Black Rage Confronts the Law

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Published by NYU Press

Harris, Paul.
Black Rage Confronts the Law.
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There emerged from the depths of my tormented being a deep groan like the rumbling thunder of a gloomy rain—or the jarring sound of a thousand exploding guns or the obscene roar of a prowling, hungry lion. Only Allah knows the acute hurt of my scarred soul.
—Raage Ugaas, Somali poet

Chapter 6

Racism, Rage, and Criminal Defenses

The environmental defense took a step forward in the case of United States v. Alexander. The U.S. Court of Appeals for the D.C. Circuit heard the Alexander case in 1972, just one year after the acquittals of Steven Robinson and James Johnson. Ironically, the decision has had a lasting impact because of the dissenting opinion. Judge David Bazelon, America's foremost jurist in the field of law and psychiatry, wrote a penetrating dissent suggesting that severe socioeconomic hardship should be allowed as a defense to a criminal charge. Two thought-provoking articles have continued the discussion of whether an environmental defense, and by analogy a black rage defense, could fit within the traditional framework of criminal law and, if not, whether a new defense should be crafted.

The Alexander case began one night in June 1968, two months after Martin Luther King, Jr., was assassinated. Five white U.S. Marine lieutenants stationed in Quantico, Virginia, drove into Washington, D.C., to celebrate their near-completion of basic officers' training. On their way to a nightclub with a young woman named Barbara Kelly they stopped at a hamburger shop, around three o'clock in the morning. As they stood by
the take-out counter, the five Marines in their formal dress white uniforms, they exchanged hostile stares with three black men at the other end of the counter. At the subsequent trial, Lieutenant Ellsworth Kramer would describe the black men in a way that showed his prejudice: "Their hair was in Afro-bush [sic] cut, wearing medallions, jersey knit shirts, sport jackets... They were what I consider eccentric dress."

The three black men were named Murdock Benjamin, Gordon Alexander, and Cornelius Frazier. After a few minutes Frazier and Benjamin walked out of the shop, and as Alexander followed them he had words with Lt. Kramer. As the two men challenged each other to step outside and fight, Lieutenant William King walked over and, according to the government witnesses at the trial, said, "What do you want, dirty nigger bastard?" "Get out of here nigger." "What you god-damn niggers want?" and "What do you want, you nigger?" In response, Alexander drew a .38 caliber revolver, cocked it, pointed it at King, and said, "I will show you what I want." Benjamin had come back into the shop and, seeing what was happening, began shooting. The Marines were unarmed. When the shooting stopped King and Lieutenant Thaddeus Lesnick were dead, Kramer was wounded in the head, and Kelly was wounded in the hip. As Benjamin, Alexander, and Frazier drove off, Benjamin stuck his gun out of the car window and fired three shots at the hamburger shop. A police car in the vicinity stopped them within a few blocks and arrested them.

At the conclusion of the trial both sides agreed that Alexander had not fired his gun. He was convicted of carrying a dangerous weapon and four counts of assault for pointing his gun. The Court of Appeals reduced the four counts to one count of assault.

Murdock Benjamin was indicted and tried under the incorrect name of Benjamin Murdock. Therefore, in the legal literature his case is known as the Murdock case and he is referred to as Murdock. (Here I shall use his correct surname.)

Benjamin argued that he heard someone say, "Get out, you black bastards," and that the Marines advanced on him. He said he shot when one of the Marines was one foot away from him, and he thought he was going to be killed. However, the jury believed the testimony of the other witnesses in the shop, who said that the Marines and Kelly were standing still after Alexander pulled his gun, and that Benjamin emptied his fully loaded
revolver into them. He was convicted of the weapons charges and second-degree murder. After the verdict, Benjamin was entitled to a second trial on the issue of insanity. In insanity cases sometimes the same jury would hear the insanity evidence, sometimes a new jury would be empaneled. In Benjamin’s case the same jury heard testimony regarding Benjamin’s mental state at the time of the shootings.

Three psychiatrists examined Benjamin and testified at trial. A doctor from St. Elizabeth Hospital concluded that he had “predisposing factors” that led him to “overreact” to possible physical threats, but that he had the ability to control his behavior. The doctor appointed at the government’s request admitted that every person is influenced by his or her background, but concluded that Benjamin suffered from no more than mild “neurotic symptoms.”

The psychiatrist who testified for the defense was Dr. E. Y. Williams, a professor at Howard University Medical School. He found Benjamin delusional, “preoccupied with the unfair treatment of Negroes in this country and the idea that racial war was inevitable.” He testified that these emotional disorders had their roots in Benjamin’s childhood in the Watts ghetto of Los Angeles. Benjamin was deserted by his father, and he grew up in a large poor family where he received little love or attention. Williams concluded that because of his abnormal psychological condition, Benjamin probably had an irresistible impulse to shoot when the Marine called his friend a nigger and him a black bastard. Unfortunately for the defense, Williams gave his personal opinion of what constituted a “mental illness,” an opinion that was devastating to the insanity defense and contrary to the law. The doctor testified that Benjamin was suffering from an abnormal mental condition that substantially impaired his behavior control, but since it was not a psychotic reaction he did not consider it a mental illness. Benjamin’s lawyer was left with a situation in which his own expert witness had weakened the claim of insanity.

