, even in this most extreme example of deliberate, intentional killing (murder), Canadian law already compromises. My central proposition is that this compromise – whose antecedents go back centuries in the Anglo-American legal canon -- constitutes a 'cultural defense'⁷. We call it provocation. It only applies to murder (which

⁶Some commentators have formulated an analysis that would salvage a 'culture defense' in these cases. See Leti Volpp, "[Mis]Identifying Culture: Asian Women and the 'Cultural Defense'", (1994) 17 *Harvard Women's LJ* 57. I know of no North American cases in which women who commit or authorize female genital mutilation have been charged, although women have been charged and convicted in France.

⁷Indeed, it is arguable that some or all other defences are culturally based. I focus on provocation here as a particularly clear example.

carries a minimum life sentence) and it has the effect of reducing a charge of murder to manslaughter (which has no minimum sentence).

Of course, legal doctrine does not actually talk about provocation as a defence that reduces liability because an accused acting according to the dictates of the dominant culture when killing the victim, nor could it do so. Anglo-European law cannot contemplate a higher source of authority than itself. It regards as deeply threatening the claim that obedience to law may be subordinated to a conflicting cultural value embraced by the accused. People may be citizens (in the social sense) of many communities, but no communal or moral authority can claim superiority over the law of the sovereign.

The conventional law of provocation, then, is not conceptualized as a 'cultural defense'. Moreover, jurisprudence emphatically denies that the defence implicitly sanctions killing motivated by rage⁸ because the victim 'deserved' it. What then does it say?

Section 232 of the *Criminal Code* sets out the requirements for the defence of provocation:

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

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

Reduced to its essential elements, the defence requires that the victim hurl an insult (by word, gesture or action) which would deprive an "ordinary person" of self-control, and which in fact causes the accused to lose self-control. The accused must act on the sudden, lest provocation become a guise for premeditated revenge. Yet despite the reference to "loss of self-control", a provoked killing is not accidental: the accused intends his or her actions (though not always the consequence of death) and deliberately shoots the gun, plunges the knife, chokes the victim.

Provocation, then, is apparently not about culturally-guided choices, it's about human nature and the loss of control. A insults B, B 'naturally' loses self-control and kills A. The requirement that an 'ordinary person' would lose self-control under the same circumstances is meant to ensure that the homicidal response really is somehow innate to the human condition. Notably, provocation invokes the 'ordinary' person rather than the 'reasonable person' (the usual objective standard against which accused are measured) because it is inherently unreasonable to fly into a rage and kill someone. Indeed, Cory J. of the Supreme Court of Canada explained recently, [t]he objective aspect would at first reading appear to be contradictory for, as legal writers have noted, the "ordinary" person does not kill. Yet, I think the objective element should be taken as an attempt to weigh in the balance those very human frailties which sometimes lead people to act irrationally and impulsively against the need to protect society by discouraging acts of homicidal violence (R. v. Thibert, 1996, para 4).

⁸As opposed to self-defence or defence of others, or necessity, or under duress, which are other motives for killing which the law recognizes.

Without knowing anything about the criminal law or the provocation defence, most people can guess at least one or both of the tropes that recur most frequently in successful provocation cases: In the first, a man kills his intimate partner (and/or her paramour) because she has betrayed him sexually, usually by cheating on him but occasionally by mocking his sexual abilities⁹. Sometimes, the accused only suspects the infidelity. In the second, a young male subject to unwanted homosexual contact kills the man who made the advance. These are not the only scenarios, but they figure prominently in the jurisprudence and the public psyche.

I will now contrast two cases involving these narratives. In the Supreme Court of Canada case of *R. v. Hill* (1986), the victim was a 32 year old man who had been a "Big Brother"¹⁰ to the 16 year old male accused. On the night of the killing, the accused was sleeping on the couch in the victim's apartment when, according to his testimony, he was awakened by an unexpected and unwelcome sexual advance--the victim was rubbing the accused's legs and chest. The accused grabbed a nearby hatchet and swung it at the victim, striking him in the head. The facts become somewhat more complicated thereafter,¹¹ but culminate in the accused grabbing two knives and stabbing the unarmed victim to death.

The second case, *R. v. Ly* (1987), was decided a year later by the British Columbia Court of Appeal. It concerned a man who had immigrated to Canada from Vietnam in 1980 and was living in a common law relationship with a woman. Interestingly, her cultural origins are not revealed¹². The accused suspected her of infidelity and confronted her with those suspicions on a couple of occasions. She denied the accusation and allegedly laughed when he described how he would "lose face" in his community if she was unfaithful. On the night of the killing, the victim returned home at 2:00 a.m., and told the accused her whereabouts that evening were none of his business. The accused testified that he then perceived the presence of a female apparition telling him to kill his partner, whereupon he strangled the victim. In both *Hill* and *Ly*, the accused raised the defence of provocation to the charge of murder.¹³

Because the test for provocation requires not only that the accused lose self-control, but also that the wrongful act or insult would cause an 'ordinary person' to lose self-control, the critical issue in both cases is the construction of the ordinary person. In

⁹ See, e.g. *R. v. Thibert*, [1996] 1 S.C.R. 37; *R. v. Stone*, [1999] 2 S.C.R. 290; *R. v. Tripodi*, [1955] S.C.R. 438; *R. v. Clark* (1974), 22 CCC (2d) 1.

¹⁰The Big Brother Organization matches boys (usually without adult male figures of authority/support in their lives) with volunteer men who befriend the boys and attempt to provide positive role models.

¹¹Among other things, the accused leaves the apartment and then returns, which certainly raises doubts about whether he could be said to have "acted on the sudden before there was time for his passion to cool".

¹²One cannot help but wonder whether not naming her race invites the inference that the victim was a Canadian born white woman. As such, she could be constructed as culturally and racially 'neutral'. While it may not ultimately alter the determination of legal culpability, I cannot avoid thinking that that the racialized and cultural identity of the victim (whatever it was) was not a neutral factor in relationship and interaction between the two people, yet this dimension of the narrative is completely effaced.

¹³Other possible defenses, such as self-defense in the case of *Hill* or mental disorder in the case of *Ly* either were not raised or were rejected at trial.

Hill, the question was whether the ordinary person was a young male (like the accused). In *Ly*, the issue was whether the ordinary person was a man of Vietnamese cultural background (like the accused).

The court in *Hill* determined that in assessing whether the 'ordinary person' would have been provoked, it was necessary to hypothesize an 'ordinary' 16 year old male subject to a homosexual advance.¹⁴

Conversely, the court in *Ly* rejected the argument that the accused should be measured against the ordinary person of Vietnamese background, insisting instead that the appropriate standard was "the ordinary married man who, because of a history of the relationship between the spouses, had a belief that his wife was not being faithful to him" (page 39). The court ruled that the cultural background or racialized identity of the accused would only be apposite to constructing the 'ordinary person' if the act or insult explicitly concerned that characteristic. That is to say, had the deceased insulted the accused by using a racial slur, then the ordinary person would be someone who bore the accused's racialized characteristic.

In effect, the court rejected a 'cultural defense' in *Ly*. The court's rationale had nothing to do with concerns about the totalizing, essentialist and caricatured presentation of Vietnamese culture or the one-dimensional description of the accused's relationship to his culture of origin. Neither did the court challenge the claim that the accused, in fact, lost self-control. Rather, the judgment derives its force from the principle that the level of self-control expected of people subject to the same law should not vary by 'culture'. Quoting Lord Diplock from the British case of *DPP v. Camplin* (1978) the ordinary person is "possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today" (page 37).

