

*University of Windsor  
Faculty of Law*

**ADVANCED CRIMINAL LAW: RACE, GENDER AND  
WRONGFUL CONVICTIONS**

*Winter Term  
2005*

Professor David M. Tanovich

**1. COURSE DESCRIPTION**

This advanced seminar course will critically explore at a theoretical and practical level the role of race and gender in the enforcement and application of criminal law in this country. It will also look at the Canadian wrongful conviction phenomenon. Particular emphasis will be given to the following issues: the meaning of systemic bias; the importance of understanding social context in the practice of criminal law; the role of judicial notice in identifying and remedying systemic biases; the causes of wrongful convictions; racial profiling; systemic bias and jury selection; the perpetuation of gender based stereotypes in the admissibility of similar act evidence and a complainant's prior sexual history; and, the intersection of race and gender in sentencing.

**2. LEARNING OUTCOMES**

The successful student will be able to:

1. Think critically about the way in which the criminal justice system functions.
2. Understand the etiology of systemic bias through examining the impact of criminal law on women and racialized communities in this country.

3. Understand why cultural competence should be a required skill for practitioners and judges.
4. Identify how the barriers faced by lawyers who raise systemic issues operate to perpetuate bias.
5. Make an argument about the relevance of racial or gender bias or the wrongful conviction phenomenon in a particular case.
6. Identify what remedies are available once a finding of systemic bias has been made.
7. Identify and propose areas of reform of the rules of evidence and procedure so that we can address both systemic biases and the fallibility of the criminal justice system.

### **3. CLASSES**

Tues/Thurs  
12:00 pm - 1:30 pm  
G111

This is a seminar course. Class attendance is mandatory and attendance will be taken. Students are expected to come to class familiar with the assigned readings and to initiate and participate in class discussion. As you critically read the materials, you should try to come up with two or three questions that you would like explored in the class. In addition, for each class, a number of students will be assigned to provide a critical review of the readings and a series of questions to generate class discussion.

See "Evaluation" for additional comments.

#### 4. **TEXTS**

##### **Required**

Tanovich, David M.

*Advanced Criminal Law Readings: Race, Gender and Wrongful Convictions* (Mr. Copies)

##### **Recommended** (available on reserve)

J. Abell and E. Sheehy, *Criminal Law & Procedure: Cases, Context and Critique* (3<sup>rd</sup> ed.) (Concord, Ont.: Captus Press Inc., 2002)

J. Abell and E. Sheehy, *Criminal Law & Procedure: Proof, Defences and Beyond* (Concord: Ont., Captus Press, 2004)

#### 5. **EVALUATION**

##### *(i) Method*

Two methods of evaluation will be used in this course:

Class Participation:	35%
Research Paper (maximum 25 pages):	65%

##### **1. Class Participation**

Generally speaking, the class participation grade will be based on your attendance, contribution and participation in the seminar. The focus will, of course, be on quality rather than quantity.

In particular, as noted earlier, one or two students will be responsible for presenting the issues and leading the discussion. In leading the seminar, the student should:

- provide an overview of the arguments or position presented in the article or judgment;
- provide a critique or concurrence with the thesis, arguments, majority or dissenting opinions using the student's background

be it personal, academic or practical (e.g. as a CLA/LAW student or summer student);

- discuss the impact of the material on the student's understanding of how the criminal justice system operates;
- situate its relevance to an understanding of social context in criminal law;
- present a number of questions for the other students to address.

Students can e-mail or arrange a meeting with me to discuss an outline of how they intend to run the seminar.

Attendance and active participation is anticipated from all students. If for some reason the participation component causes difficulties, it is the responsibility of the student to call it to my attention so that we may find an appropriate accommodation.

## **2. Research Paper**

A list of suggested paper topics is attached to this syllabus. Students can choose an alternative topic provided it is related to the themes of the course and is approved by me. A paper topic must be selected by **February 16, 2005.**

The purpose of the paper is to provide you with an opportunity to state and defend a critical thesis that is related to the themes of this seminar. The end product should be of publishable quality. The top paper(s) will, with the consent of the student, be submitted to a legal journal such as the Criminal Law Quarterly. To assist students, I am prepared to review a draft of the paper and provide comments provided it is submitted to me before **March 18, 2005.**

The papers will be graded based on the following criteria:

- the clarity and originality of your thesis;
- the clarity, analysis and development of your argument;
- the extent to which you can fuse case precedent and academic commentary with your own views and ideas;
- the persuasiveness of your argument;
- the extent to which you have identified and addressed counter arguments;
- research depth and organization; and,
- writing style.

The paper for the course is due on **April 15, 2005 (no later than 3:30 pm)**. Late papers will not be accepted. Please submit your paper to my assistant, Mary Mitchell. E-mail receipt is only available provided that it is sent before April 13, 2005.

Plagiarism is a serious academic offence and will be treated as such. Attached to this syllabus is the Faculty of Law's statement on plagiarism.