The problem was that the legal definition of insanity and the various psychiatric definitions of insanity do not always fit. Williams’s definition clashed with the legal definition. Changing fashions in psychiatry, as well as the philosophies of individual psychiatrists, affect the medical definition. Political changes also affect the legal definition. In 1968, in federal jurisdictions the law was clear that a mental illness included any abnormal
condition of the mind that substantially affected mental or emotional processes and substantially impaired behavior control. Legally, mental illness was not limited to psychosis.

Benjamin’s lawyer did his best, given that his psychiatrist had decimated his case. In his closing argument, he used a variant of the black rage defense without calling it by that name. The lawyer tried to explain Benjamin’s abnormality by pointing to the difficulty of his childhood environment.

Dr. Williams premised his conclusion on the fact that this man had had what we might call a rotten social background. Now we know that most people survive rotten social backgrounds. But most people are not now here at this time on trial. The question is whether the rotten social background was a causative factor and prevented his keeping control at that critical moment.

The phrase “rotten social background” was a poor choice, probably reflecting the lawyer’s paternalism toward his client. It places the speaker on a higher level than the person growing up in a poor, single-parent family in Watts. “Rotten” is defined as “morally corrupt,” “decayed,” and “foul smelling.” It is a pejorative term, and by using it the attorney associated Benjamin with negatively charged images. A positive and sympathetic way of describing Benjamin’s early life would have been to say he came from a disadvantaged, traumatic, or painful background. It would also have been important to find some positive, redeeming factors in his life and express them in a positive way to the jury. Every client I’ve ever represented has had redeeming qualities, which I found when I took the time and energy to connect with him or her.

Benjamin’s lawyer, in a quandary after Williams’s testimony, correctly tried to focus on whether or not Benjamin could control his behavior the night of the shootings.

At the critical moment when he stepped back in the Little Tavern restaurant and he was faced with five whites, with all of his social background, with all of his concepts, rightly or wrongly, as to whether white people were the bogeymen that he considered them to be, the question at this moment is whether he can control himself. . . . Now you have got to take the trip back through his lifetime with him and look at the effect that his lifetime had on
him at that moment and determine whether he could control himself or not.

Although this was a good argument, again the lawyer’s choice of words was counterproductive and may reflect a subtle prejudice. “Bogeymen” are not real. Racists are real. A bogeyman is a figment of one’s terrified imagination. The Marine who hurled racial epithets at Benjamin was an actual person, standing just a few feet from him, spewing hateful invectives. Benjamin may have responded with excessive force, but he didn’t imagine the threat. Only two paragraphs of the closing argument were published, so it is hard to analyze it, but the use of terms like “bogeyman” and “rotten social conditions” indicate a closing that was apologetic in approach, and a lawyer who was not in sync politically and emotionally with his client’s background.

We’ll never know how persuasive the jury found the defense argument to be because the trial judge completely undercut Benjamin’s defense. The judge instructed the jurors that they were not to concern themselves with the issue of how a “rotten social background” affected Benjamin. The judge had allowed the psychiatrist to testify to Benjamin’s childhood because it was proper evidence for a doctor to consider when making a mental diagnosis. He allowed the defense lawyer to discuss it in his closing argument because it was a proper comment on the evidence. However, after closing arguments the judge became agitated and refused to allow the jury to consider the social and economic environment of the defendant. His colloquy with the defense counsel outside the jury’s presence shows the judge’s determination to keep race and poverty out of the jury’s decision-making process. It is also an example of a judge reinforcing the myth of the colorblind courtroom.

The Court: I will tell them it is not in any way a question of his rotten social background.
Counsel: I object.
The Court: You may.
Counsel: May I state my reasons?
The Court: You may.
Counsel: I was talking in terms of the cause of his condition.
The Court: No, you weren’t sir. You were appealing in the most direct way
to something that I am going to keep out of the courtroom, if I stay a Judge. I am not going to permit it to come in here.

After Benjamin was found guilty of second-degree murder, the case was appealed. In a two-to-one decision the Court of Appeals upheld the verdict. The majority implied that the trial judge made a mistake in his jury instruction, but held that in the context of all the instructions and the evidence he had allowed, there was no reversible error. Feeling uneasy about their decision and attempting to meet the concerns articulated in Judge Bazelon's dissent, the majority opinion stated that the ultimate responsibility for the deaths was society's inability "to eliminate explosive racial tensions" and "to deny easy access to guns." The judges then rationalized their failure to rule that the jury should have been allowed, in clear terms, to consider the racial and economic evidence by repeating the old standby that the court's role is limited and that it cannot be concerned with broad issues of justice.