Yet in *Hill* and *Ly*, the sex of the accused remains pertinent to construing how the ordinary person would react. Why? Surely not because males have less self-control than females. The proposition that men are inherently less rational, and thus more prone by nature to impulsive violence than women is not one that judges tend to endorse. Indeed, Wilson J.¹⁵ in *Hill* declares that any notion that holding persons of different sex to different standards of self-control "would clearly be unacceptable" (para. 80). Why then is it crucial in a case like *Hill* to hypothesize that the ordinary person subject to an unwanted sexual advance is a young man? Why, for that matter, is it important to know that the victim was also male (or, to put it another way, that the insult was a *homosexual* advance)?

The Court avoids answering these questions. For our purposes, however, I think we can answer the question by imagining alternative scenarios: First, picture a 16 year old female responding to an unwanted sexual advance from a 32 year old male with homicidal rage.¹⁶ Does this sound ordinary? How about a 16 year old male responding to an unwanted sexual advance from a 32 year old woman with homicidal rage? Try a 16 year old female subject to an unwanted sexual advance from a 32 year old woman. I know of no reported cases of provocation which feature these or like scenarios. If men do

¹⁴In fairness, *Hill* is not without ambiguity on this matter, but the more recent Supreme Court of Canada provocation case of *Thibert*, *supra* note 10, advances this as the correct interpretation of the *Hill* judgment.

¹⁵Who, incidentally, was the first woman appointed to the Supreme Court of Canada.

¹⁶Suffice to say that if this was ordinary, the mortality rate for men would skyrocket.

not 'naturally' have less self-control in general than women, then the only explanation left is that unwanted homosexual advances by men are 'naturally' worse than any other kind of unwelcome sexual advance, and therefore elicit a stronger negative reaction from the targets. If one rejects a claim that homophobia is 'natural', one has difficulty resisting the conclusion that law projects as "human nature" the current of 'mainstream' culture which defines masculinity in homophobic terms, and it is important to know that the accused in *Hill* is a young male subject to a homosexual advance to because he is a product of that culture and his actions and reactions (including what causes him to 'lose control') are shaped by it.

Now in *Ly*, the accused does not get the benefit of claiming that his cultural context explains why the conduct of his spouse was a "worse" insult to him than it might be to someone outside that cultural context. He still gets the 'benefit' of his sex, so to speak, in the sense the standard is the ordinary *man* in the mainstream Canadian context who suspects his wife is unfaithful. In a recent analysis of this case, political theorist Arthur Ripstein (1997) endorses the court's result by asserting that the law "cannot make allowances for a man losing his temper because he regards a woman as his property, however deeply ingrained such a view may be in some cultures" (page 220). One might reasonably query whether the current law of provocation does precisely that for men who are understood as members of 'mainstream' culture.

As a purely empirical matter, most men in Canada (whatever their cultural context) who are confronted with an unwanted homosexual advance do not actually try to kill the other man. Similarly, only a small fraction of men (and an even smaller proportion of women) who discover their partners' infidelity *in flagrante* attempt to kill their partners, or their partners' paramours. The "ordinary man" imagined in law does not purport to describe a statistical reality. It would thus appear to be a concession to human weakness that is not very ordinary at all. If the 'ordinary person' is not a purely positive construct--a description of how 'ordinary' people actually behave--it must contain a normative undercurrent. Despite its own stated objective of demonstrating compassion for past acts, the jurisprudence of provocation cannot avoid being read prospectively as an object lesson of what ordinary people might--and may--do to the partners who betray them and the gay men who proposition them.

Since fewer women than men actually kill, and women by definition will not be propositioned by gay men, the standard can pretend to be gender neutral while actually redounding to the benefit of male accused most of the time¹⁷. It bears reiterating that most ordinary men, according to this standard, are quite extraordinary.

I am not the first to criticize the existing application of the provocation defence as implicitly sanctioning violence against women and gay people. And, as I noted at the outset, many have argued that recognizing a 'cultural defense' would effectively heighten the vulnerability of women and children from within cultural minority communities. What I have tried to do is link the two streams, which have thus far been running parallel and *incommunicado*. This disjuncture is maintained discursively by characterizing the sexism and homophobia in the provocation defence as 'political', (and therefore subject to

¹⁷ But not all the time. There are various reported cases involving women killing their husband or their husband's paramour. Suffice to say, however, that these cases make up a small portion of the total. See, e.g. *R. v. Daniels* (1983), 7 CCC (3d) 542; *R. v. Gladue*, [1999] 1 SCR 688.

challenge and transformation) while the sexism of 'culture defences' is a matter of 'culture' (and therefore immutable and monolithic)

I have attempted to problematize the tacit assumptions that law and culture occupy different conceptual spaces. I contend that the provocation defence purports to be a compassionate concession to the 'reality' of human nature. In its application, however, it legitimates certain cultural norms about masculinity, notwithstanding that law purports not to accommodate cultural specificity in judging acts of lethal violence. The fact that this construction of 'human nature' is challenged by critics as misogynistic and homophobic speaks to the reality that culture is an ever shifting, contested and unstable terrain, a feature which is regularly overlooked when discussing 'other' cultures. Thus, in respect of the 'cultural defense', I contend that the question "should the law recognize a 'cultural defense'?" is the wrong question. If one attends to the principle of equal citizenship, and specifically equality under the law, what we should be asking is why law privileges one particular 'cultural defense' above all others.

It is beyond the scope of this paper to mount an exhaustive account of the policy alternatives to the existing law of provocation. Nevertheless, I suggest that a multicultural perspective which exposes the arbitrariness of the *status quo* lends support to the arguments favouring abolition of the partial defence of provocation in criminal law. Of course, the defence only exists in its current form because murder carries a mandatory life sentence in Canada. If judges possessed discretion in sentencing for murder, provocation would almost inevitably be regarded as a factor relevant to sentencing. In other words, abolishing the partial defence of provocation would likely not eliminate the legal relevance of murderous rage, but would instead displace it to another stage in the criminal process, with all its attendant political freight. One consequence of abolishing the mandatory minimum sentence for murder might involve the introduction of other intense emotional states – compassion, depression, pity, love – as potentially mitigating factors¹⁸. Ultimately, a principled approach probably militates in favour of abolishing the partial defence of provocation, but to the extent that it would come at the expense of murder's mandatory minimum sentence, many of the problems associated with the defence will not be resolved, but rather only deferred to the sentencing phase.

III THIS LAW IS MY LAW: STRATEGIC ALLIANCES BETWEEN ETHNOCULTURAL GROUPS AND THE JUSTICE SYSTEM

The extensive literature on deliberative democracy/communicative ethics challenges the instrumentality of interest-based politics and promotes the ideal of a political community where participants achieve consensus on fundamental norms through reasoned argument among equal citizens. Both internal and external critiques have grappled with the abstract and utopian quality of this procedural framework. At present, formal equality of legal citizenship masks profound social, political and economic inequalities between citizens and groups of citizens affects not only participation in the polity, but also the extent to which participation is meaningful. In other words, representation is not only about sitting around the table, but also about speaking and being heard.

¹⁸ See Christine Boyle, "The Sensitive, New Age Ordinary Person".

Melissa Williams articulates the importance of representation in terms of equal citizenship: “the full and equal citizenship of members of marginalized groups depends upon their participation in processes of political decision-making, and [] these processes must be conducted in a manner that is open to the reasons that marginalized groups bring to them” (Williams 2000: 145). An element of bootstrapping inheres in marginalized groups’ strategy of mobilizing politically and attempting to enter the formal channels of political discourse. By this I mean that members of disadvantaged communities recognize that while they may possess formal (legal) citizenship, they do not enjoy the benefits of respect, access to resources and membership that accompany substantive citizenship. These groups deploy the incidents of enfranchisement to participate in the political process as a means of advancing and securing the substantive recognition that formal citizenship itself fails to provide. Herein lies the paradox: mobilizing in a way consistent with membership precisely in order to redress the lack of genuine membership.