*(ii) Numerical Grade Distribution*

Grades in this class will conform to the guidelines issued by the law school. The following grading scheme will be used:

A+	93 - 100
A	86 - 92.9
A-	80 - 85.9
B+	77 - 79.9
B	73 - 76.9
B-	70 - 72.9
C+	67 - 69.9
C	63 - 66.9

C-	60 - 62.9
D+	57 - 59.9
D	53 - 56.9
D-	50 - 52.9
F	35 - 49.9
F-	0 - 34.9

## 6. **OFFICE HOURS**

Office: Room 2153  
 253-3000 (ext. 2966)  
 tanovich@uwindsor.ca  
<http://athena.uwindsor.ca/law/tanovich> (website)

Hours: Students may arrange to see me by either dropping by (I am almost always in my office) or sending me an e-mail.

## 7. **CLASS TOPICS AND READINGS**<sup>1</sup>

**January 4**  
**Course Introduction**

**January 6**  
**Understanding Systemic Bias (pages 2-13)**  
 Tanovich, *Introductory Notes* (2004)

**January 11**  
 No Class

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<sup>1</sup> All readings are contained in the casebook.

**January 13**

**The Importance Of Social Context (pages 16-38)**

Devlin, "Jurisprudence For Judges: Why Legal Theory Matters For Social Context Education" (2001), *27 Queen's L.J.* 161  
Pages 16-38

**January 18**

**Social Context - Race (pages 108-166)**

Kafele, "Cultural Influences: Representing Clients In A Diverse Society"  
(CLA Fall 2004 Conference Presentation)

The Right Honourable Beverley McLachlin, "Racism and the Law: The Canadian Experience" (2002), *1 Journal of Law & Equality* 7

Chapter 3 - Racism in Justice: Understanding Systemic Racism in, *Ontario, Report Of The Commission On Systemic Racism In The Ontario Criminal Justice System (1995)*

**January 20**

**Social Context - Gender (pages 168-199)**

Liu, "A 'Prophet With Honour': An Examination of the Gender Equality Jurisprudence of Madam Justice Claire L'Heureux-Dube of the Supreme Court of Canada" (2000), *25 Queen's L.J.* 417

**January 25**

**Social Context - Gender (pages 200-237)**

Martin, "Retribution Revisited: A Reconsideration Of Feminist Criminal Law Reform Strategies" (1998), *36 Osgoode Hall L.J.* 151

**January 27**

**Social Context - Wrongful Convictions (pages 240-286)**

*United States v. Burns* (2001), 151 C.C.C. (3d) 97 (S.C.C.)

Gross, "Exonerations In The United States - 1989 Through 2003"  
(unpublished manuscript) (April 19, 2004)

**February 1**

**What Can We Do With Social Context Evidence? (pages 39-106)**

*R. v. S.(R.D.)* (1997), 118 C.C.C. (3d) 353 (S.C.C.)

Justice Corrine Sparks, "Justice L'Heureux-Dube: Dimensions of a Quintessential Judicial Leader" in Sheehy, *Adding Feminism To Law: The Contributions of Justice Claire L'Heureux-Dube* (Toronto: Irwin Law, 2004)

Backhouse, "The Chilly Climate for Women Judges: Reflections on the Backlash from the *Ewanchuk Case*" (2003), *15 Canadian Journal of Women and the Law* 167

**February 3**

**Equality And Section 15 Arguments In Criminal Law (pages 288-331)**

McInnes and Boyle, "Judging Sexual Assault Law Against A Standard Of Equality" (1995), *29 U.B.C. Law Review* 341

*R. v. Mills* (1999), 139 C.C.C. (3d) 321 (S.C.C.)

Stuart, "Privacy and Equality Rights for Complainants in Sexual Assault Cases" in *Charter Justice In Canadian Criminal Law* (Toronto: Carswell, 2001)

*R. v. Golden* (2001), 159 C.C.C. (3d) 449 (S.C.C.)

**February 8**

**Equality And Section 15 Arguments In Criminal Law (pages 332-377)**

*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* (2000), 150 C.C.C. (3d) 1 (S.C.C.)

**February 10**

**An Anatomy Of A Wrongful Conviction - The Donald Marshall Case (pages 380-389; 487-503)**

National Film Board Movie (1989) - *Justice Denied*

*R. v. Marshall*, [1972] N.S.J. No. 138 (C.A.)

*R. v. Ebsary*, [1986] N.S.J. No. 199 (C.A.)