Some lawyers believe the most important variable in winning or losing a trial is the judge. This is an overstatement, but as the Benjamin trial showed it contains a lot of truth. Judges can influence the outcome of a jury trial in three significant ways. First, their attitude toward the witnesses and the integrity of the physical evidence impacts on the jurors. When a judge gives off signals that he believes the prosecution's witnesses and evidence, this carries substantial weight with the jurors. Second, a judge's negative attitude toward the defense lawyer can make it difficult to present an effective case. Judges will sometimes interrupt, castigate, and ridicule defense attorneys. They will put immense pressure on the attorneys to "move the case along." The speed-up assembly line model of work is not limited to the auto plants. Criminal trial lawyers are often treated like production workers. The judge, acting like a boss or foreman, pushes the attorney to finish the case with only one goal in mind, getting the case off the assembly line and the next one into production. There is often little regard to justice.

If the lawyer stands up to the judge, jurors can become aware of the conflict between a fair trial and administrative efficiency. A jury may react negatively to a judge who rides a defense lawyer. After one acquittal, a juror told me that the jury actually discussed the judge's bullying behavior during deliberations and felt sympathetic toward me. After another suc-
ccessful trial, two jurors asked me why the judge did not want to give the defendant a fair trial. Although handling a case before a hostile judge is technically difficult and an emotionally unpleasant experience, I try to follow the example of that spirited, fictional English barrister, Rumpole of the Bailey, who once said, "On the Day of Judgment I shall probably be up on my hind legs putting a few impertinent questions to the Prosecution."

The third and by far most crucial way in which a judge molds the trial is by her rulings on evidence and testimony. Judges can determine what questions may be asked a witness and in what form the questions are asked. They control the time allowed for examination and for opening and closing arguments. Judges also rule on what pieces of physical evidence are admissible and which testimonial evidence (words of a witness or defendant) will be heard by the jury. These decisions can make or break a case. In Benjamin's case, the trial judge's instructions to the jury to disregard the influence of the environment on the defendant had an overwhelming effect on what the jury could consider. As Judge Bazelon said in his dissent, "Such an instruction is contrary to law, and it clearly undermined Murdock's approach to the insanity defense in this case."

Bazelon's dissent encouraged some of those responsible for the criminal justice system to look at "the root causes of crime." He wrote that the legal system would never be able to deal justly with crime unless it understood the relationship between environment and mental illness.

We sacrifice a great deal by discouraging Murdock's responsibility defense. If we could remove the practical impediments to the free flow of information we might begin to learn something about the causes of crime. We might discover, for example, that there is a significant causal relationship between violent criminal behavior and a "rotten social background." That realization would require us to consider, for example, whether income redistribution and social reconstruction are indispensable first steps toward solving the problem of violent crime.

Bazelon's opinion reverberated through the legal community. It found a warm reception among judges and lawyers who saw the need to publicly debate the responsibility of society for crime. Bazelon hoped that the debate would lead to measures to alleviate poverty and thereby strike at the root of crime.

Almost a decade after Bazelon's article, Richard Delgado questioned
whether the criminal law should allow a defense based on adverse social conditions. In an article the title of which alludes to the Alexander case, "'Rotten Social Background': Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?" Delgado makes a lengthy and persuasive argument that environmental adversity, primarily poverty, is a root cause of crime.

There is also a strong relationship between environmental adversity and criminal behavior. Of course, not all poor persons violate the law and not all those from privileged backgrounds are law-abiding; it remains, however, that of more than one million offenders entangled in the correctional system, the vast majority are members of the poorest class. Unless we are prepared to argue that offenders are poor because they are criminal, we should be open to the possibility that many turn to crime because of their poverty—that poverty is, for many, a determinant of criminal behavior.

Delgado then asks the essential question with which this book concerns itself: Assuming that poverty and racism cause criminal behavior, then should not that fact mitigate criminal responsibility? But English and American jurisprudence historically has been rooted in the concept of individual responsibility. This doctrine is identified with the capitalist myth that every person has free choice, unconstrained by class, race, religion, or gender. The notion of free choice is found in all areas of law. For example, until the reforms of the New Deal, child labor laws were held unconstitutional as a violation of the right of the worker (a child) to bargain freely with the employer. Until fairly recently, consumers and tenants were legally defined as free to bargain on equal terms with monopoly corporations and large landlords. Therefore, if a consumer signed an unfair contract or a tenant signed an unfair lease, she was held to the terms of the agreement because under the law's mythology she had made a free choice when she signed the document.

Historically, in criminal law poverty has not been an excuse for crime, nor has it mitigated the penalties. Peasants who lost their lands were hanged for shooting deer to feed their families. In Les Misérables, Jean Valjean is sentenced to five years in prison for breaking a window and stealing a loaf of bread. The fact that his sister and her seven children suffer from extreme hunger is no defense. The law has not changed much
in hundreds of years. The story of Valjean may have been successful on Broadway, but hungry, homeless people are still prosecuted and jailed under trespass and disturbing-the-peace laws. In San Francisco in the fiscal year 1993–94, eleven thousand homeless men and women were arrested or criminally cited for nuisance-type crimes. Economic deprivation is still not allowed as a defense. The fiction that all people are capable of free choice unencumbered by race, class, and gender still dominates American jurisprudence.

The law does recognize certain situations in which criminal behavior is excused or legally justified. The rationale is that where individual choice is absent there is no moral basis to punish. The doctrine is ably articulated by H. L. A. Hart: “We should restrict even punishment designed as ‘preventive’ to those who at the time of their offense had the capacity and a fair opportunity or chance to obey the law: and we should do this out of considerations of fairness and justice to those whom we punish. This is an intelligible ideal of justice to the individual.”