In the context of criminal law, immigrants and refugees are frequently reminded that they are lucky to be here, and that their job is to adapt to, and obey, Canadian law as a condition of membership. The suspicion that they will not do so is frequently manifested by overpolicing, underprotection and insensitive and/or discriminatory treatment at all stages of the criminal process, both as accused and as victims¹⁹. This creates a dilemma for those who occupy a disadvantaged status within the particular ethno-cultural community. For instance, many racialized and immigrant women subject to domestic violence fear that seeking protection from the state will expose their partners to a racist criminal justice system, reinforce negative stereotypes about the violent/sexist/primitive nature of their community and leave them even more marginalized and vulnerable within their communities than before. Small wonder many members of ethno-cultural communities distrust²⁰ and feel alienated from the legal system. Their reluctance to access the legal system becomes another symptom of their exclusion from membership and the protection that citizenship is meant to provide.

Notwithstanding the hazards of engagement, certain woman-centred African immigrant groups decided to undertake law reform advocacy in relation to female genital mutilation (FGM). Though powerful segments within the various affected communities defend it as a religiously or culturally mandated tradition, many women and men from within the same communities reject the validity of the religious or cultural rationales invoked in favour of the practice. A conventional framing of this issue within liberal debate about multiculturalism²¹ typically involves querying whether respect for cultural difference requires toleration of a practice which appears fundamentally and irredeemably violent, debilitating and misogynistic. The answer is almost invariably ‘no’: FGM represents the limit of liberal tolerance for cultural diversity.

I will not wade into that debate as currently framed, although I note in passing that several countries where FGM is a practice of the dominant culture have also taken steps to formally prohibit it, with greater or lesser (usually lesser) degrees of practical impact. Indeed, many commentators note that the practice is contested within the

¹⁹ For recent government reports documenting these issues, see Government of Ontario, *Commission on Systematic Racism in the Ontario Criminal Justice System*, (Government of Ontario: 1994); Department of Justice, *Ethnocultural Groups and the Justice System in Canada* (Government of Canada: 1996)

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²¹ See, e.g. Okin etc.

affected communities, but implicitly treat this as a contingent fact of little theoretical significance. Instead, they revert to the monolithic 'cultures in collision' image, which necessarily reifies the essentialized conception of culture that liberal critics profess to reject. The case study which I present takes as its starting point the fact that FGM is opposed by many members of affected communities.

The extent to which FGM occurs in Canada is unknown. Anecdotal reports suggest that it is performed, probably by health care professionals²², but concrete information about frequency and numbers is scant. Anti-FGM activists from within the various communities attempt to discourage it through education about the adverse health and psychological effects of FGM. They also engage in consciousness-raising to dispel the alleged cultural or religious justifications for the practice. These activists are also keenly aware that publicity about FGM often breeds revulsion from 'mainstream' culture, and further stigmatizes immigrants from affected communities as primitive and uncivilized.

The Canadian Department of Justice first considered the desirability of amending the *Criminal Code* to make FGM a criminal offence in 1991. In its report, the Department of Justice recommended against amendment, concluding that FGM already constitutes a criminal offence under existing laws prohibiting aggravated assault²³, assault causing bodily harm²⁴ and failure to provide necessities of life to a child. Just as cutting off a girl's hand (without medical reason) would fall within the general definition of aggravated assault (wounding, maiming, disfiguring or endangering life), so too would cutting off a girl's clitoris fall within the general definition of aggravated assault. Based on this advice, no action was taken to explicitly criminalize FGM.

However, in 1993²⁵ the *Criminal Code* was amended to add the offence of removing a child under the age of 18 with the intention of committing outside Canada an act which would be, *inter alia*, an aggravated assault or an assault causing bodily harm in Canada²⁶. The effect of the amendment was to criminalize taking a girl out of Canada with the intent of subjecting her to FGM elsewhere, conduct which would not have been criminal absent the amendment. Presumably, the objective was to dissuade parents from evading Canadian law by taking their daughters to be circumcised overseas. In effect, Canadian criminal law's jurisdiction was extended extraterritorially to take precedence over competing normative frameworks that permitted FGM elsewhere.

A few years later, in 1997, the government reversed its earlier position and amended the *Criminal Code* to explicitly define FGM²⁷ and declare that it constituted an aggravated assault to which no person could consent, except under stipulated circumstances²⁸.

²² This hypothesis is based on the fact that in Canada, unlike in Britain and France, girls have not been showing up in hospital emergency wards suffering the consequences of botched procedures.

²³ *Criminal Code*, s. 268.

²⁴ *Criminal Code*, s. 267.

²⁵ c. 45, s. 3.

²⁶ *Criminal Code*, s. 273.1.

²⁷ S. 268(3) states that to wound or maim includes to "excise, infibulate or mitliate, in whole or in part, the labia majora, labia minora or clitoris of a person".

²⁸ Unless it was medically necessary or the woman was over 18 and no bodily harm resulted.

Why did this happen, and what message did the Government intend to convey through the explicit criminalization of FGM? As noted earlier, the practice was already illegal under the general law prohibiting various forms of assault. From a purely doctrinal perspective, it would have made more sense to create an exemption from the law of assault for male circumcision, a common cultural and religious practice in North America (to which a small but feisty network of men have recently raised loud objections). Technically, male circumcision also constitutes an aggravated assault, even though its physical and psychological impact on males can hardly be compared to the damage done by FGM to females. Nevertheless, the fact that no one seriously fears criminal prosecution for circumcising their male child speaks to the power of dominant cultural norms to supercede the letter of the law and determine what the law is 'really' about.

My first reaction to the criminalization of FGM was to wonder if singling out FGM for special mention in the *Criminal Code* announces to Canadian society that the practices of some members of particular communities are so heinous and the members of that community so unruly that they warrant special targeting for the criminal sanction. Such action could reinforce negative stereotypical associations between immigrants, culture and criminality, thereby accentuating their status as the outside the law – outlaws to Canada -- and reinforcing Canadian self-perception as enlightened, liberated, and law-abiding. In a compelling article, David Fraser uses legislative debate in Australia to support this critique of the criminalization of FGM in that country²⁹. Similar analyses have emerged from the criminalization of FGM in Britain, France and the US.

Indeed, I feared that it would be a short step from singling out those who commit FGM as outside the law of the state to demanding that people from countries where FGM is practiced should literally remain outside the state, and be denied entry to Canada *qua* 'undesirable' 'criminal' types. After all, one particularly invidious strand of anti-immigrant backlash appropriated migrant women's activism around domestic violence to argue for immigration restrictions from so-called 'non-traditional' source countries because male nationals did not respect women's human rights. In short, my concern was that explicit criminalization of FGM adds nothing to the existing state of the law except more stigma.

I was quite prepared to stop my analysis at that point and hold up the explicit criminalization of FGM in Canada as an object lesson in how the dominant culture, through the power of naming, gratuitously marginalizes members of minority cultural communities. I then decided to investigate how the law actually came into existence.

To my surprise, it emerged that the political pressure to criminalize FGM in Canada emanated from women from affected communities who inserted and asserted themselves directly into the legislative process. This contrasts directly with the process depicted in other jurisdictions, where the women themselves rarely participated or, when they did so, were selectively recruited by more broadly based organizations to perform the role of exoticized victim of primitive misogyny.