**February 15**

**An Anatomy Of A Wrongful Conviction - The Donald Marshall Case (pages 390-486)**

Digest of Findings and Recommendations - *Nova Scotia, Report Of The Royal Commission on the Donald Marshall, Jr., Prosecution (1989)*

Commissioner's Report - Findings and Recommendations - *Nova Scotia, Report Of The Royal Commission on the Donald Marshall, Jr., Prosecution (1989)*

Roach, "Wrongful Convictions And Criminal Procedure" (2004), 42 *Brandeis Law Journal* 349

**February 17**

**An Anatomy Of A Wrongful Conviction - Thomas Sophonow and Using The Law of Evidence (pages 592-656)**

Recommendations, *Manitoba, The Inquiry Regarding Thomas Sophonow* (2001)

Tanovich, "In The Name Of Innocence: Using Supreme Court of Canada Evidence Jurisprudence To Protect Against Wrongful Convictions" (2003)

**Reading Week (February 21-25)**

**March 1**

**Anatomy Of A Racial Profiling Case - The Evidence and Legal Framework (pages 660-709)**

"Racial Inequality In Police Stops" in Ontario, *Report Of The Commission On Systemic Racism In The Ontario Criminal Justice System* (1995)

Tanovich, "The Evidence Of Racial Profiling" Notes (2004)

*R. v. Brown* (2003), 173 C.C.C. (3d) 23 (Ont. C.A.)

Makin, "For Judges, Free Speech Has Its Limitations" *Globe and Mail* (8 March 2004)

**March 3**

No class. Law school classes are cancelled so students can attend the "Accessing The Justice in Professionalism" colloquium. To register, please go to [professionalism@uwindsor.ca](mailto:professionalism@uwindsor.ca).

## **March 8**

### **Anatomy Of A Racial Profiling Case - The Evidence and Legal Framework (pages 710-772)**

*R. v. Mann* (2004), 21 C.R. (6<sup>th</sup>) 1 (S.C.C.)

Tanovich, "The Colourless World Of *Mann*" (2004), 21 C.R. (6<sup>th</sup>) 47

*R. v. Ferdinand* (2004), 21 C.R. (6<sup>th</sup>) 65 (Ont. S.C.J.)

Tanovich, "Using The Charter To Stop Racial Profiling: The Development Of An Equality-Based Conception Of Arbitrary Detention" (2002), 40 *Osgoode Hall Law Journal* 145

## **March 10**

### **Anatomy Of A Racial Profiling Case - Constructing A Case (pages 774-820; 830-832)**

Tanovich, "Identifying Cases" Notes (2004)

*Omoruyi-Odin v. Toronto District School Board*, [2002] O.H.R.B.I.D. No. 21

*Smith v. Canada Customs and Revenue Agency*, [2004] O.J. No. 3410 (S.C.J.)

*R. v. Smith*, [2004] O.J. No. 735 (S.C.J.)

*R. v. Khan*, [2004] O.J. No. 3811 (S.C.J.)

*R. v. Khan*, [2004] O.J. No. 3819 (S.C.J.) (only pages 830-832)

## **March 15**

### **Anatomy Of A Racial Profiling Case - Constructing A Case (pages 821-838)**

*R. v. Khan*, [2004] O.J. No. 3819 (S.C.J.)

*R. v. Smith*, [2004] O.J. No. 4979 (S.C.J.) [hand-out]

**March 17**  
**Similar Act Evidence (pages 960-991)**

*R. v. Handy* (2002), 164 C.C.C. (3d) 481 (S.C.C.)

**March 22**  
**Similar Act Evidence (pages 992-1010)**

*R. v. Blake* (2003), 181 C.C.C. (3d) 169 aff. [2004] S.C.J. No. 65

**March 24**  
**Prior Sexual History (pages 1012-1068)**

*R. v. Darrach* (2000), 148 C.C.C. (3d) 97 (S.C.C.)

*R. v. Ewanchuk* (1999), 131 C.C.C. (3d) 481 (S.C.C.)

Sheehy and Boyle, "Justice L'Heureux-Dube and Canadian Sexual Assault Law: Resisting the Privatization of Rape" in Sheehy, *Adding Feminism to Law: The Contributions of Justice Claire L'Heureux-Dube* (Toronto: Carswell, 2004)

**March 29**  
**Prior Sexual History (pages 1069-1083)**

Anderson, "Time To Reform Rape Shield Laws" (2004), *Criminal Justice* 14

*R. v. Temertzoglou*, [2002] O.J. No. 4951 (S.C.J.)

**March 31**

**Sentencing - The Intersection Of Race and Gender (pages 1086-1178)**

Sections 718, 718.1, 718.2, 718.21, 723, 724, 742.1 of the *Criminal Code*

Amnesty International, *Stolen Sisters: A Human Rights Response To Discrimination and Violence Against Indigenous Women in Canada* (2004)

*R. v. Ramsay* (2004), 22 C.R. (6<sup>th</sup>) 76 (B.C.S.C.)

*R. v. Munson*, [2001] S.J. No. 735 (Q.B.)

**April 5**

**Sentencing - The Intersection Of Race and Gender (pages 1179-1256)**

*R. v. Gladue* (1999), 133 C.C.C. (3d) 385 (S.C.C.)