Although this doctrine would seem to include the homeless or the racially oppressed, if they could make a persuasive case that they had no “fair opportunity” to obey the law, neither the penal statutes nor common law has allowed for such an interpretation. There are two classifications carved out of the criminal law to protect people when there is no “moral blameworthiness”: excuse and justification. Under excuse, the largest category is insanity. The theory is that an insane person has lost free choice and therefore should not be held criminally responsible for his actions, although he may be locked up in a hospital to protect the public.

Until the 1980s, states were moving to a liberal—that is, a broader, more inclusive—definition of legal insanity. This inclusive definition was represented by the law in all federal jurisdictions. A person would be held not guilty if he had a mental disease or defect that caused him to lack substantial capacity to understand the wrongfulness of his conduct or to conform his conduct to law. However, the law-and-order politics of the Reagan years combined with a high-profile case resulted in a restrictive rule of insanity. After John Hinckley was acquitted of shooting President Reagan on the grounds of insanity, Congress passed the Insanity Defense Reform Act. The Act was basically a throwback to 1843, when the English House of Lords in the M’Naghten case established a rule referred to as the
"right-wrong test"—that is, the defendant is insane only if he did not know his act was wrong. The Act also provided a commitment procedure in which a defendant found not guilty by reason of insanity is confined to an institution for the criminally insane. The most significant change was to shift the burden of proof from the prosecution to the defense. Instead of the state having to prove the defendant is not insane beyond a reasonable doubt, the defense must now prove insanity by "clear and convincing" evidence. This change definitely makes it more difficult to win a black rage case in all federal jurisdictions.

The federal courts were not the only ones to change from a liberal to a conservative view of insanity law. Even before the Hinckley case, there was a movement to make it more difficult to obtain not guilty insanity verdicts in state courts. The movement gained momentum after Hinckley's acquittal. By the end of the Reagan era, Idaho, Montana, and Utah had abolished the insanity defense and thirty-four states had passed new laws restricting its use. Thirteen states enacted various forms of a "guilty but mentally ill" defense. The harshest version mandates that persons found not guilty but mentally ill are to be sent to regular prisons for the maximum term authorized for the crime and may, but need not, be offered psychiatric treatment. The U.S. Supreme Court has ruled that state laws that adopt a restrictive definition of insanity, shift the burden of proof to the defense, provide for commitment in a hospital or prison, or completely abolish the insanity defense are constitutional.

The law of diminished capacity has fared somewhat better in the onslaught against the insanity defense. This defense was introduced successfully into American law in 1949 and 1960 by Charles Garry (later to gain fame as chief counsel for the Black Panthers). With the help of his partner, Benjamin Dreyfus, Garry persuaded the California Supreme Court to rule that psychiatric evidence was admissible in determining whether an accused was capable of the mental state of premeditation or malice required for a murder conviction. The court, under the stewardship of the greatly respected and forward-thinking Chief Justice Roger Traynor and influenced by Justices Raymond E. Peters and Mathew O. Tobriner, established a rule of law which by 1975 was followed by approximately twenty-five states and came to be known as "diminished capacity." Under this doctrine, if a person knows the difference between right and wrong but is
suffering from a mental illness that affects his ability to follow the law, the
degree of his crime is reduced. For example, first-degree murder would be
reduced to second-degree murder or manslaughter. The defendant would
not be judged insane but rather to have a diminished capacity to control
his behavior, which means he is considered not as morally blameworthy
as the normal, healthy individual. Diminished capacity can also be used
to negate the element of specific intent. In many crimes the law requires
the proof of a conscious choice to commit the designated crime. For ex-
ample, in burglary it must be proved that the defendant entered with a
specific intent to commit a felony. In assault it must be proved that there
was a specific intent to cause great bodily injury. A failure to prove the
required mental state reduces the degree of the crime, usually from a fel-
ony to a misdemeanor. Since the black rage defense seeks to explain the
defendant’s mental state, the doctrine of diminished capacity is well suited
to these cases.

Although many states allow some form of diminished capacity defense,
the deluge of law-and-order statutes threatens to make this defense an
endangered species. A sad example of that trend is found in California,
where the combination of a high-profile case and the politics of blaming
the courts for crime created the same dynamic that led Congress to enact
the Insanity Defense Reform Act.

In 1978, Dan White, a conservative San Francisco supervisor (city coun-
cilman) killed the liberal mayor, George Moscone, and the first gay super-
visor, Harvey Milk, shooting them in their respective City Hall offices.
White’s attorney put forth an excellent diminished capacity defense, and
White was convicted of manslaughter instead of first- or second-degree
murder. The night after the verdict was announced there were riots out-
side of the City Hall in which police cars were burned, protesters were
beaten, and many people were arrested. White was sentenced to approxi-
mately eight years in prison. Conservative politicians were able to harness
gay and liberal outrage surrounding the verdict in order to pass a law
abolishing the diminished capacity defense in California state courts. The
California example reminds us that the future of the black rage defense
will be fought out in the political arena as well as in the courtroom.