In speaking with activists from affected communities and from immigrant women's groups³⁰ in Canada, I learned that while there was no consensus among

²⁹ David Fraser, "The First Cut is Not the Deepest"XX (1995) *Dalhousie Law Journal* XX.

³⁰ My thanks to Sadia Gassim, who organized the petition I refer to *infra*, Lucy Spencer of the National Organization of Immigrant and Visible Minority Women (NOIVM) and Khamisa Baya of

opponents of the practice, a number of anti-FGM activists within those communities actively supported explicit criminalization. What ensued was a sophisticated campaign that built coalitions with mainstream feminist organizations and drew on popular organizing. In fact, a major impetus for the 1997 amendment appeared to be a 5,000 person petition launched by a woman from one of the affected communities which she presented to the Minister of Justice³¹. Signatories included people within and outside the affected communities.

In late 1996, the House of Commons Standing Committee on Justice and Legal Affairs invited submissions on a draft amendment to the Criminal Code regarding child prostitution, child sex tourism, criminal harassment, and FGM (Bill C-27). Community based organizations such as Women's Health in Women's Hands, the Female Genital Mutilation Legal Community Committee, the African Canadian Legal Clinic³² as well as the National Action Committee on the Status of Women (among others) weighed in favouring explicit criminalization.

The FGM Legal Community Committee explicitly asserted their interest in participating in law reform as a democratic right flowing from citizenship:

The FGM Legal Community Committee, as part of our movement to eradicate female genital mutilation and in fulfilling our duty and responsibility as citizens, demand our right as citizens of this country, to be part of the decision making process, using our expertise and experience in the determination of female genital mutilation legislation that so vitally affects our lives.³³

The lack of consultation prior to the initial draft of Bill C-27 elicited angry objections from many of the NGO participants, including the FGM Legal Community Committee, which may explain the strong tone of this passage.

Supporters of the amendment claimed that naming FGM as a criminal offence would convey the message of its illegality more unequivocally to affected communities than the *status quo*, thereby providing a more powerful deterrent³⁴. However, all anti-FGM briefs I examined gave precedence to education and consciousness-raising within the community as the means to eradicating the practice. The form and substance of the criminal sanction was assessed in accordance with its heuristic value³⁵. When I asked

Women's Health in Women's Hands, each of whom generously gave their time to discuss their involvement in the legislative process with me. I am also grateful to Ms. Baya for sending me an extensive package of submissions and briefs from various participants.

³¹ Sadia Gassim, telephone interview, 16 June 1999.

³² It is clear from reading the written submissions that these groups collaborated to a greater or lesser extent. Not only are their positions very similar, portions of text are also identical.

³³ FGM Legal Community Committee, "Brief to the Parliamentary Standing Committee on Justice and Legal Affairs Re: Bill C-27 Section 268 subsections (3) & (4)", November 26, 1996 at 7. The lack of consultation prior to the initial draft of Bill C-27 elicited angry objections from many of the NGO participants, including the FGM Legal Community Committee, which may explain the strong tone of this passage.

³⁴ See, e.g. Khamisa Baya, Women's Health in Women's Hands, "Brief on Bill C-27", 27 November 1996 at 23.

³⁵ See, e.g. Women's Health in Women's Hands, *supra* at 23, FGM Legal Community Committee, *supra* at 29, African Canadian Legal Clinic, "Bill C-27" (no date) at 13. The National Organization of

one advocate if she was concerned about the stigmatizing effect of specifically targeting FGM in the *Criminal Code*, she surmised that the affected communities are already so maligned by mainstream Canadian society that criminalizing a particular cultural practice associated with these communities would hardly make a difference³⁶. In other words, given the current degraded status of the affected communities, they had little to lose in terms of group reputation, and something to gain in terms of protecting vulnerable members of the community.

Like all ‘real world’ examples, the process through which African immigrant women asserted themselves as political subjects is a highly imperfect representation of deliberative democracy in action. It would be futile to launch a critique of ideal theory based on impracticality. Nevertheless, I believe there is merit in examining real situations as a means of identifying some of the complexities that must eventually be confronted when the theoretical rubber hits the empirical road. Presumably, each case presents some issues that are idiosyncratic, and others that are more generalizable.

Many scholars have commented on the applicability of the principles of deliberative democracy in contexts of multiculturalism and inequality of power, noting that norms of communication may privilege groups who practice certain kinds of speech. Let me add to this the following concern: Once one recognizes the existence of sub-state communities from which participants in public deliberation may emerge, one must confront the implications of the fact that these sub-state communities may establish their internal norms according to processes do not conform to the tenets of communicative ethics. That is not to say that norms are uncontested within those communities. It does mean that power dynamics between members within particular communities may be constituted and negotiated differently than the power dynamics between members and the mainstream.

How does the story of the criminalization of FGM in Canada illuminate these issues? As racialized, Muslim, immigrant women, the Somali and Sudanese women who led the advocacy campaign occupy a disadvantaged position in Canada. Although some commentators query the exclusionary impact of the formal structures of public deliberation, from my reading of the submissions of the FGM Legal Community Committee and *Women’s Health in Women’s Hands*, the groups were manifestly able to articulate their objectives and their reasons by reference to normative claims – equality, citizenship, participation -- that would be cognisable in the arena of political debate. I do not know whether this required distortion of their preferred mode of argumentation in order to accommodate the formal requirements of participation, but my point is simply that the mode of discourse was not an insurmountable barrier. Moreover, they were also

Visible and Minority Women of Canada created a very comprehensive and nuanced Workshop Manual on FGM as a resource for organizations and groups interested in educating their communities about FGM. The objectives of the workshops are to:

- correct misconceptions and fallacies about FGM
- give information about the negative health and legal consequences of FGM
- help participants think about ways to prevent FGM
- help participants find the self confidence to face the social pressure to continue FGM prevalent among certain communities; and
- prepare participants to educate others in their communities about the need to eradicate female genital mutilation.

³⁶ Telephone Interview, June ?? 1999.

successful in recruiting support and forming coalitions with overlapping communities. In particular, the African-Canadian Legal Clinic and the National Action Committee on the Status of Women lent their support to explicit criminalization. The level of cooperation was evident not only in the general content of the various submissions, but also in the exact reproduction of key passages of text. I doubt very much that defenders of FGM, however powerful within their respective communities, would have as easy access to the mainstream language of political discourse, or to potential allies.

The strategic choice to collaborate with the mainstream justice system, and call for a law as an instrument that would speak directly to the communities, was made by the advocacy groups with foreknowledge of the risks attendant in engaging with a criminal justice system known to be indifferent, uncomprehending, or outright hostile to racialized and ethnic minorities. The submissions reflect this awareness. For example, the FGM Legal Community Committee, the African Canadian Legal Clinic and Women's Health in Women's Hands all advocated a two tier sentencing regime which would expose those who actually perform the operation to more serious penalties than the parents of the girl. In particular, they were concerned that lengthy imprisonment of parents would not be in the best interests of the child. Each group explicitly linked its position to concerns about racial bias in sentencing³⁷, including Women's Health in Women's Hands:

These concerns regarding overly lengthy incarceration of parents and /or guardians are neither unfounded nor exaggerated, and are strengthened by documented reports of endemic systemic ethno-racial discrimination in the criminal justice system and similar biases in the sentencing process of the judicial system. The result of such institutionalized discrimination is not only higher than average conviction rates but also relatively lengthier incarceration periods for Canadians from ethno-racial communities³⁸

Other specific responses to the draft legislation related to inserting a more comprehensive definition of FGM, which would expressly cover re-infibulation (which may occur after childbirth). The groups also opposed the inclusion a 'therapeutic defence' for procedures performed for the physical health, reproduction function or 'normal sexual appearance'. One argument was that FGM never has a therapeutic benefit, and that current notions that altering women's genitalia can be 'therapeutic' is a western conceit that can be traced back to the Victorian era, where clitoridectomies and removal of ovaries were performed to 'cure' nymphomania, promiscuity, lesbianism, and masturbation:

Female genital surgeries continue to be practised today in the West that have questionable or no medical benefits for the woman herself -- for example, 'father's stitches' (extra stitches during episiotomy repair) to make the vaginal opening tighter after vaginal delivery, vaginoplasty for

³⁷ I believe the underlying assumption behind two-tier sentencing is also that the practitioner who performs the FGM is not a member of one of the affected communities, though this is not spelled out explicitly.