*R. v. Hamilton* (2004), 186 C.C.C. (3d) 129 (Ont. C.A.)

Tanovich, "Race, Sentencing and the "War on Drugs" (2004) 22 C.R. (6<sup>th</sup>) 45

**April 7**

Open

## 8. PAPER TOPICS

### *General*

1. Professor Dorothy Roberts has written:

Not only is race used identifying criminals, it is also used in defining crime. ... Race is built into the normative foundation of the criminal law. Race becomes part of society's determination of which conduct to define as criminal. Crime is actually constructed according to race.<sup>2</sup>

What does she mean? Is her conclusion applicable to Canada?

2. Have Royal Commissions or other inquiries on systemic racism in Canada had any salutary effect on our criminal justice system?<sup>3</sup>
3. How is marginalization relevant to the enforcement of our criminal law?<sup>4</sup>
4. In "*Wrongful Convictions and Criminal Procedure*" (2003), 42 *Brandeis Law Journal* 1, Professor Roach argues that "[c]arefully chosen case studies such as the Donald Marshall Jr. case ... can ... be an effective vehicle to discuss how the criminal justice system can discriminate against racial minorities, the poor, the mentally disabled and others from disadvantaged groups." Is there a relationship between marginalization and wrongful convictions in Canada?<sup>5</sup>

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<sup>2</sup> See D.E. Roberts, "Crime, Race and Reproduction" (1993), 67 *Tul. L. Rev.* 1945 at 1954. See also: S.L. Johnson, "Comment, Unconscious Racism and the Criminal Law" (1988), 73 *Cornell L. Rev.* 1016.

<sup>3</sup> See Chapter 3 of J. Abell and E. Sheehy, *Criminal Law & Procedure: Cases, Context and Critique* (3<sup>rd</sup> ed.) (Concord, Ont.: Captus Press Inc., 2002) [hereinafter *Cases, Context and Critique*]. Copies of this book are available on reserve.

<sup>4</sup> See Chapters 2, 4 and 9 of *Cases, Context and Critique*, supra note 2. See also: S. Taylor, "Gay and Lesbian Pornography and the Obscenity Laws in Canada" (1999), 8 *Dalh. J. of Legal Studies* 94 and R.V. Erickson and K.D. Haggerty, *Policing The Risk Society* (Toronto: UofT Press, 1997).

<sup>5</sup> In the U.S. context see A.L. Rizer, "The Race Effect On Wrongful Convictions" (2003), 29 *Wm. Mitchell L. Rev.* 845.

5. Critically assess the argument that the big winner of the *Canadian Charter of Rights and Freedoms* sweepstakes is crime control.<sup>6</sup>

### *Criminal Procedure - Policing*

6. How is social context relevant to the interpretation of sections 8 and 9 of the *Charter*?<sup>7</sup>
7. What impact has the Supreme Court's approach to privacy in *R. v. Edwards* and *R. v. Belnavis* had on the ability of the poor to litigate search and seizure issues?<sup>8</sup>
8. Should private security guards be subject to the *Charter*?<sup>9</sup>
9. Critically discuss the impact of the judicial creation of an investigative detention and frisk power by the Supreme Court of Canada in *R. v. Mann* on the policing of visible minority groups in Canada.<sup>10</sup>
10. Critically assess the suggestion that there should be a reverse onus under

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<sup>6</sup> See K. Roach, *Due Process And Victims' Rights* (Toronto, UofT Press, 1999).

<sup>7</sup> See *R. v. Mills* (1999), 139 C.C.C. (3d) 321 (S.C.C.); *R. v. Golden* (2001), 159 C.C.C. (3d) 449 (S.C.C.); *R. v. Demers*, [2004] S.C.J. No. 43 (as per LeBel J. dissenting); *R. v. Sanderson* (2003), 174 C.C.C. (3d) 289 (Ont. C.A.) and *R. v. Griffiths* (2003), 11 C.R. (6<sup>th</sup>) 149 (Ont. C.J.). See also: D.M. Tanovich, "R. v. Griffiths: Race and Arbitrary Detention" (2003), 11 C.R. (6<sup>th</sup>) 149 and "Using The Charter To Stop Racial Profiling: The Development of an Equality Based Conception of Arbitrary Detention" (2002), 40 Osgoode Hall Law Journal 145.

<sup>8</sup> See *R. v. Laurin* (1997), 113 C.C.C. (3d) 519 (Ont. C.A.); *State v. Titus*, 707 So.2d 706 (1998, Fla. S.C.); *State v. Trecroci*, [2001] WI-QL 445 (C.A.); and *People v. Garriga*, [1993] NY-QL 1299.

<sup>9</sup> See *R. v. Buhay* (2003), 174 C.C.C. (3d) 97 (S.C.C.); *R. v. Chang* (2003), 180 C.C.C. (3d) 330 (B.C.C.A.).