In addition to insanity, the category of excuse includes duress, mistake,
accident, and provocation. Duress is a legitimate defense when a person
commits a criminal act because she is threatened with imminent death or serious injury. For example, F. Lee Bailey used this defense in the case of newspaper heiress Patty Hearst. Hearst was kidnapped by a very small group called the Symbionese Liberation Army. Months after her abduction she took part with the group in an armed bank robbery. Bailey argued she was under duress when she helped rob the bank.

All of these excuse defenses involve a two-step process. First, the judge must be persuaded that all the legal elements of the defense are present. For example, in the duress situation there must be evidence of an *imminent* danger. If the judge agrees that the legal requirements are fulfilled, she allows the evidence into the trial and later instructs the jurors that they may consider the duress defense. The second step is the actual weighing of the evidence by the jury during deliberations. In the Hearst case, the judge found that there was enough evidence of duress to instruct the jury that they could entertain that defense. The jury found the argument, as well as the brainwashing defense, unpersuasive and convicted Hearst.

Delgado suggests that a judge might find that living in desperate socio-economic conditions creates the legal elements of a duress defense. However, it is unlikely that most judges would find *imminent* harm, and therefore they would refuse to instruct the jury that a duress defense is permissible. With the right facts, however, a judge such as Bazelon who is open to the connection between poverty and crime might give a duress instruction. If so, a creative lawyer would be able to use a black rage strategy to gain an acquittal.

Another excuse category is provocation, which is the killing of another person while under the influence of a reasonably incurred emotional disturbance. This is not a complete defense—it only reduces murder to manslaughter by negating the element of malice. Provocation, commonly referred to as "heat of passion," has often been used in cases where a husband comes home to find his wife in bed with a lover and kills one or both of them.

The doctrine of provocation would also fit a situation in which a person acts violently after being insulted with racial epithets. An example of black rage exploding into violence when a man is provoked by racial insults can be found in the classic American novel *Invisible Man*. Echoing Dostoevsky's *Notes from Underground*, Ralph Ellison created an African American
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protagonist who lives undiscovered in the basement of an apartment building restricted to whites and goes through life with his hopes, his needs, his pains—his entire being—virtually invisible to an uncaring white society. In one powerful scene the main character is insulted by a white man and reacts with an awful fury.

One night I accidentally bumped into a man, and perhaps because of the near darkness he saw me and called me an insulting name. I sprang at him, seized his coat lapels and demanded that he apologize. He was a tall blond man, and as my face came close to his he looked insolently out of his blue eyes and cursed me, his breath hot in my face as he struggled. I pulled his chin down sharp upon the crown of my head, butting him as I had seen the West Indians do, and I felt his flesh tear and the blood gush out, and I yelled, "Apologize! Apologize!" . . . And in my outrage I got out my knife and prepared to slit his throat . . . when it occurred to me that the man had not seen me . . . . And I stopped the blade, slicing the air as I pushed him away, letting him fall back to the street. I stared at him hard as the lights of a car stabbed through the darkness. He lay there, moaning on the asphalt; a man almost killed by a phantom. It unnerved me. I was both disgusted and ashamed. . . . The next day I saw his picture in the Daily News, beneath a caption stating that he had been "mugged." Poor fool, poor blind fool, I thought with sincere compassion, mugged by an invisible man!

Reading Ellison’s words, we may wonder whether that's how Murdock Benjamin felt when the Marine called him and Alexander a “black bastard” and a “dirty nigger bastard.”

There are two problems with using provocations as a defense. First, many jurisdictions hold that words alone do not justify a response of violence. Second, the rule in most states is that the personal history of the defendant is not allowed in assessing whether his response was “reasonable” in light of the provocation. Even with these limitations, a black rage provocation defense is viable in the less restrictive jurisdictions. With the right facts and a sympathetic client, this defense could be used in all jurisdictions.

The other rule of law that allows a person to commit an act that otherwise would be a crime is called justification. Justification encompasses cases in which the social value of the act outweighs its moral blameworthiness. The two categories of justification are self-defense (including defense
of another person) and necessity. Necessity is a defense when one must break a law in order to prevent a greater harm, such as a driver who breaks the speed limit in order to get a critically injured person to the hospital. In the 1970s lawyers were successful in defending protesters at nuclear power plants on the grounds of necessity. Lawyers argued that the protesters' criminal trespass was a reasonable action to prevent the danger of radiation discharges and meltdowns. However, many appellate courts responded by making the elements of the defense more restrictive, so that it was extremely difficult to use the necessity defense in civil disobedience actions at nuclear plants or cases in which protesters destroyed weapons at military bases. The necessity defense has been used successfully in cases of people engaged in programs to prevent AIDS by allowing addicts to exchange used needles for clean ones.

Necessity cannot be used if there is an adequate alternative. Therefore, a woman cannot steal food to feed her children if welfare is available. Also, the harm caused by the act cannot be greater than the harm it seeks to avoid. It would be hard to justify violent acts in most situations. It is difficult to envision a court giving a necessity instruction in a black rage case because it would, by definition, justify criminal responses to racial oppression.