³⁸ Women's Health in Women's Hands, *supra* at 14.

cosmetic purposes to 'snug' the vagina to enhance male sexual pleasure, or so-called 'labia reductions' and 'female circumcisions'³⁹

Thus, the submissions deftly invert the lens back on the ideology and practices of the dominant culture to critique the therapeutic defence contained in the draft legislation, thereby disrupting the conventional dichotomy of the 'liberated First World woman' and 'oppressed Third World woman'. Finally, the groups complained that the draft law precluded the possibility of consent to FGM by a person under 18, but thereby implicitly left available a defence of consent when the act was performed on a female over eighteen. The groups rejected a defense of consent, regardless of age.

While the aforementioned organizations successfully promoted explicit criminalization of FGM, they were only partially successful with respect to the consent defence. The final law states that no consent is to FGM is valid unless "the person is at least eighteen years of age **and there is no resulting bodily harm**"⁴⁰ (emphasis added). The therapeutic defence remains. Similarly, the two-tier sentencing scheme was rejected. The law prohibiting FGM in Canada carries a maximum fourteen-year sentence for parents and for those who commit it⁴¹. The measures proposed by the advocacy groups to balance the need to protect vulnerable girls and women against the racist elements of the criminal justice system failed to win acceptance.

It is also important to bear in mind the potential immigration consequences beyond criminal liability: If the parents are not Canadian citizens, deportation is a possible consequence of conviction for a serious criminal offence. As it happens, no one has ever been charged in Canada with an offence related to FGM⁴², before or after the 1997 amendment.

Trying to criminalize a practice associated with particular ethno-racial groups without playing into racist conceptions of that group is a daunting and delicate task, and the briefs I reviewed self-consciously attempted to negotiate the terrain between a dismissive rejection of law *qua* sustainer of racialized oppression versus a naive faith in law *qua* transparent instrument of social change.

At one level, the narrative I describe may be criticized as an 'easy' case for liberals concerned about multiculturalism to the extent that everyone involved was publicly committed to eradicating FGM. Of course, it should be noted that in none of the scholarly analyses of FGM from within the 'multiculturalism' literature have I encountered citations to public defenses of the practice from members of the affected communities. The nearest to a public endorsement I have seen is in Doriane Lambelet's description of the "Seattle Compromise" in which a Seattle hospital agreed to perform a symbolic circumcision by nicking the labia of female infants and drawing blood. Her

³⁹ Women's Health in Women's Hands *supra* at 7.

⁴⁰ *Criminal Code of Canada*, s. 268 (3)(4)

⁴¹ In her view, because parents are motivated by a [misplaced] belief about what is in the best interests of their daughter, they ought not to be punished, and the family ought not to be dismembered, by a possible prison term. Conversely, the one who performs the procedure for profit warrants a more severe sentence. In the end, however, the law prohibiting FGM in Canada carries a maximum fourteen year sentence for parents and committers alike.

⁴² One can only speculate on the significance of this fact. Maybe FGM is not happening in Canada, maybe it is not happening *anymore*, or maybe it is goes unreported by members of the affected communities and undetected by teachers, doctors, social workers etc. outside it.

article described Somalis who warned that they would subject their daughters to traditional (debilitating) circumcision in the absence of the proposed alternative. In general, it appears that while scholarly debate has been preoccupied with the question of whether FGM should be tolerated, the actual debate in the North has not turned on whether the practice should end, but how best to bring about its demise.

One may suggest that this academic fixation is politically harmless. I do not agree. I contend that it is a marginalizing narrative⁴³ which reifies and perpetuates a story of Africans as lawless, disordered, and primitive. Imagine that Canadians were a minority community in the state of Nirvana where there existed true equality between the sexes. Observers from Nirvana noticed that some Canadian men sexually harassed Canadian women. Earnest debate erupted in Nirvana, continuing for years, about whether Nirvana should tolerate the Canadian cultural practice of sexually harassing women. And that's all they talked about, over and over and over. It is probably safe to say that some Canadians do see sexual harassment as relatively innocuous behaviour, implicitly sanctioned by prevailing cultural/sexual norms. However, I venture to suggest (perhaps optimistically) that for most Canadians, the question is not whether sexual harassment is a culturally defensible practice, but rather how best to identify and end it. Yet if all the Nirvana press talks about and reports on, and all that Nirvanan scholars write about, is whether Nirvana should tolerate Canadians' cultural practice of sexual harassment, ordinary Nirvanans might be forgiven for thinking of all Canadian men as lascivious jerks who either commit or conspire to protect harassers, and all Canadian women as pathetic victims who meekly submit to their fate. Not only is it an unflattering picture of Canadian culture, it also demeans Canadian women while purporting to express concern about them.

According to the descriptions by advocates of criminalization of FGM, the criminal law was intended primarily as another instrument of persuasion to convince resistant sectors of the community that FGM was wrong. In other words, law reform operated as a mechanism for reconfiguring intra-group power. Those who opposed FGM evidently felt that they had not been able to prevail on the strength of existing legal, medical, cultural, feminist and religious arguments against the practice. Whether this was due to their status within the communities as women or as feminists, or the perceived weakness of their arguments, or a combination of both, is not clear. In any event, passage of a specific law prohibiting FGM accorded them a tactical advantage over those who had disregarded them until that point, thereby improving their access to norm generating discourse within their community. In other words, it enhanced their intra-group recognition as women.

Outside of their communities, the form of recognition gained through the criminal law must be assessed as highly problematic. Recognition as perpetrators and victims of a culturally distinct crime is hardly the type of recognition ethnic communities usually seek. The mixed record of advocacy on this matter underscores how cultural and racialized minorities take a gamble when they decide to engage with law, even for limited and strategic purposes. Activists within the community can control the form and content of internal grassroots education, and may believe that the role of law should be confined to pre-emptive deterrent. They may carefully craft a balanced approach to legislative reform, only to see one side of the balance discarded by legislators. They cannot control

⁴³ I thank Ruth Rubio-Marin for this helpful phrase.

(though may try to intercede) in how the power of the criminal law, once unleashed, will be exercised by mainstream police, prosecutors and judges against the members of their community who transgress the law. Nor can they determine how the law will be read by mainstream culture and the impact this will have on the affected communities.

I suspect – along with activists in other jurisdictions who opposed criminalization – that the law will in fact be read as mainstream [white, Judeo-Christian] Canadians inscribing their moral superiority on [African Muslim] bodies through the text of the criminal law. The fact that the proponents of the law came from the communities who are the law’s object will likely remain unknown to the vast majority of Canadians. This is because the *de facto* marginalized status of Canadians of African origin means that they rarely are, and are even more rarely seen, as law makers. Instead, they are more frequently characterized as law breakers, a perception that can only be exacerbated by the anti-FGM law itself.