<sup>10</sup> (2004), 21 C.R. (6<sup>th</sup>) 1 (S.C.C.). See also, D.M. Tanovich, "The Colourless World of Mann" (2004), 21 C.R. (6<sup>th</sup>) 47 (S.C.C.); *R. v. Ferdinand* (2004), 21 C.R. (6<sup>th</sup>) 65 (Ont. S.C.J.) and Chapters 9 and 11 of *Cases, Context and Critique*, supra note 2.

section 9 in cases involving police stops of racialized groups.<sup>11</sup>

11. Critically assess *R. v. Sterling* wherein the Court upheld the power of the police to conduct random virtue testing in designated crime areas.<sup>12</sup>
12. Has punishing the police now become a relevant consideration under section 24(2) of the *Charter*? What is the relevance of this for racialized communities?<sup>13</sup>

### *Substantive Criminal Law*

13. Critically assess the Supreme Court's approach to defining a "crime" in *R. v. Malmo-Levine* (2003), 179 C.C.C. (3d) 417 (S.C.C.).<sup>14</sup>
14. Should there be a defence of *de minimus non curat lex*?<sup>15</sup>
15. In "*The Pendulum Has Been Pushed Too Far*" (1993), 42 U.N.B.L.J. 341, Professor Stuart argues that our sexual assault laws have "pushed the pendulum too far." Do you agree?<sup>16</sup> How does Canada compare to other

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<sup>11</sup> See D.M. Tanovich, "E-Racing Racial Profiling" (2004), 41 *Alberta Law Review* 905 at 929-931 and "Using The Charter To Stop Racial Profiling: An Equality-Based Conception Of Arbitrary Detention" (2002), 40 *Osgoode Hall L.J.* 145 at 181-183.

<sup>12</sup> (2005), \_\_\_ C.R. (6<sup>th</sup>) \_\_\_\_ (Ont. S.C.J.).

<sup>13</sup> See *R. v. Buhay* (2003), 174 C.C.C. (3d) 97 (S.C.C.); *R. v. Lam* (2003), 180 C.C.C. (3d) 279 (B.C.C.A.) and *R. v. Schedel* (2003), 12 C.R. (6<sup>th</sup>) 207 (B.C.C.A.). See also: S. Penney, "Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence Under Section 24(2) Of The Charter" (2004), 49 *McGill Law Journal* 105.

<sup>14</sup> See Chapter 1 of *Cases, Context and Critique*, supra note 2. See also: E. Sheehy, "Advancing Social Inclusion: The Implications for Criminal Law and Policy" (2004), 46 *Can. J. of Crim. and Crim. Just.* 73.

<sup>15</sup> See *R. v. Kubassek* (August 26, 2004) (Ont. C.A.). See also *Canadian Foundation for Children, Youth and Law v. Canada (A.G.)* (2004), 180 C.C.C. (3d) 353 (S.C.C.) (as per Arbour J., in dissent) and *R. v. Hinchey* (1996), 111 C.C.C. (3d) 353 (S.C.C.).

<sup>16</sup> See *Proof, Defences, and Beyond*, supra note 15. See also: *R. v. V.(R.)*, [2004] O.J. No. 849 (S.C.); *R. v. Temertzoglou* (2002), 11 C.R. (6<sup>th</sup>) 179 (Ont. S.C.J.);

common law countries?<sup>17</sup>

16. Should there be a “cultural defence” in Canada?<sup>18</sup>
17. Is the repeal of the defence of extreme intoxication for sexual offences (and other offences that implicate bodily integrity) in section 33.1 of the *Criminal Code* unconstitutional?<sup>19</sup>
18. In “*The Homosexual Panic Defence In Canadian Criminal Law*” (1997), 1 C.R. (5<sup>th</sup>) 371, Kathleen Banks argues that our courts have recognized a homosexual panic defence. Is she correct? If so, what law reform recommendations could be made?<sup>20</sup>
19. Should the partial defence of provocation be abolished given the concerns that those most frequently raising the defence are men in cases where the victims are women?<sup>21</sup>

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C. Boyle and M. MacCrimmon, “The Constitutionality of Bill C-49: Analyzing Sexual Assault As If Equality Really Mattered” (1999) 41 *Crim. L. Q.* 198.

<sup>17</sup> See D. Cashman, “Negotiating Gender: A Comparison of Rape Laws in Canada, Finland and Pakistan” (2000), 9 *Dalh. J. of Legal Studies* 120.

<sup>18</sup> See *R. v. Nahar*, [2004] B.C.J. No. 278 (C.A.); *R. v. Ly* (1987), 33 C.C.C. (3d) 31 (B.C.C.A.); P. Fournier, “The Ghettoisation of Difference in Canada: ‘Rape By Culture’ and the Danger of a ‘Cultural Defence’ in Criminal Law Trials” (2002), 29 *Manitoba L.J.* 81; J. Choi, “The Viability of a ‘Cultural Defence’ in Canada” (2004), 8 *Can. Crim. L. Rev.* 93; C.M. Wong, “Good Intentions, Troublesome Applications: The Cultural Defence and Other Uses of Cultural Evidence in Canada” (1999), 42 *Crim. L. Q.* 367; and, L. Volpp, “(Mis)Identifying Culture: Asian Women And The ‘Cultural Defense’” (1994), 17 *Harv. Women’s L.J.* 57.