Self-defense is fertile ground for the black rage defense. Chapter 8 discusses how Clarence Darrow used a form of the black rage defense in the context of the law of self-defense. Chapter 13 discusses how a form of Native American rage also fit into the traditional rule of self-defense. An analysis of those cases would lead one to agree with Delgado that self-defense is a more effective means of putting forth the socioeconomic defense than insanity, duress, or provocation.

Delgado suggests four new models of excuse that would allow an extreme environmental deprivation defense. These models are also theoretically appropriate for the black rage defense. In two categories, involuntary rage ("automatic behavior") and inability to control conduct, he develops liberalized variants of established insanity law. However, since Delgado wrote his article the political atmosphere has become even more hostile to broadening the insanity defense, so his models will have to await a more propitious time.

Delgado puts forth a third model, which he calls "isolation from domi-
nant culture.” In this model a person who could show that due to his extreme cultural isolation he did not internalize the values of the larger society or was pressured into adopting the norms of a deviant subculture would be allowed to argue this as a defense. At first glance, such a defense seems totally unrealistic. But Delgado’s model foreshadowed a defense used in a 1994 Fort Worth, Texas, murder case. That case received national publicity, not because of the facts or the people involved but because defense lawyers David Bays and Bill Lane used the term “urban survival syndrome.” The defendant, a seventeen-year-old black teenager, had been harassed and threatened by two other black men, aged twenty-eight and nineteen, over a year-long period. The defendant, Daimion Osby, was forced into a fistfight with the two men in a parking lot. Osby told the police that he was scared and pulled out a gun and shot and killed both men, who were unarmed but had a gun in their car.

The defense attorneys raised a self-defense claim and argued that Osby had a reasonable fear for his life even though the two men were unarmed. In order to support the element of reasonableness they focused on the danger in the community. An author who had written on race relations was allowed to give expert testimony on statistics showing that southeast Fort Worth was a dangerous high-crime area. FBI statistics were used to prove that the two victims fit the FBI profile of the most dangerous men in America. The lawyers argued that Osby lived in a world where he had to use a gun in order to protect himself from these two men. According to the norms, customs, and reality of his environment, his fear of his assailants was reasonable and he was legally entitled to use deadly force.

The prosecutor was Renee Harris, an African American woman who graduated from the same high school Osby dropped out of. She aggressively attacked the theory of urban survival syndrome, arguing that no such syndrome exists in the entire field of psychiatry and that Osby’s actions could not be excused legally or morally. The jury, which consisted of nine whites and three blacks, hung eleven to one for conviction. The lone dissenter, a fifty-three-year-old black man who actually lived in southeast Fort Worth, told the other jurors that they did not understand the neighborhood this shooting took place in or the people who lived there. Six jurors who were interviewed by a newspaper said they ignored the defense, considering it either a publicity tactic or just a far-fetched theory.
A group of black ministers held a press conference in which they called the defense racist and untrue. Reverend Michael Bell said, “Southeast Fort Worth is not a free-fire zone. We refuse to let the word go forth that our community is so gripped by anarchy and lawlessness that everyone has to tote a gun and shoot first and ask questions later.” The ministers’ reaction reveals the weakness of any defense that relies on a set of values and violent rules of behavior as a replacement for the norms of the dominant society.

Delgado’s final model is based on his persuasive argument that crime is in part society’s fault. The “societal fault” defense would be used in sentencing in order to mitigate the punishment. In fact, when making a sentencing determination some judges already take into consideration the socioeconomic hardships an individual defendant has suffered. Delgado suggests that this issue should go to a jury. Analogizing to civil law, where juries are allowed to apportion damages based on the comparative negligence of the parties, Delgado argues that a jury should apportion the blame for the crime between the defendant and society. The judge would then reduce the sentence by the proportion of fault allotted to society. Actually, in some jurisdictions, such as Texas, the jury does decide the sentence, but it does not use Delgado’s formula. In death penalty cases in all jurisdictions, after a finding of guilt there is a penalty phase in which the jury is allowed to hear evidence regarding the personal hardships of the defendant, including family abuse and social, racial, and economic deprivation. These factors are weighed by the jury in determining whether the defendant should spend the rest of his life in prison or should be executed. Delgado’s societal fault model could certainly be useful in sentencing. However, there has been a move in criminology toward harsh mandatory sentences, which take discretion out of the hands of judges. Such mandatory sentencing laws have flooded the federal prisons with first-time drug offenders. Recently, I sat in federal court and watched a judge apologize to a defendant for giving him five years in prison. He had no prior arrests, had a family and a job, and was convicted of selling marijuana. The judge explained that under federal law she had no discretion to lower his sentence. Three-strike laws and lengthy mandatory sentences are being passed in many states, making moot Delgado’s proposal to mitigate sentences of persons who act as a partial result of the hopelessness, anguish, misery, and fury caused by a dysfunctional society.
By holding the present criminal law system up to the light, Bazelon and Delgado allow us to see its weaknesses and injustices. One can poke holes in their proposals, but their models help us to see that there can be alternatives to the fiction of free choice and the failure of the penal system to recognized the role of racism and poverty. The black rage defense attempts to focus attention on what Bazelon calls the “root causes of crime.” It is a means of forcing the decision-making process to factor in the results of chronic unemployment, lack of opportunity, racial harassment, and discrimination. It is an alternative to the predominant jurisprudence in the country with its assembly line of guilty pleas. It is an alternative that has worked.