I would add here that once a new criminal offence is added to the *Criminal Code*, it is rarely removed⁴⁴: Section 71 of the *Criminal Code* still proscribes the offence known as duelling⁴⁵. Even if cultural norms in all sectors of the various communities evolve away from the practice of FGM in the next 5, 10, or 20 years, and even if no one is ever arrested, charged or convicted of the crime, I suspect that an offence named FGM will continue to send out a message to and about certain Canadians for a very long time.

In her thoughtful article on deliberative democracy and minority representation, Melissa Williams attempts to articulate certain procedural norms to ameliorate the multiple effects of marginalization on disadvantaged groups’ ability to participate meaningfully in political decision-making. She concludes that

For relatively privileged citizens engaging in a discourse with marginalized citizens, [democratic deliberation] requires a willingness to interrogate one’s own judgements about the unreasonableness of others’ arguments, particularly where recognizing the validity of those arguments would jeopardize one’s material or cultural interests. One might even go so far as to say that a spirit of impartial discourse sometimes requires a sort of ‘difference principle as applied to reasons’. By this I mean a willingness to regard the reasons offered by marginalized groups as the reasons that sustain a collective decision even when those reasons are not immediately available from within one’s own social or cultural experience⁴⁶.

Williams’ proposal seems to presume that marginalized groups speak with one voice. Where such a situation obtains, Williams’ approach may indeed be appropriate⁴⁷. However, sometimes the appearance of consensus results from the suppression of

⁴⁴ Even laws declared unconstitutional may remain on the statute books for many years before they are finally removed.

⁴⁵ Apparently, duelling was made an offence because people accused of assault or murder consequent to a duel were routinely acquitted by juries. Explicit criminalization was required to overcome the ‘cultural defence’ of insult to honour.

⁴⁶ Melissa Williams, “The Uneasy Alliance of Group Representation and Deliberative Democracy”, in Will Kymlicka and Wayne Norman, eds., *Citizenship in Diverse Societies* (Oxford: Oxford University Press 2000), 145.

⁴⁷ The episode she describes involves an application to the US Senate Judiciary Committee to approve the renewal of the special design insignia of the United Daughters of the Confederacy. The

dissenting views within a community; in other instances, lack of consensus may surface publicly. I must admit that I disagree with the position taken by the various groups that advocated in favour of explicit criminalization of FGM. I find myself more persuaded by the critique articulated by similarly situated groups in other jurisdictions. Of course, I cannot explain why similar groups did not coalesce in Canada to oppose explicit criminalization, but I would not readily assume that the arguments used by groups elsewhere are inapposite in Canada. I doubt that the differences between the justice system in Canada and elsewhere inspires sufficient confidence in the former to warrant the risks of resorting to the criminal law to deal with the problem of FGM as it exists in Canada. Moreover, I am sceptical that deferral to the reasons of marginalized groups can substitute for persuasion on the substantive norms at issue. It will clearly not work where members from marginalized groups express diverse opinions. This does not preclude struggling to achieve an ‘enlarged perspective’ that might make one more receptive to persuasion by hitherto unfamiliar arguments, but such a stance is not reducible to deference. My point is that once one takes intra-group diversity seriously, the availability of deference as a method of resolving inter-group differences in perspective is constrained by the absence of a formal mechanism for prioritizing the different voices within a specified community. One must return to argument and persuasion, whether expressed through logocentric analysis, narrative, or other means.

If one assumes that there were no voices from the affected communities who were willing to speak against explicit criminalization as a necessary means of deterring FGM in Canada, I concede that it would be highly problematic for non-members to oppose the advocates, especially on the grounds that legislative action would not be in the best interests of their own community. Such a stance would appear patronizing at best. Both the desired benefits and the apprehended costs of explicitly criminalizing FGM will redound to the advocates’ own respective communities. If there is a compelling reason for deference, it arises less from a difference principle as applied to reasons, and more from the empirical uncertainty regarding the effects of the legislation, and the fact that those who will feel its impact are perhaps in the better position to assess which risks they prefer to assume.

The foregoing illustrates the contradictory results of negotiating intra-group power relations within marginalized communities through resort to an apparatus of the state which may help redress inequalities within the group, but may also simultaneously push the group as a whole further to the margins. Assuming such contradictory results are bytimes unavoidable, perhaps the normative question that should inform action would be, ‘where will this leave the most vulnerable members within those disenfranchised communities – further ahead or further behind?’

D. THE COLOUR OF THE LENS: JUDICIAL NEUTRALITY IN A DIVERSE SOCIETY

insignia included an image of the Confederate flag. Senator Caroline Moseley-Braun, the sole African-American Senator on the Committee strongly objected the renewal of the patent because of the association of the Confederate flag with the institution of slavery. Although the application was initially approved, a majority of Committee members reversed their decision after listening to Senator Moseley-Braun’s intervention.

To be equal before the law also requires that one be treated with equal respect by the agents of the law. For those who end up in court, it is the judge who is the interpreter, the finder of fact, the embodiment of the law. To be treated unfairly by a judge is to be treated unfairly by the law.

Canada, like most other settler societies, is stratified along axes of race, class, gender, ethnicity, ability etc. And, of course, judges tend to occupy the favoured sides of each of those categories. In 1990, over 85% of Canadian judges were white, middle class, of British or French ancestry, Judeo-Christian, and without disability. Though much has been said about diversifying the bench, and some genuine effort is put into the project, I think it is fair to say that progress is slow and the profile has not changed dramatically in the last decade.

Despite the obvious lack of diversity on the bench in comparison with society at large, the ideal of judicial objectivity -- itself a cultural norm⁴⁸ -- has long shielded judges from open criticism. The ideal assumes that whatever the personal attributes and history of the judge, objectivity is possible and judges are uniquely capable of attaining it. A philosophical tradition of conflating the epistemological perspective of the powerful, with the stance of objectivity (thereby effacing the partiality of perspective) has abetted and sustained the projection in the Anglo-European legal tradition of the white, male, patrician judge as an objective arbiter of truth. However, the assault on objectivity from feminists, post-modernists and others has reverberated [somewhat] even in the judiciary.

As the Supreme Court of Canada put it recently, "while judges can never be neutral, in the sense of purely objective, they can and must strive for impartiality"⁴⁹ This is understood as the rule against apprehended bias: "a system of justice, if it is to have the respect and confidence of its society, must ensure that tribunals are fair and that they appear to be fair to the informed and reasonable observer"⁵⁰. At the risk of oversimplifying, the rule against bias is to judges what the law against discrimination is to the rest of us. What does this principle mean in a multi-cultural, multi-racial society riddled with systemic inequality? The problem is really two fold: first, what does the mythical "reasonable observer" know about the social context of inequality? second, to what extent can judges transcend the influence that the dominant culture has on their own attitudes and perceptions in order to be fair to the litigants appearing before them? Though diversifying the composition of the bench is a laudable goal, it cannot of itself resolve these problems.

In recent years, particularly since the advent of human rights legislation and the *Canadian Charter of Rights and Freedoms*, Canadian courts have been more willing to acknowledge and occasionally respond to both intentional and systemic discrimination against ethno-cultural and racialized minorities by legislators, police, employers, private citizens, even jurors. Everyone, it seems, other than judges themselves. The courts display extreme reluctance to deploy the law regarding reasonable apprehension of bias to deal with judges who explicitly resort to racist, sexist or ethnocentric stereotypes to

⁴⁸ Some aboriginal commentators explain that in their communities, the fairest judge is someone who knows the parties, and can thus bring the wisdom of that knowledge to the act of judging.