<sup>19</sup> See Chapter 12 of *Proof, Defences and Beyond*, supra note 15.

<sup>20</sup> See Chapter 14 of *Proof, Defences and Beyond*, supra note 15.

<sup>21</sup> See Chapter 14 of *Proof, Defences and Beyond*, supra note 15. See also: S. Edwards, “Abolishing Provocation and Reframing Self-Defence” [2004] *Criminal Law Review* 181; W. Gorman, “Provocation: The Jealous Husband Defence” (1999), 42 *Crim. L.Q.* 478; T. Quigley, “Battered Women and the Defence of Provocation” (1991), 55 *Sask. L. Rev.* 223; B. Baker, “Provocation as a Defence For Abused Women Who Kill” (1998), 11 *Cal. J. of L. and Jur.* 193. See also: C. Nelson, “(En)Raged or (En)Gaged: The Implications of Racial Context To The Canadian Provocation Defence”

20. Does section 17 of the *Criminal Code* have any continuing role to play in the defence of duress after *R. v. Ruzic* [2001] 1 S.C.R. 687? Compare and contrast with the common law defence?<sup>22</sup>
21. What is the legacy of *R. v. Lavellee* (1990), 55 C.C.C. (3d) 97 (S.C.C.) and *R. v. Malott* (1998), 121 C.C.C. (3d) 456 (S.C.C.)?<sup>23</sup>
22. Should the defence of necessity be broadened?<sup>24</sup>
23. Critically assess the Supreme Court of Canada's approach to the defence of sane-automatism in *R. v. Stone* (1999), 24 C.R. (5<sup>th</sup>) 1 (S.C.C.).<sup>25</sup>
24. Is gender bias present in our substantive criminal law once we move outside of the sexual assault and defences contexts?

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(2002), 3 University of Richmond L. Rev. 1007.

<sup>22</sup> See Chapter 16 of *Proof, Defences and Beyond*, supra note 15. See also: *R. v. Li* (2002), 162 C.C.C. (3d) 360 (Ont. C.A.); *R. v. Williams* (2002), 168 C.C.C. (3d) 67 (B.C.C.A.); and, *R. v. Fraser* (2002), 3 C.R. (6<sup>th</sup>) 308 (N.S. Prov. Ct.).

<sup>23</sup> See Chapter 15 of *Proof, Defences and Beyond*, supra note 15. See also: *R. v. LaLonde* (1995), 37 C.R. (4<sup>th</sup>) 97 (Ont. G.D.); S. Noonan, "LaLonde: Evaluating The Relevance of BWS Evidence" (1995), 37 C.R. (4<sup>th</sup>) 110; *R. v. C.(T.L.)*, [2004] A.J. No. 800 (P.C.A.); M. Schaffer, "Coerced Into Crime: Battered Women and the Defence of Duress" (1999), 4 Can. Crim. L. Rev. 271 and "Symposium: Confronting Domestic Violence and Achieving Gender Equality: Evaluating Battered Women & Feminist Lawmaking" (2003), 11 Am. U. J. Gender Soc. Pol.'y & L. 237; P. Kazan, "Reasonableness, Gender Differences and Self-Defence Law" (1997), 24 Manitoba L.J. 549.

<sup>24</sup> See Chapters 17 and 18 of *Proof, Defences and Beyond*, supra note 15. See also: B. Berger, "A Choice Among Values: Theoretical and Historical Perspectives On The Defence of Necessity" (2002), 39 Alta. L. Rev. 848; S. Coughlan, "Duress, Necessity, Self-Defence and Provocation: Implications of Radical Change" (2002), 7 Can. Crim. L. Rev. 147.

<sup>25</sup> See Chapter 13 of *Proof, Defences and Beyond*, supra note 15. See also: J. Livingston and S. Verdun-Jones, "Sidebar Psychology: Discussing and Challenging the Defence of Psychological-Blow Automatism" (2002), 47 Criminal Law Quarterly 79. See also *R. v. Fontaine* (April 24, 2004) (S.C.C.).