As authors, scholars, and lawyers develop the black rage defense, however, we must be careful not to restrict its meaning or its usage. The most recent law-related article about black rage unfortunately does just that. In a law review comment entitled *Black Rage and the Criminal Law: A Principled Approach to a Polarized Debate*, University of Pennsylvania law student Judd Sneirson misinterprets black rage and ends up limiting its meaning and potential as a trial defense or a sentencing mitigator. Sneirson uses the Colin Ferguson case as a jumping-off point to propose that black rage be recognized as a mental disease, but that it only be allowed as a partial excuse in criminal trials. That is, it should be restricted to use as a diminished capacity defense, not as a full-blown insanity defense. Sneirson writes,

> External forces ranging from racist environments to witnessing adultery can trigger profound human responses. By reducing the degree of moral responsibility to below that of a calculating killer while refusing to exculpate entirely, diminished capacity recognizes human weakness, holding individuals accountable only for controlling their responses to external forces. In this respect, diminished capacity consigns external forces and internal responsibility each to the respective role that befits them.

Analogizing black rage to the anger of a husband who kills his adulterous wife or her lover is problematic. Although racist environments and witnessing adultery can both cause violent responses, allowing them as defenses will yield quite different results. In modern times, a diminished capacity defense in an adultery situation is no longer intended as a social
message that sexual relations outside of marriage are immoral and worthy of death. Rather, it is simply a recognition that a person who kills when confronted visually with the act of adultery is not in a rational frame of mind, and thereby a jury can find him guilty of manslaughter instead of murder. In a black rage case, however, there is a message being sent to the public: Society's tolerance of racism causes criminal acts. This societal fault is the philosophical basis of the defense. Snierson argues that the jury should not be allowed to acquit a person raising a black rage defense because we must maintain a balance between "individual and societal responsibility." He says that this satisfies "the traditional goals of criminal law." We have seen, however, that traditional criminal law hides social reality with fables of colorblind courtrooms, equality of opportunity, absolute free choice, and fair administration of the law. We should be trying to develop defenses that go beyond conventional rules, not confining our strategies to the restrictions of a criminal law system that perpetuates racism.

As a former law review editor, I am well aware of the pressure on students to write "balanced" articles. When writing about black power and the First Amendment, I had to get permission from my faculty editor to use the word "black" instead of "Negro." Law reviews often suffer from an emphasis on academic scholarship instead of practical application. Snie rson's comment falls prey to the pressures of compromise and the mistake of putting theory ahead of practice. It has no discussion of actual black rage trials in the text and mentions United States v. Robertson and United States v. Alexander only in footnotes.

Let's look at real cases. Accepting Snie rson's proposal would mean that Steven Robinson would have had no defense at all; his only option would have been to plead guilty. Was it "unprincipled" to argue that Robinson was not guilty by reason of temporary insanity? Did the jury violate some sacred convention of criminal law by acquitting him? Would society be better off if Robinson had gone to prison for five years? What about James Johnson? Under Snie rson's proposal he also would not have been allowed a complete defense. These are real human beings. Their crimes were caused in substantial part by the effects of racism. Legally and morally, these men deserved a chance to argue their circumstances, and a jury deserved a chance to find them not guilty. The black rage defense gave them that opportunity.
Sneirson has written a genuine and well-meaning article, but he makes a crucial error when he defines black rage as a mental disease and goes on to argue “that black rage is a form of legal insanity that criminal law should recognize.” He bases this interpretation in part on the book *Black Rage* by William Grier and Price Cobbs. Describing their book as a “seminal sociological and psychiatric study,” he incorrectly states that the authors “treat black rage as a mental disease independent of an underlying mental condition.” Grier, in a newspaper interview regarding the Colin Ferguson case, said very clearly that “black rage is not a psychiatric diagnosis.”

In *Black Rage*, Grier and Cobbs are explicit in their position that the principles of psychological function are universal:

There is nothing reported in the literature or in the experience of any clinician known to the authors that suggests that black people function differently psychologically from anyone else. Black men's mental functioning is governed by the same rules as that of any other group of men. Psychological principles understood first in the study of white men are true no matter what the man's color.

The book emphasizes how the “experiences of black people in this country are unique.” The authors devote numerous chapters to explaining how those experiences cause mental illness. Though the experiences are race-based, the illnesses are the same ones that whites, Asians, and Latinos suffer. For example, they show how the black experience results in a significantly higher rate of paranoid symptoms among mentally ill blacks than among mentally ill whites. But the category of “paranoia” is the same for both races. This point was driven home to me when I spoke with jurors after the Robinson acquittal. One conservative young white man said that he would not have robbed a bank under similar pressures, but he understood how the experiences of Robinson as a black man caused him to crack up temporarily. The juror appreciated that a white person or a black person could suffer from a transient situational disturbance. He also comprehended that experiences *unique* to a black man had driven Robinson over the edge.