⁴⁹ *R. v. RDS*, [1997] 3 SCR 484 at para. 29.

⁵⁰ *RDS*, per Cory J. at para. 91.

resolve cases⁵¹. Extra-judicial criticism, by and through the media, or the occasional government study or public inquiry, provide some means of denouncing discrimination by the judiciary, but often with little practical effect.

Finally, in 1997, a case reached the Supreme Court of Canada involving an allegation of bias made against a judge who explicitly factored race into a decision regarding a 15 year old black male charged with unlawfully assaulting a white police officer and unlawfully resisting that police officer in the lawful execution of his duty.

It is no small irony that the complaint of reasonable apprehension of bias was made against a black female judge by the prosecution, essentially on behalf of the white police officer. The case began in Nova Scotia, which has a relatively large Afro-Canadian population dating back hundreds of years⁵². Anti-black racism in Nova Scotia also has a long and notorious history, and includes well-documented evidence of discrimination at all levels of the criminal justice system, from policing through to corrections. Judge Connie Sparks was the first black female judge in Canada, and the first black judge in Nova Scotia.

Of course, given this background, it really is no surprise that Judge Sparks became a target for allegations of bias. Since law has been shaped by, and in the image of, those who hold power, it follows almost axiomatically that the perspective of judges who embody that image will be constructed as objective and neutral. The obverse is that the perspective of an outsider -- in this case a black, female judge -- will be viewed with suspicion by those who, perhaps for the first time, do not see their own image reflected in the face of the judge. Add to this the reality that many people who (correctly or otherwise) believe that the judge in their case was biased against them come from conditions of disadvantage, and lack the financial and social resources to pursue a case further. Not so the police. Thus, despite the assertion by the Supreme Court of Canada that "it is obviously not appropriate to allege bias against Judge Sparks simply because she is black and raised the prospect of racial discrimination"⁵³, the fact that she *is* black made the allegation more likely to surface and more likely to stick.

The trial concerned a youth known as RDS⁵⁴, whom the police officer claimed had deliberately run into him on his bicycle, yelled at him and pushed him while the officer was arresting another black youth. RDS denied interfering, and explained that he had stopped because he saw his cousin detained by police. He testified that he tried to ask his cousin what happened and find out if he should call the cousin's mother. At that point, the police officer threatened to arrest RDS if he did not "shut up", placed him in a choke-hold, and then arrested him. RDS denied addressing or touching the police in any way. In its summation, the prosecution argued that the testimony of the police officer ought to be preferred to that of RDS, asking rhetorically (in effect) why would a police officer lie about what happened? In acquitting the accused, Judge Sparks noted a number

⁵¹ Of course, one reason for this may be that affected litigants lack the resources to appeal a decision; in smaller centres, the fact that a lawyer must face the same judge time and again also exerts a chilling effect on lawyers' enthusiasm. Finally, the use of stereotypical reasoning is rarely explicit, making it very difficult to attack.

⁵² Many in the current community are descendants of the Black Loyalists who fought on the side of the British in the US War of Independence and slaves who escaped the US via the Underground Railroad.

⁵³ RDS, at para. 142, *per* Cory J.

⁵⁴ The names of young offenders cannot be disclosed, so they are identified by letters.

of features of the testimony of the accused and the police officer which, in her view, left her with a reasonable doubt that the prosecution had proved its case. In addition, Judge Sparks made the following comments in response to the question of why a cop would testify that something happened which did not, in fact, happen:

I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the evidence of RDS that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day"⁵⁵.

The police cried foul, the prosecution appealed. Two higher Nova Scotia courts found that the comments of Judge Sparks gave rise to a reasonable apprehension of bias. The case was appealed to the Supreme Court of Canada.

By a margin of 6-3, the Supreme Court of Canada overturned the NS Court of Appeal, and found no reasonable apprehension of bias against Judge Sparks. Four of the six majority judges⁵⁶ vindicated Judge Sparks completely. They found that Judge Sparks did not actually attribute the police officer's probable overreaction to the racial dynamics of the situation, but had she chosen to do so, she would not necessarily have erred⁵⁷. The other two in the majority said her comments were "unfortunate" and "close to the line" but did not cross it because they were meant to counter the illicit invitation to presume that police officers are inherently more credible than accused. The dissenting judges ruled that Judge Sparks had used a generalization about white police officers to infer that this officer was racist and had overreacted because of it. In substance, the dissent insisted that absent actual evidence that the police officer was racist and his actions were motivated by racism, the social context of racial tension between police and black youth has no relevance in the assessment of testimony⁵⁸. To put it another way, unless a police officer is proved to be "racist", one must presume that a white cop and black kid in Halifax, Nova Scotia perceive one another and interact in an unmediated, 'race-less' relationship of equality. The majority validated an alternative view -- that anti-Black racism is a *social* reality, and a judge is entitled to factor it in to an assessment of whether and why certain events (like police overreaction) may have occurred.

What does the majority judgment⁵⁹ tell us about the act of judging in a diverse and unequal society? First, the judgment affirms the "sound belief behind the

⁵⁵ RDS at para 74.

⁵⁶ Interestingly, the four person judgment was written jointly by the two female judges then sitting on the Supreme Court of Canada, and concurred in by two male colleagues.

⁵⁷ RDS, at para 56, *per* L'Heureux-Dube and McLachlin JJ.

⁵⁸ Suffice to say that obtaining that kind of evidence for routine cases such as these, is not a realistic possibility. RDS was represented by legal aid on a minor charge in a busy court. Besides, it is hardly likely that a police officer will ever "admit" to being motivated by racism, or that his actions and perceptions have been conditioned by racism.

⁵⁹ I take the liberty of drawing on both the 4 person and 2 person judgments which comprise the majority, to the extent that I believe they agree on the principles I extract here.

encouragement of diversity in judicial appointments that women and visible minorities would bring an important perspective to the difficult task of judging"⁶⁰. Second, it acknowledges that

judges in a bilingual, multiracial and multicultural society will undoubtedly approach the task of judging from their varied perspectives. They will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. In fact, such a transformation would deny society the benefit of the valuable knowledge gained by the judiciary while they were members of the Bar. As well, it would preclude the achievement of a diversity of backgrounds in the judiciary. The reasonable person does not expect that judges will function as neutral ciphers; however, the reasonable person does demand that judges achieve impartiality in their judges⁶¹.

In other words, a black judge may bring to her credibility assessment of a white police officer and a black youth a different set of background experiences than a white judge brings, but this does not incapacitate either judge from "being equally open to, and considering the views of all parties"⁶² before them.

Thirdly, the majority finds that the hypothetical reasonable person, who determines whether an apprehension of bias is 'reasonable', "must be taken to possess knowledge of the local population and its racial dynamics, including the existence in the community of a history of widespread and systemic discrimination against black and aboriginal people, and high profile clashes between the police and the visible minority population over policing issues . . . The reasonable person must thus be deemed to be cognizant of the existence of racism in Halifax, Nova Scotia"⁶³.

The story of *RDS* contains several subplots about race, social citizenship and Canadian law: There is the familiar story of an encounter between a poor black youth and a white police officer. The convergence of factors that produce that particular spectacle are well entrenched in the socio-cultural terrain of Halifax, Nova Scotia.

There is the story of what unfolded in the Halifax courtroom, where the surprise was less the acquittal of the accused than the casting of an African-Canadian woman in the role of judge, law's agent. Judge Spark's candour about disclosing the basis of her credibility determination also departed from the usual courtroom script.