## Evidence

25. Identify two or three areas of the law of evidence that need to be reformed to better accommodate the relevant social experiences of Aboriginals or African Canadians? What recommendations would you make?
26. Construct an argument on how race is a relevant factor to take into account on a *Corbett* application?
27. Should *R. v. McIntosh* (1997), 117 C.C.C. (3d) 385 (Ont. C.A.) be overturned in light of the social context of wrongful convictions and, in particular, in light of the problem of cross-racial identifications?<sup>26</sup>
28. It is clear from the 1983 reforms to the *Criminal Code* and *Canada Evidence Act* and Bill C-49 (1992) and decisions like *R. v. Mills* (1999), 28 C.R. (5<sup>th</sup>) 207 (S.C.C.) and *R. v. Darrach* (2000), 36 C.R. (5<sup>th</sup>) 223 (S.C.C.) that Parliament and the Supreme Court of Canada have made a determined effort to remove gender bias from the law of evidence.<sup>27</sup> Have they succeeded?
29. Did the Supreme Court of Canada set the similar act bar too high in *R. v. Handy* (2002), 164 C.C.C. (3d) 481 (S.C.C.)? Should similar act evidence be relevant to credibility?<sup>28</sup>
30. When is a complainant's prior sexual history with the accused sufficiently probative to warrant admission?<sup>29</sup>

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<sup>26</sup> See R. Natarajan, "Racialized Memory and Reliability: Due Process Applied To Cross-Racial Eyewitness Identifications" (2003), 78 N.Y.U. L. Rev. 1821.

<sup>27</sup> See D.M. Tanovich, "Starr Gazing: Looking Into The Future Of Hearsay In Canada" (2003), 28 Queen's L.J. 371.

<sup>28</sup> See L. Stuesser, "Similar Fact Evidence in Sexual Offence Cases" (1997), 39 Crim. L. Q. 160.

<sup>29</sup> See Chapter 8, *Proof, Defences and Beyond*, supra note 15; S. Chapman, "Section 276 of the Criminal Code and the Admissibility of Sexual Activity Evidence" (1999), 25 Queen's L.J. 121; D. Paciocco, "The New Rape Shield Provisions In Section 276 Should Survive Charter Challenge" (1993), 21 C.R. (4<sup>th</sup>) 223; C. Boyle and M. MacCrimmon, "R. v. Seaboyer: A Lost Cause?" (1992), 10 C.R. (4<sup>th</sup>) 153; R.A. Schuller

31. What impact will the Supreme Court's decision in *R. v. S.(R.D.)* (1997), 118 C.C.C. (3d) 353 (S.C.C.) have on the use of social context evidence by trial judges?<sup>30</sup>
32. Is trial fairness being used as a shield for gender bias?<sup>31</sup>
33. How is racial and ethnic bias perpetuated in credibility assessments?<sup>32</sup>
34. How are relevance determinations susceptible to the use of stereotypes? How can we address the problem?<sup>33</sup>
35. Why is the teaching of the law of evidence dominated by cases involving violence against women?

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and M.A. Klippenstine, "The Impact of a Complainant's Sexual History Evidence On Jurors' Decisions: Considerations From A Psychological Perspective" (2004), 10 Psych. Pub. Pol. And L. 321; M.J. Anderson, "Time To Reform Rape Shield Laws" (2004), Criminal Justice 14; M.J. Anderson, "From Chastity Requirement To Sexuality License: Sexual Consent and a New Rape Shield Law" (2002), 70 George Washington Law Review 51.

<sup>30</sup> See *R.D.S. Forum* at (1998), 10 Canadian Journal of Women and the Law" 159-212.

<sup>31</sup> See *R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321 (S.C.C.); *R. v. Handy* (2002), 164 C.C.C. (3d) 481 (S.C.C.); *R. v. Shearing* (2002), 165 C.C.C. (3d) 225 (S.C.C.); *R. v. Osolin* (1993), 86 C.C.C. (3d) 481 (S.C.C.); *R. v. W.(D.)* (1991), 63 C.C.C. (3d) 397 (S.C.C.).

<sup>32</sup> See *R. v. Williams* (1998), 124 C.C.C. (3d) 481 at 494 (S.C.C.); *R. v. Parks* (1993), 84 C.C.C. (3d) 353 (Ont. C.A.) and *R. v. Wilson* (1996), 107 C.C.C. (3d) 86 (Ont. C.A.). See also, D. Opekokew, "Review Of Ethnocentric Bias Facing Indian Witnesses" in R. Gosse et. al., *Continuing Poundmaker and Riel's Quest* (Saskatoon: Purich Publishing, 1994); S.L. Johnson, "The Colour of Truth: Race and the Assessment of Credibility" (1996), 1 Michigan J. Race & L. 261 and L.S. Kohn, "Barriers To Reliable Credibility Assessments: Domestic Violence Victim-Witnesses" (2003), 11 Am. U. J. Gender Soc. Pol'y & L. 733.

<sup>33</sup> See D.M. Tanovich, "Relevance, Social Context and Poverty" (2003), 9 C.R. (6<sup>th</sup>) 348.