James Johnson suffered from the mental disease of paranoid schizophrenia. He did not have a mental disease called “black rage.” The black
Rage component of the trial was critical because it explained the societal experiences that inflamed Johnson's mental illness and caused him to kill in a blinding fury.

Grier and Cobbs show that in order to treat black people effectively, it is necessary to distinguish between normal adaptive behavior and pathology. An example they use is their description of "cultural paranoia":

We submit that it is necessary for a blackman in America to develop a profound distrust of his white fellow citizens and of the nation. He must be on guard to protect himself against physical hurt. He must cushion himself against cheating, slander, humiliation, and outright mistreatment by the official representatives of society. If he does not so protect himself, he will live a life of such pain and shock as to find life itself unbearable. For his own survival, then, he must develop a cultural paranoia in which every whiteman is a potential enemy unless proved otherwise and every social system is set against him unless he personally finds out differently.

Sneirson quotes much of this same passage, but he uses it to buttress his misinterpretation that "black rage describes a mental disturbance caused by long-term exposure to racism." In contrast, Grier and Cobbs follow up their example by explaining that cultural paranoia, along with cultural depression and cultural masochism, are the norms for black America, not mental diseases. "They are no more pathological than the compulsive manner in which a diver checks his equipment before a dive or a pilot his parachute." This distinction is critical to the treating therapist because her job is to differentiate between normal adaptive behavior and mental illness. Grier and Cobbs warn therapists treating black people that they "must first total all that appears to represent illness and then subtract the Black Norm. What remains is illness and a proper subject for therapeutic endeavor." To use psychiatry to treat the healthy norm of black rage would be ineffective and destructive, some would say genocidal.

Identifying black rage as insanity is not only a psychiatric error, it also has negative political consequences. Bell hooks addresses this issue in her 1995 book Killing Rage, Ending Racism. She explains how rage is a necessary and usually healthy response to white supremacy. She describes a sequence of racially discriminatory incidents against black women that took place at an airport, which served to intensify her rage against the
white man sitting next to her. She writes, "I felt a 'killing rage.' I wanted to stab him softly, to shoot him with the gun I wished I had in my purse. . . . With no outlet, my rage turned to grief and I began to weep, covering my face with my hands."

Bell hooks uses her rage to write insightful and forceful books about race, gender, class, and culture. Black people have always tapped into their rage to achieve in the sciences, in the arts, in the law, and in their daily struggle to survive. Justified rage against racial and economic oppression fueled the civil rights movement. Its fury kept the young men and women of the Student Nonviolent Coordinating Committee (SNCC) warm as they filled the jails of the South. Rage was turned into the eloquence of Malcolm X as he educated white and black alike. It became the eloquent poetry and prose of Maya Angelou. Without such appropriate rage, there would be only depression, dejection, and inaction.

Grier and Cobb are aware of the distinction between pathological and normative rage. Published in the tumultuous year 1968, the majority of their book is a psychological treatment of race and mental illnesses. Their last chapter, entitled "Black Rage," is a political polemic. They describe the painful reality of black men, raising themes reiterated over twenty-five years later at the Million Man March in Washington, D.C.:

The grief and depression caused by the condition of black men in America is an unpopular reality to the sufferers. They would rather see themselves in a more heroic posture and chide a disconsolate brother. They would like to point to their achievements (which in fact have been staggering); they would rather point to virtue (which has been shown in magnificent form by some blacks); they would point to bravery, fidelity, prudence, brilliance, creativity, all of which dark men have shown in abundance. But the overriding experience of the black American has been grief and sorrow and no man can change that fact.

They echo the insights of Algerian psychiatrist Frantz Fanon when they say that it is healthy for one to move from grief to rage. When anger and self-hatred are redirected, they aim at the oppressor. Sometimes rage is redirected into political struggle, sometimes into blind violence. Grier and Cobb's concluding chapter, like James Baldwin's The Fire Next Time, warns white Americans that if they do not end racial oppression there will be a
terrible, “apocalyptic and final” outbreak of black rage. They are not talk-
ing about a few individuals such as Murdock Benjamin pathologically
killing individual white people. They are invoking the images of the Watts
riots and the Detroit uprising. They are saying that rage is good, that it is
necessary to a healthy people. They contrast the collective anger of black
people with the collective acceptance of despair and assert that African
Americans “will never swallow their rage and go back to blind hope-
lessness.”

The authors’ political point is echoed in the book’s introduction by
U.S. Senator Fred Harris, who was a member of the National Advisory
Commission on Civil Disorders. Harris tells white Americans that “black
rage is the result of our failure.” Like Grier and Cobbs, Harris warns that
the “root cause of the black wrath that now threatens to destroy this nation
is the unwillingness of white Americans to accept Negroes as fellow hu-
man beings.”

Black rage is much more than an insanity defense. It has a political as
well as a psychiatric meaning. It has positive as well as negative aspects.
Therefore, it is necessary for lawyers and legal workers to think through a
black rage defense and to use it in a way that does not demean or stereo-
type black people. In the next chapter, I will analyze some cases in which
lawyers failed in that responsibility.