In principle, there is nothing remarkable about a judge acknowledging anti-Black racism. Many Canadian judges have made this observation in the past, often in stronger language than Judge Sparks used. They have all been white.

Another distinguishing feature of Judge Sparks' invocation of social context is that she acknowledged systemic racism as a feature of the cultural landscape against which the actions of individuals may be interpreted, even if it was not a motivation of any

⁶⁰ *RDS*, at para 119, *per* Cory J.

⁶¹ *RDS*, at para. 38, *per* L'Heureux-Dube and McLachlan JJ.

⁶² para. 41.

⁶³ *RDS*, at para. 47.

actor. This was not a case ‘about’ discrimination *per se*. It was not about defining equality, or ascertaining what constitutes race discrimination. It was about credibility. I suggest that this is a crucial aspect of the case whose significance must not be underestimated.

I contend that the assessment of credibility is at once the most routine and the most potent locus for the performance of racialization by and through law. Cases before human rights cases are infrequent and often bear little in the way of practical consequences; section 15 *Charter* cases involving discrimination based on race even more seldom arise. But on most days in most Canadian cities, racialized accused are brought before a mostly white criminal justice system, and put through a process where credibility determination (and not complex legal principles) will overwhelmingly determine whether they will be convicted or acquitted, incarcerated or fined, put on probation or allowed to walk away. The role that social context around race, culture, ethnicity and other ‘identity’ categories does and should play in choosing what and whom to believe has a profound and immediate impact. The consequences reverberate throughout the criminal justice system.

It is important to realize that what is at stake in importing social context into credibility determination is not simply counteracting stereotypes on the basis of identity categories (*e.g.* women are prone to falsely accusing men of sexual assault, or accused are more prone to lie than police officers). This is conceptually unproblematic. In the trial of RDS, however, social context was used to help reconstruct what may [not] have happened for purposes of choosing between alternative versions presented by opposing witnesses.

At a normative level, I endorse this use of social context. The problem rests in conceptualising first, how a decision maker actually engages with social context and second, what constraints limit what a judge may take into account under the aegis of social context.

At various points, Justices L’Heureux-Dube and McLachlin commend social context as a means for what Prof. Jennifer Nedelsky calls an “enlargement of mind”, or the taking of other perspectives into account. So far, so good. But later, the same judges write of Judge Sparks that “As member of the community, it was open to her to take into account the well known presence of racism in that community and to evaluate the evidence as to what occurred against that background”⁶⁴. Assuming the community in question is Halifax or Nova Scotia, does this mean that it was equally open to her *not* to take the existence of racism into account? If so, where does this leave minority accused and white police officers in other courtrooms before other judges?⁶⁵ If social context can improve the quality of the crucial function of credibility determination, can it remain an option to be exercised on a discretionary basis?

Elsewhere, the judges also appear to endorse the notional idea of ‘placing oneself in the position of the accused’ in order to attain the requisite enlargement of mind. But if there is more than one witness in a case, and the testimony conflicts over what did or did not happen, the idea of placing oneself in the shoes of the witness verges on incoherence. For instance, the police officer testified that RDS hit him with a bike. RDS denied hitting the police officer with a bike. One of the two was either mistaken or lying. Notionally

⁶⁴ RDS, para. ?

⁶⁵ Richard Devlin makes a similar point in “Redressing the Imbalances”, *supra* note 46 at 19-20.

placing oneself in the position of each witness cannot assist in making the choice of whose story was more accurate. Whatever it means to take social context into account, or to aspire to an enlargement of mind, it cannot purport to internalise the witness's perspective when the judge's task is to evaluate the credibility of that witness, even if that witness is a member of a disadvantaged community. Where testimony conflicts on events (as opposed to their signification), such an approach can only lead to stalemate.

To the extent that the Supreme Court of Canada addresses the question of constraints, *L'Heureux-Dube and McLachlin JJ.* indicate that the experiences upon which judge relies must be "relevant ... not based on inappropriate stereotypes and do not prevent a fair and just determination ... based only on the facts in evidence"⁶⁶. The judges clearly want to prevent invidious generalizations from entering the decision-making process under the protective guise of 'social context' drawn from the personal experiences of judges. I interpret them to mean that stereotypes are inappropriate because they are false, and thus reliance upon them impedes rather than advances the goal of accurate credibility determination. Having said that, it is not clear whether their vague and cautionary note is adequate to the task of compelling judges to reflect critically on their generalizations prior to relying upon them.

Dianne Pothier, who was co-counsel for RDS, argued in a recent article that "the use of social context is appropriate to further equality and inappropriate if it further marginalizes already marginalized groups"⁶⁷. While this formulation provides greater certainty than the standard set out in the judgment, I am not persuaded that it is a workable standard for purposes of credibility determination. One might have thought that the use of social context in determining credibility is appropriate if and when it enhances the quality of credibility determination in the particular case. It cannot be assumed that furthering equality and reducing marginalization are necessarily commensurate with (or proxies for) the optimal credibility determination in a given case. I do not preclude the possibility that such an argument can be sustained, but the argument remains to be made before one can translate the equality-based claim that collective experiences of oppression and disadvantage merit presumptive recognition as truthful into a claim that the testimony of individual members of marginalized communities warrant the same presumption in a criminal trial⁶⁸.

To some extent, impartiality is to judges what credibility is to witnesses – a signifier of integrity. That Judge Sparks' integrity was impugned because she in turn doubted the credibility of a white police officer testifying against a black youth is inextricably bound up with the racialization and law. The story of RDS and the police officer began hundreds of years ago and continues into the present. The story of a black female judge's [contested] vindication by the Supreme Court of Canada for explicitly bringing the reality of racism to bear on judging is a story that is just beginning, and will

⁶⁶ *RDS*, para. ?

⁶⁷ Richard Devlin and Dianne Pothier, "Redressing the Imbalances: Rethinking the Judicial Role after *R. v. RDS*," (1999-2000) 31 *Ottawa Law Review* 1 at 24.

⁶⁸ See also Richard Devlin, *supra* at 20. My concern can be put another way: It is one thing to use an equality argument to discredit generalizations that are used to draw negative inferences against disempowered groups. It does not follow that the same equality strategy can sustain generalizations that are used to draw negative inferences about empowered groups. If the generalization is to withstand scrutiny, it must do so on its empirical merits.

unfold in years to come. But the story of a black woman who was appointed a judge, then discursively demoted by an allegation of bias from agent of law to object of legal scrutiny – where racialized minorities have long resided -- captures something about progress, resistance, and retrenchment in the arena of law and multiculturalism that characterizes this moment in law's complex relationship with diversity.

V CONCLUSION

The collage I have presented is not intended to tell a coherent story about the current state of multiculturalism and criminal law in Canada. Certainly, it is still the case that law overwhelmingly speaks to, about, and in the name of the dominant culture. If Canadian society was utterly homogeneous and hermetically sealed, considerations of social context would be superfluous, the conflation of behaviour shaped by cultural norms with 'human nature' would be a harmless error, and there would be no sub-national collectivities to stigmatize. Of course, Canada has never been like that; it's just that the legal system operated for so long as if it was.

I have not raised the usual subjects of law and multiculturalism in the usual way, in part because I wanted to subvert the bifurcated approach that the topic frequently engenders -- law on one side, culture on the other. In so doing, I have not sought to provide definitive answers to many of the tough problems that I and other commentators identify; instead, I hope to promote development of a 'multicultural' perspective on legal methodology, legal actors, and legal institutions. [TO BE COMPLETED . . .]