36. Is race relevant to bail?<sup>34</sup> What reforms are necessary?<sup>35</sup>
37. How does Crown discretion perpetuate racial or gender bias?
38. Section 634 of the *Criminal Code* permits the Crown and defence to challenge prospective jurors without having to show cause. Peremptory challenges have historically been used to exclude Black jurors from the jury. In some cases, prosecutors have used peremptory challenges in such a fashion in cases where the accused is Black. In other cases, defence lawyers have used them to exclude Black jurors where the accused is a police officer. Should the section be repealed? Does it make a difference who is exercising the challenge?<sup>36</sup>
39. What role can courts play in ensuring that defence counsel are adequately funded?<sup>37</sup>
40. Critically assess the decision of the Ontario Court of Appeal in *R. v. Hamilton* (2004), 22 C.R. (6<sup>th</sup>) 1 (Ont. C.A.) on the issue of the relevance of systemic racism to sentencing.<sup>38</sup>

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<sup>34</sup> See Chapter 13 of *Cases, Context and Critique*, supra note 2. See also: *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (1995) at Chapter 5; G. Kellough and S. Wortley, "Bail Decisions and Plea Bargaining as Commensurate Decisions" (2002), 42 *British Journal of Criminology* 186.

<sup>35</sup> See *R. v. Hall* (2002), 4 C.R. (6<sup>th</sup>) 197 (S.C.C.).

<sup>36</sup> See Chapter 16 of *Proof, Defences and Beyond*, supra note 15. See also: *R. v. Lines*, [1993] O.J. No. 3284 (Gen. Div.); *R. v. Brown*, [1999] O.J. No. 4867 (S.C.) and *R. v. Gayle* (2001), 154 C.C.C. (3d) 221 (Ont. C.A.); M. Henry and F. Henry, "A Challenge To Discriminatory Justice: The Parks Decision in Perspective" (1996), 38 *Crim. L.Q.* 333 and D.M. Tanovich, "Rethinking Jury Selection: Challenge For Cause and Peremptory Challenges" (1994), 32 C.R. (4<sup>th</sup>) 310.

<sup>37</sup> See Chapter 12 of *Cases, Context and Critique*, supra note 2. See also: *R. v. Ho* (2003), 17 C.R. (6<sup>th</sup>) 223 (B.C.C.A.) and S. Coughlan, "Annotation" (2003), 17 C.R. (6<sup>th</sup>) 223; *R. v. Osborne* (2003), 17 C.R. (6<sup>th</sup>) 267 (N.B.C.A.); *R. v. Cai* (2002), 170 C.C.C. (3d) 1 (Alta. C.A.) and *Quebec (Procureur general) c. C.(R.)* (2003), 10 C.R. (6<sup>th</sup>) 1 (Que. C.A.).

<sup>38</sup> See D.M. Tanovich, "Race, Sentencing and The War On Drugs" (2004), 22 C.R. (6<sup>th</sup>) 45; H.A. Kaiser, "Hamilton: A Regrettable Retrenchment By The Ontario Court of Appeal" (2004), 22 C.R. (6<sup>th</sup>) 57; and, D.J. Song and C. Boyle, "When Race Matters

41. How has *R. v. Gladue* (1999), 133 C.C.C. (3d) 385 (S.C.C.) affected the manner in which defence lawyers and Crowns prepare for the sentencing of Aboriginal offenders?
42. Should sentencing circles be a sentencing option in cases of violence?<sup>39</sup>
43. Is gender bias still present in the sentencing of sexual offenders?<sup>40</sup>
44. Is gender bias present in the sentencing of female offenders?<sup>41</sup>

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On Sentencing: *R. v. Ramsay* and *R. v. Hamilton*" (2004), 22 C.R. (6<sup>th</sup>) 57. See also Chapter 5 of *Cases, Context and Critique*, supra note 2; T. Williams, "Sentencing Black Offender In The Ontario Criminal Justice System" in J.V. Roberts and D.P. Cole, *Making Sense of Sentencing* (Toronto: UofT Press, 1999); and, D.E. Roberts, "The Social And Mass Cost Of Mass Incarceration In African American Communities" (2004), 56 *Stanford Law Review* 1271.

<sup>39</sup> See Chapter 5 of *Cases, Context and Critique*, supra note 2. See also: *R. v. L.(B.)* (2002), 163 C.C.C. (3d) 404 (Alta. C.A.).

<sup>40</sup> See *R. v. S.(M.)* (2003), 12 C.R. (6<sup>th</sup>) 80 (Sask. C.A.); *R. v. L.(G.)* (2003), 175 C.C.C. (3d) 564 (Ont. C.A.); *R. v. D.(D.)* (2002), 163 C.C.C. (3d) 471 (Ont. C.A.); *R. v. Ewanchuk* (2002), 164 C.C.C. (3d) 193 (Alta. C.A.) and *R. v. Rezaie* (1996), 112 C.C.C. (3d) 97 (Ont. C.A.).

<sup>41</sup> See D. Martin, "Punishing Female Offenders and Perpetuating Gender Stereotypes" in J.V. Roberts and D.P. Cole, *Making Sense of Sentencing* (Toronto: UofT Press, 1999).